2009

PROFESSIONAL RESPONSIBILITY

Hon. Edward W. Hanson, Sr.
Judge
Circuit Court for the City of Virginia Beach

and

Ann K. Crenshaw
Kaufman & Canoles, P.C.

HYPOTHETICAL #1

An attorney represents a debtor in bankruptcy proceedings. An order was entered discharging the client's debts. The lawyer closed his file and terminated his relationship with this client at that time.

The Bankruptcy Code requires a debtor to disclose acquisition of property occurring within 180 days of filing the bankruptcy petition. The client inherited valuable real estate 167 days after the filing of his petition. The inheritance occurred after the discharge date, but nevertheless within the 180 day disclosure period. The acquisition was not disclosed to the court or to the attorney. Over a year later, the court entered a final order closing the proceeding.

A few weeks later, the attorney was informed by a third party of the real estate inheritance the prior year. The attorney called his former client and asked if he wanted to disclose the real estate ownership to the court; he did not. The attorney explained the risk of being charged with and convicted of bankruptcy fraud. This did not persuade the client to make the disclosure. The attorney asked the client whether he understood at the time he inherited the property his duty to disclose it to the court. The client said he did not definitely remember when he first learned of that duty, but that it may not have been until this most recent call from the attorney, well after the close of the 180 day disclosure period.

Should the attorney inform the Bankruptcy Court of the inheritance or must he keep this client information confidential?

HYPOTHETICAL #2

Lawyer Smith is an employee of a non-profit corporation which brings legal actions on behalf of clients. Lawyer Jones, a private practitioner, sometimes handles these cases at the request of the non-profit corporation on a pro bono basis, alone or as co-counsel with Lawyer Smith. Although no fee is charged, in some instances the legal actions result in court-awarded attorney's fees.

Is it proper for Attorney Smith, as a condition of employment, and Attorney Jones, as private practitioner, to turn over court-awarded attorney's fees to the non-profit corporation?

HYPOTHETICAL #3

Husband and wife are planning to divorce. They live in a small community with a limited number of attorneys. The husband wishes to prevent his wife from obtaining adequate counsel. Therefore, he visits each family law attorney in succession, shares his situation, but with no intent to hire them. He in fact already knows that he will retain Attorney A. The wife goes to one of the visited attorneys, Attorney B, seeking representation. When Attorney B writes the husband's attorney (A) establishing B's representation of the wife, Attorney A sends a letter back stating the wife's attorney (B) has a conflict of interest and must withdraw from the representation.

Prior to hiring her attorney, the wife first had gone to Attorney A for representation. Before their initial interview, Attorney A had the wife sign a disclaimer stating that:

> I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney.

He then listened to her story. After the interview, the attorney did a conflicts check, and announced he could not represent her as he already represented her husband. As part of their discussion, the wife had shared information regarding her finances and her personal life, including details that would relate to child custody issues. The wife tells her own attorney, Attorney B, of that appointment, and he writes Attorney A and asks him to withdraw from representing the husband.

Does either attorney need to withdraw from this matter?

HYPOTHETICAL #4

Client terminated his relationship with Attorney A during the course of litigation. The client then hired Attorney B. The client has an unpaid balance with Attorney A for attorney's fees. Attorney A obtained a judgment against the client for fees incurred in the course of the litigation. In an attempt to collect on the judgment, Attorney A caused a garnishment summons to be served on Attorney B as garnishee. The summons specifically is for "Custodian of client's retainer (unused)." Attorney A also had served on Attorney B a subpoena duces tecum for "all documents that disclose the amount of retainer paid to the custodian by client and that disclose all charges against said retainer."

1) Does the conduct of former counsel described in the hypothetical interfere with the client's right to terminate the attorney/client relationship and be represented by counsel of his own choosing?

2) Is the conduct of the former counsel described in the hypothetical ethically appropriate?

3) How should current counsel respond to the garnishment and subpoena?

HYPOTHETICAL #5

Attorney's fees were awarded in a civil action for an alleged violation of an injunction. The fees were applied against the client by the judge for an action by the client's attorney. The case has been appealed, and as a condition for staying the award of attorney's fees until the appeal is heard, the court requires a bond to be posted in the amount of the fees, which are de minimis, equaling approximately the amount of a monthly bill for the client.

If the attorney guarantees the de minimis bond is it a violation of professional ethics when the client remains ultimately liable?

HYPOTHETICAL #6

Lawyer A and Lawyer B are members of the same law firm. Lawyer A is a member of a local governing body. Lawyer B represents a client of the law firm in a zoning application before the local governing body. Lawyer A will disclose his relationship with Lawyer B and will abstain from participation in the local governing body's consideration and decision concerning the zoning application of the law firm's client. Based on those facts, is it ethically permissible for Lawyer B to represent a client in a matter before the local governing body on which Lawyer A serves if Lawyer A discloses his relationship with Lawyer B and abstains from participation in the local governing body's consideration of the matter?

If the attorney board members disclose the conflict and abstain from participating, may his partner appear before the Board?

HYPOTHETICAL #7

An attorney is involved in litigation in which a guardian ad litem has served as the visitation supervisor. There are contested issues of material fact involving events which occurred during a visitation, and the guardian ad litem will have to testify in that regard. The guardian ad litem's testimony may be impeached or contradicted by the testimony of one of the parties present during the visitation.

May the guardian ad litem (GAL) represent the client and testify as a witness to disputed issues of material fact, or, must a new GAL be appointed?

HYPOTHETICAL #8

An attorney represents a client in a criminal matter in which sentencing is pending. Prior to sentencing, the client contacts the attorney and advises she has been arrested for driving while intoxicated and driving with a suspended license. The client also advises that at the time of this arrest, she provided false identification (her girlfriend's driver's license) and was arrested under her girlfriend's name.

1) What ethical obligations the attorney has to the client and to the client's friend whose identification was used in the second arrest?

2) How should the attorney advise the client when she inquires whether she should appear in court on the driving while intoxicated and driving on a suspended license charges?

3) What ethical obligations does the attorney have to the court concerning the pre-sentencing investigation in the original criminal matter?

HYPOTHETICAL #9

Two attorneys are the only partners in the Law Firm. Simultaneously, they serve as mediators for a mediation firm ("Mediation Firm"), whose other mediators include both attorneys and non-attorney mediators. These two attorney/mediators are independent contractors of the Mediation Firm. One of them also serves as the director of that Mediation Firm. All of the mediators refer clients to the two lawyers for legal representation in the same matters as the mediations.

1) May the attorney who is director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict of interest, would disclosure to the clients of the attorney's role with the Mediation Firm cure that conflict?

2) May the attorney who is *not* the director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict, would disclosure to the clients of the attorney's work for the Mediation Firm cure that conflict? Would a "firewall" be needed between the two attorneys?

HYPOTHETICAL #10

A legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Would the acceptance of the daughter as a client for this guardianship petition trigger an impermissible conflict of interest for the legal aid office?

HYPOTHETICAL #11

Owner entered into a contract with Contractor, who employed Subcontractor. Litigation ensued between Owner, Contractor and subcontractors on issues of breach of contract, fraud claims at law and mechanic's liens actions in equity. In one lawsuit, a mechanic's lien was filed in the name of Subcontractor against Owner, who settled the mechanic's lien suit and was subrogated in whole or part to Subcontractor's claim for the payment against Contractor. Subsequently, a suit was filed in Subcontractor's name against Contractor ("the suit"). Owner's lawyer is counsel of record for Subcontractor. After becoming aware of the suit, but prior to service of process, Contractor contacted Subcontractor to discuss a possible monetary settlement of the suit. Thereafter, counsel of record for Subcontractor wrote a letter to Contractor's lawyer, stating: "I just learned that after Monday's hearing [in another case not related to the suit] Contractor contacted Subcontractor and requested that Subcontractor or Subcontractor's counsel in the mechanic's lien action call Contractor's lawyer 'to work something out.' **If these *ex parte* communications continue and if Contractor/Contractor's lawyer are attempting to bribe Subcontractor or influence his action against Contractor or his testimony in any way, we will take the matter up with Judge and the Commonwealth's Attorney.** Contractor/Contractor's lawyer are to have no further communications with Subcontractor. Any and all communications regarding the Subcontractor action should be directed to me."

Does the portion of the attorney's letter highlighted herein constitute a threat of criminal or disciplinary charges solely to obtain an advantage in a civil matter?

HYPOTHETICAL #12

Defense counsel in a workers' compensation claim proceeding composed a typed physician's medical report on a hospital's letterhead. The medical report thus composed had been sent by facsimile back and forth between the defense counsel and the hospital emergency room physician. The physician, when contacted, conceded that he had merely signed the medical report, and that the defense counsel, or someone in his office, had prepared it for the physician's signature. The defense counsel filed the report with the Workers' Compensation Commission and sent a copy to the claimant's counsel. Thereafter, the claimant's counsel and the defense counsel reached a settlement that the Workers' Compensation Commission approved.

