

LEGAL ETHICS OPINION #1671 COMMONWEALTH'S ATTORNEY ALSO WORKING
AS CITY ATTORNEY

You have presented a hypothetical situation in which Attorney A is the elected Commonwealth's Attorney and is also employed in the same jurisdiction as City Attorney to represent the municipality in civil litigation and to render advice in civil matters. Attorney A has an assistant, Attorney B, who serves as both Assistant Commonwealth's Attorney and Assistant City Attorney. During Attorney A's tenure as Commonwealth's Attorney/City Attorney, a building inspector for the municipality allowed occupancy of a building without issuing a certificate of occupancy, and the building inspector never required the builder to complete the project. A notice of violation was issued to the builder, but no other action was taken, apparently after a consultation with Attorney A, which took place during the time the builder was being prosecuted as described infra.

Due to several violations by the builder, the State Police conducted an investigation. Subsequently, the Attorney A, in his capacity as Commonwealth's Attorney, obtained an indictment against the builder. Attorney A should have been aware that the building inspector, with whom he consulted in advising the municipality as its City Attorney, did not enforce the Virginia Uniform Statewide Building Code. To obtain evidence concerning the criminal prosecution, Attorney B interviewed extensively the building owner. The information would also have been useful to Attorney A in his capacity as City Attorney in advising the City of any potential liability. The building owner initiated a civil suit against the builder and the building inspector. The criminal case against the builder was nolle prosequed because a witness/co-defendant was unavailable. Effective July 1, 1995, the offices of City Attorney and the Commonwealth's Attorney separated. Attorney A resigned as City Attorney, and in his capacity as Commonwealth's Attorney has refused to consider prosecution of the builder, although the witness/co-defendant is now available. Attorney B has become the new City Attorney and has resigned from his position as Assistant Commonwealth's Attorney.

Under the facts you have presented, you have asked the committee to opine as to 1) the propriety of Attorney A representing the Commonwealth in prosecuting the builder and in taking action to nolle prosequi the builder's felony indictment while simultaneously representing the City which faces possible civil liability for the conduct of the building inspector; 2) whether Attorney A could represent the Commonwealth in evaluating whether to revive the criminal charge after Attorney A resigned as City Attorney; and 3) whether Attorney B, acting as City Attorney, could represent the City in the civil dispute after having interviewed the building owner.

The appropriate and controlling disciplinary rules relative to your inquiry are DR 4-101(B) requiring an attorney to preserve client confidences and secrets; DRs 5-105(A) and (B) which require an attorney to decline or withdraw from representing a client whose interests conflict with those of another client, if the lawyer's independent professional judgment will be or is likely to be adversely affected; DR 5-105(C) which allows an attorney to continue representing multiple clients with conflicting interests if it is obvious that he can represent the interests of each,

provided the clients consent after adequate disclosure; and DR 5-105(D) which prohibits representation of a client adverse to a former client if the legal matters are substantially related unless the former client consents after full disclosure. Also applicable is DR 5-105(E) which vicariously disqualifies all other attorneys in an office or law firm if one of its lawyers must withdraw due to a conflict under any of the provisions of DR 5-105.

The committee has previously opined that DR 5-105 prohibits an attorney from representing multiple clients if the lawyer's obligations to one client will likely adversely affect the lawyer's independent professional judgment on behalf of another client. In Legal Ethics Opinion #1271, the committee examined a situation where a part-time Commonwealth's Attorney undertook to defend a husband and wife in a civil action in which they were accused of fraudulent conduct which could ostensibly require the part-time Commonwealth's Attorney to launch a criminal investigation. Citing DR 5-105(B) and (C), the committee reasoned that if the trier of fact in the civil action were to find that the husband and wife engaged in fraud, a conflict would arise in the lawyer's representation of both the Commonwealth and the husband and wife. Since it was not obvious that the attorney could adequately represent the interests of each, the conflict would not be curable if the husband and wife were to waive the conflict.

The committee has emphasized that under DR 5-105(C) unless an attorney can meet the threshold test of "obviously adequate representation" an attorney cannot represent multiple parties with conflicting interests and client consent will not cure the conflict. Legal Ethics Opinion #1393.

In the facts you present, the committee believes Attorney A, in his capacity as both the Commonwealth's Attorney and the City Attorney had a conflict of interest in prosecuting the builder while at the same time advising the building inspector and representing the City's interests in the civil matter. In zealously representing the Commonwealth against the builder, he likely would have discovered the facts and circumstances surrounding the builder's dealings with the building inspector which would likely be adverse to the defense of the building inspector and the interests of the City. Moreover, Attorney A's situation would be similar to the scenario in LEO #1271 if Attorney A had reason to believe that the building inspector's conduct warranted a criminal investigation (i.e., if builder and inspector acted in concert to defraud owner). Your facts suggest that Attorney A's loyalty to and zealous advocacy of the Commonwealth may have been compromised in that he refuses to renew the prosecution now that the missing witness has become available. This conflict is not curable by waiver since it is not obvious that Attorney A can adequately represent the conflicting interests of both the City and the Commonwealth. Even if Attorney A reasonably believed that he could do so, Attorney A could not make the required disclosure and obtain the consent of the City and the Commonwealth necessary to comply with DR 5-105(C).

Attorney A's departure from the City Attorney's office and his assumption of duties as a full-time Commonwealth's Attorney does not remove the conflict. His decision as to whether to revive the criminal prosecution of the builder remains compromised or influenced by his duties to his former clients, the City and building inspector, under DR 5-105(D). The committee believes that

the owner's civil suit against the builder and building inspector arises from the same facts which are the basis of the criminal prosecution and therefore the two matters are "substantially related." The interests of the City and the Commonwealth are materially adverse. Again, because Attorney A cannot make the requisite disclosure to and obtain waiver from the City, the conflict is not curable by consent.

The committee believes that Attorney B may ethically represent the City in the civil action filed by owner against the building inspector. Although Attorney B interviewed Owner to obtain information relevant to the criminal prosecution and did not disclose his role as an Assistant City Attorney, your facts do not suggest that Owner was represented by counsel or that Attorney B gave legal advice to an unrepresented party. DR 7-103(A). Moreover, the committee is of the opinion that Attorney B's interview with Owner did not create an attorney-client relationship nor expectation of confidentiality which would foreclose, under DR 4-101(B), the use of any information acquired during that interview. Since Attorney B's prior contacts with Owner did not involve the purpose of obtaining professional employment or legal advice, the obligations under DR 4-101 do not apply. See Legal Ethics Opinion #1570. See also Wolfram, Modern Legal Ethics 13.10.1 (1986)(The office of prosecutor can best be conceptualized as a lawyer with no client but several constituencies. Victims of crimes are not clients of prosecutors.)

[DRs 4-101(B), 5-105, 7-103(A); LEO 1271, 1393, 1570; Wolfram, Modern Legal Ethics 13.10.1 (1986)]

Committee Opinion
April 1, 1996