Is it ethically permissible for the defense counsel to prepare the medical report on the hospital's letterhead for the physician to sign and then present it as a part of the evidence for an adjudication of the claimant's claim?

HYPOTHETICAL #13

The represented defendant just after sentencing had asked the court about his right of appeal. The Commonwealth Attorney then informed the court that if the defendant appeals, he will be tried by a jury and requests that the clerk of court note that on the warrant. In this jurisdiction, it is commonly known that a jury will usually impose a longer sentence than the judge for this offense. The defendant subsequently chose not to exercise his right of appeal.

Did the prosecutor violate any provision of the Rules of Professional Conduct by making this statement in the presence of the defendant?

HYPOTHETICAL #14

There were four co-defendants, A, B, C and D in a criminal matter in which each were charged with manufacturing marijuana. Attorney X was appointed to represent co-defendant A and Attorney Y was hired to represent co-defendant D. After the preliminary hearing, Attorney X became employed by the Commonwealth's Attorney's office, withdrew from representing A and had no further involvement with this case. The Commonwealth's Attorney's office entered into an agreement with three of the co-defendants, including co-defendant A previously represented by Attorney X. A, B and C were granted transactional immunity in exchange for their testimony against D. A special prosecutor was appointed to prosecute the remaining co-defendant, D, who continued to be represented by Attorney Y. At the trial of co-defendant D's case, B and C testified that D manufactured the marijuana without any assistance from them. Co-defendant A was not called to testify. The trial resulted in a hung jury, and the prosecutor announced he intended to retry the matter. By this time, Attorney X had left the Commonwealth's Attorney's office and was employed as a associate of Attorney Y.

Is it proper for Attorney Y to continue the representation of his client, D?

HYPOTHETICAL #15

Is it ethically permissible for an attorney to conduct the initial interview with two/multiple codefendants who have sought that attorney's advice, or must that attorney interview one defendant first and then the other in order to avoid having to decline representation of both clients?

HYPOTHETICAL #16

Attorney A, in 1986, began representing Client with regard to alleged arrearages by her ex-husband in the payment of sums due under a property settlement agreement which had previously been ratified as part of the divorce proceeding between Client and ex-husband. Attorney A instituted contempt proceedings which were still pending in April, 1987. At that time, ex-husband requested that Attorney A represent him, as co-counsel with Attorney B, on DUI and refusal charges. In the presence of Attorneys A and B, ex-husband was informed of the conflict and signed a waiver stating he had no objection to Attorney A's continued representation of Client. Ex-husband agreed orally to not object in the future to A's representation of Client. Client also executed a waiver of conflict acknowledging that the retainer paid by ex-husband to Attorney A would not be available to apply toward arrearages owed by ex-husband to Client.

In March, 1992, Attorney A was still representing Client and attempting to collect arrearages from ex-husband. When criminal and traffic charges were placed against ex-husband, Client again permitted Attorney A to represent ex-husband. Client signed a waiver acknowledging the potential conflicts, including the fact that the retainer paid by ex-husband to Attorney A would not be available to satisfy, in part, the arrearages sought by Client. Client also acknowledged that Attorney A could take no actions on Client's behalf against ex-husband without ex-husband's consent until the charges were resolved. Ex-husband again signed a waiver of the "potential conflict of interest" and authorized Attorney A to "take whatever actions he deems necessary" against ex-husband regarding the arrearage claim while representing him in the criminal matters. Client is continuing to collect the alleged sums due from ex-husband, and ex-husband now objects to Attorney A's continued representation of Client.

May Attorney A continue to represent Client (the former wife) in the contempt proceeding against her former husband to compel payment of arrearages owed Client under their property settlement agreement over ex-husband's objection to such representation?

FOCUS - 13 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1777

2003 Va. Legal Ethics Ops. LEXIS 6

June 13, 2003

[*1] Attorney-Client Privilege - is Conversation Protected Where Attorney Discovers Client's Mistake in a Bankruptcy Filing

TEXT: I am writing in response to your letter dated November 25, 2002, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("committee").

You have presented a hypothetical situation involving an attorney representing a debtor in bankruptcy proceedings. An order was entered discharging the client's debts. The lawyer closed his file and terminated his relationship with this client at that time. The Bankruptcy Code requires a debtor to disclose acquisition of property occurring within 180 days of filing the bankruptcy petition. The client inherited valuable real estate 167 days after the filing of his petition. The inheritance occurred after the discharge date, but nevertheless within the 180 day disclosure period. The acquisition was not disclosed to the court or to the attorney. Over a year later, the court entered a final order closing the proceeding. A few weeks later, the attorney was informed by a third party of the real estate inheritance the prior year. The attorney called his former client and asked if he wanted [*2] to disclose the real estate ownership to the court; he did not. The attorney explained the risk of being charged with and convicted of bankruptcy fraud. This did not persuade the client to make the disclosure. The attorney asked the client whether he understood at the time he inherited the property his duty to disclose it to the court. The client said he did not definitely remember when he first learned of that duty, but that it may not have been until this most recent call from the attorney, well after the close of the 180 day disclosure period.

Your request asks whether the attorney should inform the Bankruptcy Court of the inheritance or must he keep this client information confidential.

The pertinent provisions in the Rules of Professional Conduct applicable to this situation are Rules 1.6 and 3.3(a)(4). Rule 1.6 establishes the basic parameters of an attorney's duty to maintain the confidentiality of client information. Rule 3.3(a)(4) directs that an attorney may not, "offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

This hypothetical situation [*3] should be distinguished from a straightforward instance of client fraud. Rule 3.3(a)(2) prohibits an attorney from knowingly failing "to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6." Rule 1.6(c) (2) directs an attorney to disclose information "which clearly establishes that the client has, in the course of the representation, perpetrated fraud related to the subject matter of the representation upon a tribunal." That provision further clarifies that information clearly establishes fraud when "the client acknowledges to the attorney that the client has perpetrated a fraud."

That is not the situation outlined in your hypothetical. The crux of the conundrum raised in your request is that the client in fact does not admit he knowingly failed to disclose the real estate. Thus, regardless of what hunch or assumption this attorney may have or wish to make, the attorney does not have information clearly establishing client fraud on the court. Therefore, this attorney must treat this failure to disclose as a client mistake. What is the attorney's duty when faced with information provided to [*4] a court that turns out to be false?

This attorney, in considering the repercussions of the former client's failure to disclose his change assets, is faced with competing duties: that of protecting client confidentiality and that of assuring candor to the court. The tension between those duties, established by Rules 1.6 and 3.3 respectively, is addressed in Comment 5 to Rule 3.3:

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

If the failure to disclose had occurred during the course of the attorney/client relationship, then this attorney would need to pursue that duty analysis. However, this attorney closed his file upon the discharge of the client's bankruptcy. At that point, the attorney/client relationship terminated, transforming the current [*5] client into a former client. Subsequent to the conclusion of that relationship, the former client learned of his inheritance and failed to inform the court of the new property. Also, subsequent to the end of the relationship, the attorney learned of the inheritance and lack of disclosure. At both moments, that of the inheritance and that of the attorney's discovery of it, the client was a former, not a current, client. Accordingly, Rule 3.3's duty to disclose false evidence is not triggered. This attorney has no duty to disclose this new information regarding his former client to the court.

Not only is this attorney not required to make that disclosure, he is prohibited from doing so. This attorney only knows about this individual's bankruptcy matter and the significance of this inheritance because of confidential information learned as a result of the attorney/client relationship. The attorney's duty of confidentiality survives the termination of that relationship. See, LEOs 1207, 1305, 1307, 1347, 1407, 1613, 1643, and 1664. Neither Rule 1.6 nor Rule 3.3 provide an exception for that duty for mistakes made by former clients after termination of the attorney/client relationship, [*6] even where the mistake relates to the subject matter of the prior representation. Only consent from this former client would permit the disclosure. This attorney has already learned from his former client that he does not want the information disclosed. In such an instance, the duty of confidentiality prevails over a duty of candor to the court. This attorney is neither required nor permitted to reveal the information regarding the failure to disclose the inherited property to the court.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsPerjuryLegal EthicsProfessional ConductTribunals

Committee Opinion
June 13, 2003

FOCUS - 9 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1744

2000 Va. Legal Ethics Ops. LEXIS 10

June 27, 2000

[*1] Attorney, in Pro Bono Representation, Returning Court-Awarded Fees to Client

TEXT: You have presented a hypothetical situation in which Lawyer A is an employee of a non-profit corporation which brings legal actions on behalf of clients. Lawyer B, a private practitioner, sometimes handles these cases at the request of the non-profit corporation on a pro bono basis, alone or as co-counsel with Lawyer A. Although no fee is charged, in some instances the legal actions result in court-awarded attorney's fees.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the non-profit corporation.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 5.4 (a) of the Virginia Rules of Professional Conduct n1 providing that:

> A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or [*2] more specified persons;
>
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer; and
>
> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
>
> n1 The prohibition in Rule 5.4 (a) on sharing fees with a nonlawyer is substantially identical to its predecessor, DR 3-102 (A) of the Code of Professional Responsibility. -

The committee has previously opined that it is unethical for a lawyer who accepts a pro bono referral from a non-profit organization to charge or collect a contingent fee for the representation. Legal Ethics Op. 1691 (1996). Thus, in the facts you present, it would be improper for the staff attorney (Lawyer A) or the pro bono lawyer (Lawyer B) to claim the court-awarded fees. In some situations, however, a cooperating attorney may contract for a reduced fee with the non-profit organization and [*3] therefore be entitled to a part of the court-awarded legal fees. The issue remains, then, whether the lawyer may ethically agree to turn over all or part of the fees awarded by the court to the non-profit organi-

zation that has sponsored the litigation. Rule 5.4 (a) is implicated because non-profit organizations or public interest groups are controlled, in whole or in part, by boards or governing bodies composed of nonlawyers.

Attorney's fees awarded to successful plaintiffs pursuant to statute are a significant source of funding for non-profit public interest organizations. Typically, all such organizations require staff or cooperating attorneys to turn over all or a part of any court-awarded legal fees arising out of successful litigation sponsored by the organization. Roy Simon, Fee Sharing Between Lawyers and Public Interest Groups, *98 Yale L. J. 1069, 1070-71 (1989)*(hereinafter "Simon"). A legal ethics rule prohibiting lawyers from sharing court awarded fees with public interest groups would jeopardize this important source of funding. n2

> n2 Professor Simon cited a study of non-profit public interest groups revealing that at least nine percent (9%) of their budgets were funded by court-awarded attorneys fees. Simon, supra at 1074.

[*4]
The committee opines that there is no ethical impropriety in a lawyer's sharing court-awarded fees with the sponsoring pro bono organization. Rule 5.4 (d) states that a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if nonlawyers are in a position to exercise control over the professional judgment of a lawyer. Given the rule's history, development and reference to for profit associations of lawyers and non-lawyers, the committee believes that Rule 5.4 (a) does not prohibit an attorney sharing or turning over court-awarded attorneys fees to a non-profit public interest group which sponsored the litigation. n3

> n3 In Formal Opinion 93-374 issued by the ABA's Standing Committee on Legal Ethics, the committee analyzed Rule 5.4, reasoning that:
>
> Paragraph (a), with its more general prohibition on a lawyer sharing legal fees with a lay person, must address some residual range of circumstances, not caught by the other, more specific paragraphs of the rule, where the sharing of fees alone, absent a partnership agreement or its equivalent, presents a significant threat to the lawyer's independence of judgment. That threat, presumably, must arise from the fact that the fee-sharing arrangement gives the lay participant both the incentive and the power to interfere in the lawyer's conduct of a matter.

[*5]
The primary purpose of Rule 5.4 is to prohibit nonlawyer interference with a lawyer's professional judgment and ensure lawyer independence. The fact that the entity with which legal fees are shared is a non-profit organization is significant given Rule 5.4 (d)'s language. In addition, the legal fees in question are court-awarded rather than paid by the client. In Legal Ethics Op. 1598 (1994), the committee concluded that the thrust of DR 3-102 (A) is that a lawyer and a nonlawyer enter into an agreement where fees received from one or more clients are shared with the nonlawyer. In the facts you present, there is no issue that the client will be charged an excessive fee, due to the nonlawyer's influence or involvement, since the client does not pay the fee and the court hears evidence and determines the amount of the fee to be awarded.

This Committee is of the opinion that it is not unethical for an attorney to participate with a nonprofit organization that requires participating attorneys to turn over court-awarded fees to the organization, notwithstanding Rule 5.4 (a) or DR 3-102 (A). n4

> n4 See, ABA Formal Op. 93-374 (1993); Cleveland Bar Ass'n Op. 141 (1979)(staff attorney for organization dedicated to legal rights for women could agree to remit court-awarded fees as condition of employment); But see, *ACLU v. Miller, 803 S.W.2d 592 (Mo. 1991)* (organization had no enforceable right to court-awarded attorneys fees because this would constitute fee-splitting between participating lawyer and a non-lawyer); Maine Comm'n on Legal Ethics, Op. 69 (1986).

[*6]
Therefore, under the facts you have presented, Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the non-profit corporation. Such conduct does not violate Rule 5.4 (a) of the Virginia Rules of Professional Conduct.

Legal Topics:

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsAttorney FeesFee SplittingLegal EthicsProfessional ConductNonlawyersLegal EthicsSanctionsGeneral Overview

Committee Opinion

June 27, 2000

FOCUS - 4 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1794

2004 Va. Legal Ethics Ops. LEXIS 5

June 30, 2004

[*1] Confidentiality Of Initial Consultation

TEXT: You have presented a hypothetical situation in which a husband and wife are planning to divorce. They live in a small community with a limited number of attorneys. The husband wishes to prevent his wife from obtaining adequate counsel. Therefore, he visits each family law attorney in succession, shares his situation, but with no intent to hire them. He in fact already knows that he will retain Attorney A. The wife goes to one of the visited attorneys, Attorney B, seeking representation. When Attorney B writes the husband's attorney (A) establishing B's representation of the wife, Attorney A sends a letter back stating the wife's attorney (B) has a conflict of interest and must withdraw from the representation.

Prior to hiring her attorney, the wife first had gone to Attorney A for representation. Before their initial interview, Attorney A had the wife sign a disclaimer stating that:

> I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney.

He then listened to her story. After the interview, the attorney did a conflicts [*2] check, and announced he could not represent her as he already represented her husband. As part of their discussion, the wife had shared information regarding her finances and her personal life, including details that would relate to child custody issues. The wife tells her own attorney, Attorney B, of that appointment, and he writes Attorney A and asks him to withdraw from representing the husband.

Under the facts presented you have asked the committee to opine as to whether either attorney needs to withdraw from this matter.

Rule 1.6(a) establishes the basic duty of client confidentiality:

> A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

The committee notes that the exceptions outlined in paragraphs (b) and (c) are not at issue in [*3] the present hypothetical.

At first blush, Rule 1.6 may seem to apply only to those instances where the potential client actually hires the attorney. The committee opines that such a literal reading of Rule 1.6 is too narrow. This committee has on more than one occasion stressed the importance of an attorney's duty of confidentiality as a "bedrock principle of legal ethics." See, LEOs ##1643, 1702, 1749, and 1787. As such, the principle should be interpreted broadly to assure that the public feels safe in providing personal information to attorneys to obtain legal services. The "Scope" section of the Rules of Profes-

sional Conduct specifically references application of Rule 1.6's confidentiality duty to the context of initial consultations. That section states, in pertinent part:

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.

This committee has consistently applied Rule 1.6 [*4] to initial consultations in prior opinions. The court in *Gay v. Lihuin Food Systems, Inc., 54 Va. Cir. 468* (Isle of Wight County 2001) agreed with that line of opinions and outlined them as follows:

> "A long line of Legal Ethics Opinions issued by . . . the Virginia State Bar likewise recognizes that a prospective client's "initial consultation with an attorney creates an expectation of confidentiality which must be protected by the attorney even where no attorney-client relationship arises in other respects." Va. Legal Ethics Op. 1546, LE Op. 1546 (Aug. 12, 1993); *see also* Va. Legal Ethics Ops. 1697, LE Op. 1697 (June 24, 1997); 1642, LE Op. 1642 (June 9, 1995); 1638, LE Op. 1638 (April 19, 1995); 1633, LE Op. 1633 (June 9, 1995); 1613, LE Op. 1613 (Jan. 13, 1995); 1453, LE Op. 1453 (March 24, 1992); 1189, LE Op. 1189 (Nov. 17, 1988); 1039, LE Op. 1039 (Feb. 17, 1988); 949, LE Op. 949 (July 8, 1987); 629, LE Op. 629 (Nov. 13, 1984); 452, LE Op. 452 (Apr. 12, 1982); 318, LE Op. 318 (June 6, 1979). An attorney, therefore, has a "duty to keep confidential those consultations that occur outside formal attorney-client relationships which nonetheless [*5] create an expectation of confidentiality." Va. Legal Ethics Op. 1642, LE Op. 1642 (June 9, 1995).

Gay v. Luihn Food Systems, Inc., 5 Cir. CL00121, 54 Va. Cir. 468 (2001). n1

>FTNT>

n1 This Virginia view that the duty of confidentiality may be triggered by an initial consultation is shared by other state bars, such as Vermont and Kansas. *See*, Vermont Legal Ethics Opinion 96-9; Kansas Legal Ethics Opinion 91-4.>ENDFN>

As stated in Comment 2 to Rule 1.6, the ethical obligation to hold inviolate confidential information of the client "encourages people to seek early legal assistance." To enable that result, people must be comfortable that the information imparted to an attorney while seeking legal assistance will not be used against them.

In the present scenario, Attorney A agreed to an interview with the wife as she was seeking legal representation in that divorce. As part of that interview, she disclosed to the attorney information regarding her finances and her personal life, in particular information that would be relevant to the child custody issue that is part of this divorce. As Attorney A received confidential information that is pertinent to his representation [*6] of the husband against the wife, this attorney may not represent the husband unless the wife consents to his use of the information in this case.

This committee is not dissuaded from that conclusion by the use of a disclaimer by Attorney A. The disclaimer he provided to the wife for signature disclaimed only that no attorney/client relationship had been formed; it did not on its face address confidentiality. As outlined earlier in this opinion, an attorney/client relationship is not required for the duty of confidentiality to be triggered; that duty arises also during a person's initial consultation with a lawyer in seeking possible representation if facts are such that no attorney/client relationship is formed. Accordingly, the disclaimer of an attorney/client relationship by this attorney is ineffective to permit him the unconsented use of information imparted by the wife. As stated above, he can only use this information, and in turn, represent the husband, only if the wife consents to that use, after consultation.

The committee notes that the conclusion that this disclaimer failed to eliminate the attorney's duty of confidentiality is limited to this particular disclaimer. While [*7] general disclaimers regarding the attorney/client relationship may not be effective, there may be others that would be. To be effective, the disclaimer must clearly demonstrate that the prospective client has given informed consent to the attorney's use of confidential information protected under Rule 1.6. Nonetheless, in the present scenario, as the particular disclaimer used failed to address the confidentiality of information

provided and as important information was communicated by the wife to Attorney A, A's duty to keep that information confidential prevents A from properly representing the husband, absent the wife's consent. Attorney A must withdraw from the representation unless that consent from the wife is obtained. n2

>FTNT>

n2 This Committee recommends the detailed advice provided by the Kansas Bar as to how to avoid conflicts arising from initial consultations in Kansas Ethics Opinion 91-04. In summary, that advice is as follows:

1) Run a conflicts check before the initial consultation;

2) Caution the potential client not to provide confidential information at that point;

3) Ask whether the potential client has met with other attorneys;

4) Send a "non-engagement" letter if declining the representation; and

5) Be prepared for responding to a motion to disqualify should the opposing party become a client.

See, Kansas Legal Ethics Opinion 91-04.>ENDFN>

[*8]

Your request also inquires whether Attorney B has a conflict of interest arising from his earlier appointment with the husband. The potential for a conflict of interest for Attorney B is distinguishable from that for Attorney A. The basis for the conclusions drawn in the discussion of Attorney A's conflict is that the potential client (in that discussion, the wife) has a reasonable expectation of confidentiality. The committee maintains that when most members of the public contact a lawyer to discuss obtaining legal services from that lawyer, those members of the public assume the details of the conversation will remain private. However, the husband did not meet with Attorney B for the legitimate purpose of obtaining legal representation; he in fact had already decided he would retain Attorney A. His primary purpose in meeting with Attorney B was to preclude him from representing the wife. The husband's purpose does not create the sort of "reasonable expectation of confidentiality" Rule 1.6 exists to protect. Accordingly, no duty of confidentiality is created for Attorney B out of the visit with this husband who misrepresented his purpose for the appointment. The committee opines [*9] that as Attorney B has no duty to maintain the confidentiality of information received from the husband, no conflict of interest was triggered by that initial consultation. Attorney B is not required to withdraw. n3

>FTNT>

n3 The Committee notes that in analyzing the present hypothetical, Rule 1.6 was the pertinent authority. Rule 1.9 was not applicable as, under the facts provided, neither party was a former client of the opposing counsel. However, in any situation where the initial consultation does create an attorney/client relationship, Rule 1.9 would need to be considered in addition to Rule 1.6.>ENDFN>

While not present in this hypothetical, the committee notes that were an attorney to direct a new client to undertake this sort of strategic elimination of attorneys for the opposing party, that attorney would be in violation of Rule 3.4(j)'s prohibition against taking any action on behalf of a client "when the lawyer knows or when it is obvious that such action would merely serve to harass or maliciously injure another." That such an attorney would not himself be attending the initial consultations does not remove the attorney from ethical impropriety; Rule 8.4(a) establishes [*10] that it is improper for an attorney to violate the rules through the actions of another.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConfidentiality of Information

#4

LEGAL ETHICS OPINION 1807 GARNISHMENT OF A RETAINER FEE HELD IN THE ATTORNEY'S TRUST ACCOUNT

You have presented a hypothetical in which a client terminated his relationship with Attorney A during the course of litigation. The client then hired Attorney B. The client has an unpaid balance with Attorney A for attorney's fees. Attorney A obtained a judgment against the client for fees incurred in the course of the litigation. In an attempt to collect on the judgment, Attorney A caused a garnishment summons to be served on Attorney B as garnishee. The summons specifically is for "Custodian of client's retainer (unused)." Attorney A also had served on Attorney B a subpoena duces tecum for "all documents that disclose the amount of retainer paid to the custodian by client and that disclose all charges against said retainer."

Under the facts you have presented, you have asked the committee to opine as to the following questions:

1) Does the conduct of former counsel described in the hypothetical interfere with the client's right to terminate the attorney/client relationship and be represented by counsel of his own choosing?

2) Is the conduct of the former counsel described in the hypothetical ethically appropriate?

3) How should current counsel respond to the garnishment and subpoena?

Before analyzing the specific issues raised regarding this hypothetical, the committee notes one clarification. In the hypothetical, the client's funds in the trust account are referred to as a "retainer." As identified in LEO 1606, the use of the word " retainer" for an "advanced legal fee," while common, is inaccurate. As explained in that opinion, "advanced legal fees" are "fees paid in advance for particular services not yet performed." *Id.* In contrast, a "retainer" is a "payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future." *Id.* The difference is significant in that advanced legal fees remain the property of the client and must be placed in the trust account, whereas a retainer is earned immediately upon receipt, is property of the lawyer, and should not be in the trust account. *Id.* The label given a fee does not determine whether it is an advanced legal fee or a retainer; only the purpose of the payment is dispositive. LEO 510. The committee assumes that the client funds in this hypothetical were paid as advanced legal fees, despite the term "retainer" being used. Throughout this opinion, the committee will refer to and treat this money as advanced legal fees.

The committee will address the first two questions together as each question is essentially asking whether this attorney's garnishment is unethical as improperly interfering with the rights of the client.

LEGAL ETHICS OPINION 1807 GARNISHMENT OF A RETAINER FEE HELD IN THE ATTORNEY'S TRUST ACCOUNT

You have presented a hypothetical in which a client terminated his relationship with Attorney A during the course of litigation. The client then hired Attorney B. The client has an unpaid balance with Attorney A for attorney's fees. Attorney A obtained a judgment against the client for fees incurred in the course of the litigation. In an attempt to collect on the judgment, Attorney A caused a garnishment summons to be served on Attorney B as garnishee. The summons specifically is for "Custodian of client's retainer (unused)." Attorney A also had served on Attorney B a subpoena duces tecum for "all documents that disclose the amount of retainer paid to the custodian by client and that disclose all charges against said retainer."

Under the facts you have presented, you have asked the committee to opine as to the following questions:

1) Does the conduct of former counsel described in the hypothetical interfere with the client's right to terminate the attorney/client relationship and be represented by counsel of his own choosing?

2) Is the conduct of the former counsel described in the hypothetical ethically appropriate?

3) How should current counsel respond to the garnishment and subpoena?

Before analyzing the specific issues raised regarding this hypothetical, the committee notes one clarification. In the hypothetical, the client's funds in the trust account are referred to as a "retainer." As identified in LEO 1606, the use of the word " retainer" for an "advanced legal fee," while common, is inaccurate. As explained in that opinion, "advanced legal fees" are "fees paid in advance for particular services not yet performed." *Id.* In contrast, a "retainer" is a "payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future." *Id.* The difference is significant in that advanced legal fees remain the property of the client and must be placed in the trust account, whereas a retainer is earned immediately upon receipt, is property of the lawyer, and should not be in the trust account. *Id.* The label given a fee does not determine whether it is an advanced legal fee or a retainer; only the purpose of the payment is dispositive. LEO 510. The committee assumes that the client funds in this hypothetical were paid as advanced legal fees, despite the term "retainer" being used. Throughout this opinion, the committee will refer to and treat this money as advanced legal fees.

The committee will address the first two questions together as each question is essentially asking whether this attorney's garnishment is unethical as improperly interfering with the rights of the client.

The committee does respect the importance of the principle that a client must be free to select the attorney of his choice, including the right of termination. Comment 3 to Rule 1.16 ("Declining or Terminating Representation") states that a "client has a right to discharge a lawyer at any time, with or without cause." This principle is also reflected in Comment 1 to Rule 5.6, which states that an "agreement restricting the rights of lawyers to practice after leaving a firm not only limits their professional autonomy *but also limits the freedom of clients to choose a lawyer."*(Emphasis added.) The question becomes is it an improper restriction on a client's freedom to choose a lawyer (and discharge a lawyer) for a former attorney to garnish the advanced legal fees in a subsequent attorney's trust account.

The importance of the client's freedom to choose a lawyer must be weighed against the attorney's right to be paid for his services. *See Allen v. United States,* 606 F.2d 432 (4th Cir. 1979)(a client who authorizes litigation on his behalf must expect to pay a reasonable fee for services performed by his lawyer). This committee has weighed that balance in prior opinions and found permissible an attorney's suing a former client for unpaid legal fees. LEOs 1325, 974. Other jurisdictions have similarly approved the referral of a former client's overdue legal bill to a collection agency. *See* Arizona Ethics Op. 2000-07; D.C. Ethics Op. 298 (2000); West Virginia Ethics Op. 94-1; Ohio Ethics Op. 91-6; New York Ethics Op. 608 (1990); Georgia Ethics Op. 49 (1985). Of course, any such collection effort by an attorney against a former client must be pursued in compliance with Rule 1.6. Paragraph (b) does allow the disclosure of confidential information "to establish a claim...on behalf of the lawyer in a controversy between the lawyer and the client." While the need to take collection action against a former client does allow the attorney to disclose confidential information necessary to collect the fee; the attorney must *not* disclose any confidential information beyond that needed for collection of the fee.

With regard to collecting fees from a former client, this committee sees no reason to distinguish between litigation and collection agencies as acceptable but garnishment as not acceptable. Of course, the garnishment at issue is of the funds paid in advance to the client's new attorney. That attorney may think of those funds, once deposited into his trust account, as somehow belonging to him, or at least reserved exclusively for him, but that is not the case. As outlined above, the funds in a lawyer's trust account remain property of the client. At any time, the client could request return of the funds to pay some other creditor, such as for a mortgage. The lawyer in possession of trust account funds lacks the authority to place himself ahead of any other creditor of the client, should the client choose to pay another creditor or if, as in this case, the creditor (i.e., the former attorney) legally garnishes the funds. As the new attorney has not yet earned the legal fees, he has no legal claim to them and holds them only on behalf of the client. The committee opines that it is not a per se violation for an attorney to garnish the funds of a former client that are in a new lawyer's trust account.

That the funds through garnishment deplete the client's suggested payment source for a new lawyer does not render the garnishment unethical. While it may or may not make it harder for the client to obtain new counsel, it is not unreasonable to this committee for the right to be paid of a lawyer who has already performed legal services to have priority over the right to be of a lawyer who has not yet performed legal services. It was ethically permissible for the former attorney in this hypothetical to garnish the trust account funds so long as he lawfully was entitled to the funds.

As part of the garnishment procedure, the former attorney also had issued a subpoena duces tecum requesting detailed information regarding the size of the retainer and the billing records. As identified above, in collecting an overdue fee from a client, Rule 1.6 permits the attorney to disclose only that confidential information necessary for collection of the fee. Similarly, an attorney, in collecting his fee in this particular situation, should not seek more confidential information from the new attorney than is necessary for collection. That limitation is in line both with the importance of the attorney/client privilege and with the attorney's duty to terminate the attorney/client relationship in such a way as to

"protect the client's interest." Rule 1.16(d). Whether the terms of this subpoena comport with that standard is a fact-specific determination. The hypothetical lacks sufficient facts for the committee to make that determination.

In addressing the third question, this is a question of both fact and law, exact resolution of which is outside the purview of this committee. However, the committee can highlight principles that should be considered for making that determination. As just mentioned above, the subpoena would be improper if it seeks greater detail about the client's new representation than is necessary for the purposes of garnishment. The new attorney should consider that in determining whether to challenge the summons, through legal means, or whether to recommend to the client that the garnishment should be accepted. This committee has repeatedly concluded that where an attorney thinks complying with a subpoena request violates his client's confidentiality protection under Rule 1.6, that attorney may rightfully challenge the request. *See* LEOs ## 1628, 1352, 967, 645, 334, 300. A similar determination should be made as to the merit and amount of the underlying debt. Again, the attorney would need to determine whether to recommend to the client that the garnishment should be challenged or accepted. Resolution of those issues remains outside the purview of this committee.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
September 20, 2004

LEGAL ETHICS OPINION 1740

ATTORNEY POSTING REQUIRED BOND IN MATTER INVOLVING APPEAL OF AWARD OF ATTORNEY'S FEES

You have presented a hypothetical situation in which attorney's fees have been awarded in a civil action for an alleged violation of an injunction. The fees were applied against the client by the judge for an action by the client's attorney. The case has been appealed, and as a condition for staying the award of attorney's fees until the appeal is heard, the court requires a bond to be posted in the amount of the fees, which are de minimis, equaling approximately the amount of a monthly bill for the client.

Under the facts you have presented, you have asked the committee to opine as to whether guaranteeing the de minimis bond by the attorney is a violation of professional ethics when the client remains ultimately liable.

The applicable rules of professional conduct relative to your inquiry are:

> Rule 1.8 Conflict of Interest: Prohibited Transactions
>
> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> > (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and
> >
> > (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

The committee has previously opined that an attorney may advance or guarantee the expenses of litigation, provided that the client remains ultimately liable for such expenses. Legal Ethics Opinions 317, 1182. The committee also reviewed prior opinions holding that it is improper for an attorney or a bail bond company owned by the attorney to post a bail bond for a client who the attorney is defending in a criminal matter. Legal Ethics Opinions 1254, 1333. An attorney whose bail bond business bonds the same client who the attorney is defending in a criminal matter creates an impermissible adverse relationship with the client and the risk of shared confidences and secrets.

The committee believes that the circumstances you present are far different from an attorney acting as a professional bail bondsman for his own clients. The committee sees little difference between an attorney posting an appeal bond in this case and the advancement of any other litigation-related expense which is permitted under the cited rules and opinions. The client would remain ultimately responsible for reimbursing the attorney for the costs of the appeal bond. Therefore, the posting of the appeal bond by the attorney is an advancement of litigation-related expenses permitted under Rule 1.8 (e)(1).

Committee Opinion
April 13, 2000

LEGAL ETHICS OPINION 1763

RECONSIDERATION OF LEO 1718; REPRESENTATION OF CLIENT BEFORE GOVERNING BODY WHEN OTHER ATTORNEY IN SAME FIRM IS MEMBER OF GOVERNING BODY

You have requested a reconsideration of Legal Ethics Opinion 1718. That opinion involved the following hypothetical:

> Lawyer A and Lawyer B are members of the same law firm. Lawyer A is a member of a local governing body. Lawyer B represents a client of the law firm in a zoning application before the local governing body. Lawyer A will disclose his relationship with Lawyer B and will abstain from participation in the local governing body's consideration and decision concerning the zoning application of the law firm's client. Based on those facts, is it ethically permissible for Lawyer B to represent a client in a matter before the local governing body on which Lawyer A serves if Lawyer A discloses his relationship with Lawyer B and abstains from participation in the local governing body's consideration of the matter?

The committee concluded that "it is not ethically permissible for a law firm to represent a client in a matter before a governing body when one of the law firm's lawyers is a member of the governing body even if he/she discloses the conflict and abstains from participation and voting in the matter."

Your request suggests that reconsideration of that conclusion occur for two reasons: 1) the adoption of the Rules for Professional Conduct since the issuance of LEO 1718 and 2) the possible effect of LEO 1718 on the availability of attorneys for service on public boards.

LEO 1718 cites a number of legal authorities as comprising the legal foundation for the conclusion that the proposed conduct triggers an incurable conflict of interest. The opinion analyzes discipline rules, ethics considerations, prior Virginia ethics opinions, an ABA opinion, and numerous ethics opinions from other states.

The pertinent regulatory authority has changed since 1998, the year the committee issued LEO 1718. That opinion cites the following authority as pertinent from the former Code of Professional Responsibility: Discipline Rules 8-101 (A) and 9-101(C), along with Ethical Considerations 8-8 and 9-6. The change highlighted by your request is that the phrase "appearance of impropriety" in the title of former Canon 9, of which DR 9-101 was a part, was not repeated in the corresponding portion of the new Rules for Professional Conduct, that is, Rule 8.4(d). Also, the text of the two Ethical Considerations cited in LEO 1718 does not appear in the new rules. However, the text of DRs 8-101(A) and 9-101(C) remains virtually intact in the new rules. Thus, the new rules maintain the prohibitions regarding the use of a public office for improper influence or advantage and regarding the suggestion that a lawyer has influence with a government official or entity.

While express reference to the "appearance of impropriety" standard is no longer in the rules, the conflict of interest portion of the rules remains an appropriate source of analysis for the question raised in LEO 1718. As referenced in that opinion, a majority of the state bars that have issued an opinion regarding this issue have found that the proposed conduct is improper. While some of those opinions are based on an analysis of the "appearance of impropriety" standard, opinions from other states are based in whole or in part on a conflict of interest analysis.

This committee finds especially compelling the analysis developed by the Michigan Bar on this issue. In considering this issue, the Michigan Bar relied upon an analysis of Rule 1.11. Mich. Bar Op. RI-22

(1989). Part (b) of that rule addresses an attorney's working on a matter both as a public official and in representing a private client. A conflict of interest arising under Rule 1.11(b) can be "cured" if both the private client and the appropriate government agency consent after consultation. That provision also provides that an attorney in that first attorney's firm could work on the matter so long as the lawyer is properly screened and notice is given to the proper agency. In applying that rule to the present issue, the Michigan Bar found that, at first blush, the rule would suggest that the government board member could "cure" the conflict by recusing himself from the matter. Nevertheless, the Michigan Bar concluded that such a "cure" was not available to the attorney/board member as such a withdrawal from duty would "deprive citizens of the representative elected to exercise judgement in such matters." This committee agrees with the Michigan Bar's conclusion that the attorney/board member's obligation to his constituents would disqualify any attorney in his firm from appearing before the board.

This committee opines that the situation in the present hypothetical triggers an impermissible conflict of interest under the Rules for Professional Conduct. This conflict of a partner representing a client before a partner's board should not be "cured" by the board member's recusal from the matter. Such recusal goes against the directive found in Comment 1 to Rule 1.11, which states,

> This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client. A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or *foreseeably may* be in conflict with official duties or obligations to the public.

Thus, this committee opines that for an attorney/board member to recuse himself from a matter before his board in order that his law firm may accept representation of a private client creates an impermissible conflict of interest. Therefore, an attorney may not accept representation of a client in a matter that would require an appearance before a board, or other public body, of which any member of that attorney's firm is a member.

Your request raises as cause for reconsideration not only the recent rules change in Virginia but also the concern that the conclusion of LEO 1718 could limit the availability of lawyers for service on public boards. The committee notes that this concern is actually one of public policy rather than of rules interpretation. The committee opines that, regardless of public policy considerations, the Rules of Professional Conduct do not permit the proposed conduct. The committee also notes that this particular potential consequence was considered and addressed in LEO 1718.

This committee reaffirms the conclusion of Legal Ethics Opinion 1718.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

LEGAL ETHICS OPINION 1729 GUARDIAN AD LITEM AS VISTITATION SUPERVISOR AND WITNESS IN SAME MATTER

You have presented a hypothetical situation in which an attorney is involved in litigation in which a guardian ad litem has served as the visitation supervisor. There are contested issues of material fact involving events which occurred during a visitation, and the guardian ad litem will have to testify in that regard. The guardian ad litem's testimony may be impeached or contradicted by the testimony of one of the parties present during the visitation.

Under the facts you have presented, you have asked the committee to opine as to whether a guardian ad litem (GAL) can represent the client and testify as a witness to disputed issues of material fact, or whether a new GAL must be appointed.

The appropriate and controlling disciplinary rule relative to your inquiry is:

> DR 5-102. Withdrawal as Counsel When the Lawyer Becomes a Witness.
>
> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (3).
>
> (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The committee has previously opined that an attorney who discovers, after undertaking employment, that he must testify as to a material matter if he is to serve the best interests of his client, must withdraw from the representation of that client. Legal Ethics Opinion 462. See also Legal Ethics Opinion 901 (wife's attorney may not continue to represent wife in case involving enforcement of property settlement agreement which husband repudiated, where attorney was a party to the negotiations and attorney's testimony would likely be required). There are exceptions to this "witness-advocate" rule, but none of these exceptions apply to your inquiry.[1]

The Code of Virginia requires that the court appoint a "discreet and competent attorney-at-law" to serve as guardian ad litem . . .or if no such attorney be found willing to act, the court will appoint some other discreet and proper person. Va. Code § 8.01-9. However, Va. Code § 16.1-266 (A) expressly limits any such appointment in the juvenile and domestic relations district court to "a discreet and competent attorney-at-law. . . ." The GAL "shall represent the child . . .at any such hearing and at all

stages of the proceedings unless relieved or replaced in the manner provided by law." Va. Code || 16.1-288. Va. Code || 8.01-9 states that "every guardian ad litem shall faithfully represent the estate of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such defendant is so represented and protected." The court may enforce this duty by removing the guardian ad litem and appointing another one. In regard to the obligations of the guardian ad litem, the Court of Appeals of Virginia has observed:

> We note that the duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interest of the child by making a bona fide examination of the facts and if he does not faithfully represent the interest of the infant he may be removed. . . .

Norfolk Division of Social Services v. Unknown Father, 2 Va. App. 420, 425 n.5, 345 S.E. 2d 533, 536 n.5 (1986). The guardian has functions that may require him or her "to assume an adversarial role in the litigation" and to pursue "an affirmative course of action." Virginia Rule of Court 8:6 for the Juvenile and Domestic Relations District Courts provides:

> When appointed for a child, the guardian ad litem shall vigorously represent the child fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.

In determining the ethical duties of an attorney serving as a GAL, this committee has recognized that the relationship of the GAL and child is different from the relationship of attorney and client. See Legal Ethics Opinion 1725. In reconciling the differences between the traditional ethical duties an attorney owes to a client, and the legal obligations that a GAL must discharge, the committee believes that where fulfilling a specific duty of a guardian ad litem conflicts with traditional duties required of an attorney under the Code of Professional Responsibility, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the GAL should follow the traditional course of action required under the Code of Professional Responsibility.

In the facts you present, the committee believes there is a conflict between the attorney's ethical obligations under the "witness-advocate" rule and the attorney's duty as a GAL to report facts to the court that were learned during the GAL's appointment and investigation, and to make recommendations to the court based upon such facts. If the GAL cannot report to the court what the GAL has observed or learned during the visitation, for fear of violating the "witness-advocate" rule, then the GAL cannot discharge the legal obligations of his appointment.

The attorney serving as GAL is charged with the duty of "fully protecting the child's interest and welfare." Va. S. Ct. R. 8:6. The Order for Appointment of Guardian Ad Litem (DC-514) provides

that the guardian ad litem is appointed "to protect and represent the interests of [child] in connection with all proceedings involved in this matter." The Order of Appointment provides further that the guardian ad litem "perform the duties . . . specified on the reverse and incorporated by reference into this order." The duties incorporated by reference include:

> 1. Represent the child in accordance with Rule 8:6 of the Rules of the Supreme Court of Virginia.
>
> 2. Advise the court relative to the following: (a) the results of the guardian ad litem's investigation of the case; (b) the guardian ad litem's recommendation as to any testing necessary to make an effective disposition of the case; (c) the guardian ad litem's recommendation as to the placement of the child and disposition of the case; (d) the results of the guardian ad litem's monitoring of the child's welfare and of the parties' compliance with the court's orders; (e) the guardian ad litem's recommendation as to the services to be made available to the child and family or household members.

(Emphasis added). Thus, the GAL is required to investigate the case and "advise the court" regarding "the results" of the investigation. This requires the GAL to provide the court with material facts that may be disputed by some party in the instant proceeding. The GAL is required to provide the court with his "opinion" as to "what is in the child's interest and welfare." Rule 8:6, supra.

Enforcing the "witness-advocate" rule in the context of a GAL complying with his legal mandate to report to the court the results of his investigation does not serve the purpose for which the rule was intended. One of the purposes of the "witness-advocate" rule is to protect the client's interests in not having testimony produced on a contested issue from a witness (lawyer) who is obviously interested in the case's outcome and is thus subject to impeachment for that reason. Legal Ethics Opinion 1709. The GAL is not "interested" in the case's outcome in the same manner as an advocate for one of the parties, who is hired as an advocate to accomplish a party's goal or objective, i.e., win custody of the child for a parent. Another purpose of the rule is to preserve the integrity of the judicial system, by avoiding any public perception that a testifying advocate has distorted the testimony to further his or her client's cause. Legal Ethics Opinion 1709, supra. The committee believes that such an appearance of impropriety is not present in the context of a GAL making his report to the court and making recommendations which he believes to be in the child's best interest.

Accordingly, it is the opinion of the committee that DR 5-102 is not violated under circumstances described in your inquiry as the rule should not apply in this context.

Committee Opinion
March 26, 1999

FOOTNOTE:

[1] The exceptions to the "witness-advocate" rule are set out in DR 5-101 (B), permitting the testifying lawyer and his firm to remain as trial counsel if: (1) the testimony will relate solely to an uncontested matter or to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (2) the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (3) recusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

FOCUS - 31 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1731

1999 Va. Legal Ethics Ops. LEXIS 6

June 29, 1999

[*1] Attorney's Duties to Client and Others When Client has been Arrested under Someone Else's Name

TEXT: You have presented a hypothetical situation in which an attorney represents a client in a criminal matter in which sentencing is pending. Prior to sentencing, the client contacts the attorney and advises she has been arrested for driving while intoxicated and driving with a suspended license. The client also advises that at the time of this arrest, she provided false identification (her girlfriend's driver's license) and was arrested under her girlfriend's name.

Under the facts you have presented, you have asked the committee to opine as to 1) what ethical obligations the attorney has to the client and to the client's friend whose identification was used in the second arrest; 2) how to advise the client when she inquires whether she should appear in court on the driving while intoxicated and driving on a suspended license charges; and 3) what ethical obligations the attorney has to the court concerning the pre-sentencing investigation in the original criminal matter.

The appropriate and controlling disciplinary rules relative to your inquiry are DR 4-101 requiring the preservation of [*2] client confidences and secrets; DR 5-105 which addresses an attorney's representation of multiple clients with conflicting interests; DR 2-108 which sets out the requirements for termination of or withdrawal from the representation; and DR 7-102 (A) (3) and (5) which require that the attorney not conceal from the court that which he is required by law to reveal and not misrepresent facts or law to the court. The committee has previously opined that information given by a client to an attorney concerning activity by the client that may constitute a past crime must be protected by the attorney as a confidence or secret under DR 4-101 (B). Generally, absent client consent, information concerning a client's past criminal conduct cannot be revealed. Legal Ethics Opinion 364 (1980) (A lawyer may not advise a Commonwealth's Attorney of his client's commission of a crime unless the client consents); Legal Ethics Opinion 1087 (1988) (A lawyer cannot reveal his client's past criminal conduct).

DR 4-101 (C) (3) states that an attorney may reveal information that clearly establishes that his client has perpetrated a fraud on a third party, but the fraud must be related to the subject matter [*3] of the representation. The committee believes that this rule does not apply, however, because the subject matter of the attorney's representation of the client (sentencing hearing on criminal drug charge) and the fraud committed by the client (misrepresentation of identity to police officer during arrest for DWI) are unrelated. Therefore, the attorney may not reveal the client's fraud unless the client consents.

As to the first question, in the facts you present, the committee believes that the attorney cannot advise or assist both the client and her girlfriend, charged with a criminal offense she did not commit, as a direct consequence of the client having perpetrated a fraud by misrepresenting her identity to the police. Due to the inherent and direct conflict, the attorney cannot adequately represent the interests of both parties, and the conflict cannot be waived. DR 5-105 (C). In fact, the only communication which the attorney may have with the client's girlfriend is for her to seek legal advice from another attorney, because of the conflicting interests of the client and the girlfriend. DR 7-103 (A) (2).

Your second question is whether the attorney should advise the client [*4] to appear in court on the scheduled court date for the trial of the criminal charges of driving while intoxicated (DWI) and driving on a suspended operator's li-

cense (DOSL). At this juncture, the committee believes that the attorney must inform the client of the potential adverse legal consequences she faces if she does not voluntarily come forward with the truth concerning her actions during the arrest, which will likely be discovered regardless of whether she cooperates. The attorney should include in this discussion the risk that the client will face more serious criminal charges than those for which she was arrested. In assisting his client to reach a proper decision, it is proper and desirable for the lawyer to identify those factors which may lead to a decision that is morally just, as well as legally permissible. EC 7-8. In the final analysis, should the client choose to remain silent and not appear in court to explain the truth, it is the opinion of the committee that the attorney must abide by the client's decision, even if it is against the attorney's advice and judgment. Id.

Your third inquiry involves the lawyer's ethical duties in his continuing representation of the [*5] client at her sentencing hearing in three weeks on the drug charges to which she pled guilty. Specifically, you ask what ethical duty, if any, does the attorney owe the court to correct or add to the pre-sentence report or memorandum if it fails to include information about the client relative to the charges of DWI and DOSL? DR 4-101 (D)(1) requires an attorney to reveal information, as admitted to the attorney by the client, which clearly establishes that the client intends to commit perjury, but the facts in your inquiry do not lead necessarily to the conclusion that the client must testify at the sentencing hearing or that the attorney must vouch for the accuracy of the pre-sentence memorandum. Of course, the client may not perpetrate a fraud on the court, nor may the attorney affirmatively misrepresent factual matters at the hearing. DR 4-101 (D) (2); DR 7-102 (A) (5). But what if neither attorney nor client is required to make any statements in court concerning the contents of the report or its accuracy?

A lawyer must always balance his duty as an advocate to zealously represent the client's interests and his duty of candor to the court. In Legal Ethics Opinion 1186 (1989), [*6] the committee concluded that a defense lawyer is under no obligation to advise the court that it has overlooked a criminal charge, since the facts are on the public record and the lawyer has done nothing to conceal them. The committee relied on DR 7-101 (A) (3) stating that it would be unethical to reveal information that would prejudice or damage the client. In Legal Ethics Opinion 1400 (1991), the committee opined that a criminal lawyer representing a client found guilty of a felony is under no duty to reveal that the sentencing document later signed by the judge erroneously states the defendant was found guilty of a misdemeanor (assuming that the lawyer did not endorse the document or otherwise participate in drafting it). In fact, the lawyer was ethically obligated not to reveal the error since the revelation would damage his client. The opinion assumed that the lawyer did not endorse the document or otherwise participate in its creation. Similarly, in Legal Ethics Opinion 1215 (1989), the committee concluded that a defense attorney was not required to inform the court or the Commonwealth that the court had rescheduled a trial date beyond the statutory limitation period for the [*7] prosecution of a particular felony. The defense attorney had not sought the continuance nor had he agreed to it.

An attorney shall not intentionally mislead the court nor conceal that which he is required by law to reveal. DR 7-102 (A) (3), (5). In the facts you present, the committee is unaware of any ethical requirement to voluntarily reveal unadjudicated criminal charges during a sentencing hearing. n1 However, the committee cautions that the attorney must be careful not to mislead the court in any statements made to the judge concerning the presentence report. In that regard, you ask the committee how the attorney should respond to the court if it asks counsel if counsel has any corrections or additions to make to the report. The committee believes that the answer to this question depends on how the question is phrased and presented by the court. The committee believes that the appropriate course of action is for the attorney to function, within the bounds of the law and ethics, as an advocate in the adversary system. This means that the attorney should avoid revealing information that would materially prejudice or damage the client, unless required by law or the disciplinary [*8] rules to do so. Inviting the court to order such disclosure, under the facts you present, is not in the client's best interest. If the attorney is asked directly by the court whether the client has a prior criminal record, the committee believes that the attorney must be truthful in his response and not mislead the court.

n1 Even if the client were convicted of the criminal charges of DWI and DOSL prior to the sentencing hearing, the burden is on the Commonwealth to document these convictions in the presentence report. A defense attorney has no obligation to disclose a client's record of prior convictions in order to prevent the court from imposing sentence on incomplete or inaccurate information, provided that neither the defense lawyer nor the defendant affirmatively misrepresent to the court that there were no prior convictions. North Carolina State Bar Op. 98-5 (1998); Texas Prof. Ethics Op. 504 (1995); Fla. State Bar Ass'n Op. 86-3 (1986). The voluntary revelation of such information without the client's consent would breach the lawyer's duty of confidentiality.

You ask whether the attorney may permissibly withdraw from the representation of the client so as to avoid [*9] the ethical dilemma presented in the preceding paragraph. Withdrawal would require leave of court which may be difficult to obtain three weeks before the sentencing hearing, especially if the attorney represented the client from the beginning. DR 2-108 (C). Withdrawal would require a motion and notice to the client who may object. The court may also expect, on such short notice, good cause or explanation of the basis for the motion to withdraw. This puts the attorney back squarely in the ethical dilemma presented in the preceding paragraph concerning what to disclose to the court. Moreover, absent one of the specific grounds enumerated in DR 2-108 to support termination of the attorney-client relationship, the attorney may not withdraw if there is material prejudice to the client. DR 2-108 (B) (1). The committee is of the opinion that withdrawal cannot be effectuated without prejudice to the client. Therefore, in the committee's opinion, withdrawal is not an option available to the attorney to resolve the dilemma presented in the preceding paragraph. However, the committee believes that the attorney has an obligation to explain to the client how the representation might be limited [*10] at the sentencing hearing, so as to avoid the risk of disclosing the client's criminal activity. The attorney would be required to withdraw, however, if the client were convicted of the criminal charges before the sentencing hearing, had misrepresented to the court that she had no prior convictions, and the attorney was unable to convince the client to rectify the fraud on the court. DR 4-101 (D) (2); DR 2-108 (A) (1).

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsProfessional ConductIllegal ConductLegal EthicsProfessional ConductTribunalsLegal EthicsSanctionsSuspensions

Committee Opinion
June 29, 1999

LEGAL ETHICS OPINION 1826

POTENTIAL CONFLICTS FOR ATTORNEY/MEDIATOR WHEN CLIENT MOVES FROM MEDIATION TO LEGAL REPRESENTATION WITH FIRM OF ATTORNEY/MEDIATOR

You have presented a hypothetical in which two attorneys are in a law firm ("Law Firm"). They are the only partners in the Law Firm. Simultaneously, they serve as mediators for a mediation firm ("Mediation Firm"), whose other mediators include both attorneys and non-attorney mediators. These two attorney/mediators are independent contractors of the Mediation Firm. One of them also serves as the director of that Mediation Firm. All of the mediators refer clients to the two lawyers for legal representation in the same matters as the mediations.

With regard to that hypothetical scenario, you have asked the following questions:

1) May the attorney who is director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict of interest, would disclosure to the clients of the attorney's role with the Mediation Firm cure that conflict?

2) May the attorney who is *not* the director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict, would disclosure to the clients of the attorney's work for the Mediation Firm cure that conflict? Would a "firewall" be needed between the two attorneys [1]
?

The Rules of Professional Conduct pertinent to your inquiry are:

Rule 1.7 which states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) the consent from the client is memorialized in writing.

Rule 1.10(a) which states that when lawyers are associated in a firm, none of them shall knowingly

represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9 or 2.10 (e).

Rule 2.10(e) which prohibits an attorney who has served as a third party neutral [2] from representing "any party to the dispute . . . in any legal proceeding related to the subject of the dispute resolution proceeding."

Also critical to your inquiry are Virginia Code §§ 8.01-581.22 and -581.24 which impose certain standards and duties when a person serves as a mediator, including the duty to maintain the confidentiality of materials and communications relating to the controversy being mediated. Fundamental to your inquiry is whether confidential information learned by a mediator in the Mediation Firm may be imputed to other employees in that firm, including the attorney/mediators, thereby creating a possible conflict of interest when a referral is made to the Law Firm.

Under Rules 2.10 (e) and 1.10 (a), any mediation performed by one of the attorneys in the Law Firm for the Mediation Firm creates a conflict of interest in representing either mediation party in that same dispute for each of the two attorneys in the Law Firm. As to the mediating lawyer, there is no cure for such a conflict. Where the attorney/mediator herself served as a mediator in the particular matter, Rule 2.10(e) is the source of a conflict of interest for subsequent representation of either mediation party. Rule 2.10(e) does not provide a curative provision, such as consent, and a "screen" is not recognized as an appropriate means to cure a conflict under any circumstances except those described under Rule 1.11. [3] Further, Rule 1.10 (a) imputes a conflict of interest under Rule 2.10 (e) to any other attorney associated in the firm. [4]

In contrast, where the attorney's law partner's service as mediator is the source of a conflict for subsequent representation of the mediation parties, the first attorney's conflict is triggered by Rule 1.10(a)'s imputation language. Rule 1.10, unlike Rule 2.10, does provide a curative provision. Rule 1.10(c) provides that any conflict disqualification triggered by Rule 1.10, "may be waived by the affected client under the conditions stated in Rule 1.7." Rule 1.7(b) allows waiver of a conflict of interest where the enumerated are met.

To reiterate, under Rule 2.10(e), together with Rule 1.10(a), any mediation directly done by one attorney of the Law Firm for the Mediation Firm creates a conflict of interest in representing either mediation party in that same dispute for all of the attorneys in the Law Firm. For the mediating lawyer, this conflict cannot be cured by client consent; however, as to the non-mediating lawyer, the imputed conflict may be cured with the consent of the affected clients.

The foregoing analysis has only addressed successive representation where either of the two lawyers in the Law Firm has been a mediator. What about those cases referred by the other mediators in the Mediation Firm to lawyers in the Law Firm? Do those referrals trigger conflicts of interest for these two attorneys? When other mediators (lawyer or nonlawyer) refer their mediation clients to these two attorneys, those mediators are not members of the lawyers' "firm" [5] for purposes of Rule 1.10(a)'s imputation; nor would either attorney have mediated the dispute herself as contemplated by the prohibition in Rule 2.10(e). Thus, the sort of mediation conflict of interest outlined above is not triggered when mediators not in the Law Firm refer cases to these two lawyers.

Nevertheless, the two lawyers in accepting referrals from fellow mediators should analyze whether their "personal interest" of participation in this Mediation Firm may materially limit their representation of the clients, including whether there may be any duty owed the mediation parties. *See* Rule 1.7(a). Examples of things to consider would be the financial arrangement with the Mediation Firm, the nature of the relationship with fellow mediators (are they familiar with each other's cases, do they advise each other regarding their mediation cases, etc.), language in any contract between the Mediation Firm and its

customers, and any pertinent legal authority. *See, e.g.*, Va. Code §8.01-581.22. Presumably, the answer to such analysis may differ for the attorney who serves only as a contracting mediator and that attorney who also serves as the Mediation Firm's director. Whether or not these attorney/mediators have a personal interest creating a conflict of interest, pursuant to Rule 1.7, in any of these cases referred by fellow [6] mediators cannot be determined with the limited facts provided in the hypothetical scenario. However, if such a conflict is present in any of these referred cases, it would impute from one firm attorney to the other due to the language of Rule 1.10(a), quoted above.

As discussed earlier, Rule 1.7 and Rule 1.10(a) allow for conflicts of interest to be "cured" under the requirements delineated in Rule 1.7(b). That curative provision is available to these Rule 1.7 "personal interest" and/or "duty to a third person" conflicts if each requirement of Rule 1.7(b) can be met.

In sum, the direct answers to your questions are as follows:

1) May the attorney who is director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict of interest, would disclosure to the clients of the attorney's role with the Mediation Firm cure that conflict?

The attorney/director can represent former customers of the Mediation Firm only where she either does not have a conflict of interest, or if she does, has properly cured it via Rule 1.7(b). Disclosure to the clients of the attorney's role with the Mediation Firm is one component of steps that would be needed to meet the requirements of Rule 1.7(b) in a particular matter.

2) May the attorney who is *not* the director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict, would disclosure to the clients of the attorney's work for the Mediation Firm cure that conflict? Would a "firewall" be needed between the two attorneys?

Similarly, this attorney can represent those clients, who are former mediation customers of fellow mediators, where she either has no conflict of interest, or if she does, where she properly can meet the requirements of Rule 1.7(b)'s curative provision. Disclosure to the client of the attorney's role with the Mediation Firm is a likely component of the needed steps to comply with Rule 1.7(b). One appropriate strategy for obtaining client consent may be creation of a "screen" between the two lawyers regarding a case. In addition, due care must be exercised to comply with the requirements of Virginia Code Section 8.01-581.22 which makes all memoranda, work product and other material contained in the mediator's case file confidential and not subject to disclosure. Also protected are any communications made in the course of or in connection with the controversy being mediated. This means that the two lawyers associated with the mediating company must ensure that adequate security measures are implemented to avoid the unauthorized access to or disclosure of information protected under the statute unless all the parties to the mediation have waived confidentiality.

Having addressed your specific questions, the Committee also cautions that, while not part of those questions, certain issues are suggested by the present scenario. The Committee notes that the given facts lack detail as to the financial arrangements regarding this Mediation Firm. Do either of those attorneys have ownership interests in the company? This Committee has issued a number of opinions providing guidance for attorneys who own ancillary businesses. *See* LEO 1819 (lobbying firm); LEO1754 (attorney selling life insurance products); LEO 1658 (employment law firm/human resources consulting firm); LEO1647 (employee-owned title agency); LEO1634 (accounting firm); LEO 1368 (mediation/arbitration services); LEO 1345 (court reporting); LEO 1318 (consulting firm); LEO 1311 (insurance products); LEO 1254 (bail bonds); LEO 1198 (court reporting); LEO 1163 (accountant; tax preparation); LEO 1131 (realty corporation); LEO 1083 (non-legal services subsidiary); LEO 1016 (billing services firm); LEO 187 (title insurance). The Committee commends those opinions to you if in fact these attorneys are owners of the mediation company.

A second item of note regards referrals between the Mediation Firm and the Law Firm. The facts presented discuss referrals by mediators of clients to the Law Firm for legal services. Details are not provided as to whether such referrals are exclusive, i.e., whether mediators ever refer customers to any other Law Firms. While it is not inappropriate *per se* for such referrals to occur, the attorneys must be mindful of the limitation imposed by Rule 7.3(d), which states as follows:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1and 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.

The scenario lacks sufficient detail for the Committee to determine whether the arrangement complies with Rule 7.3(d); the Committee highlights the issue for your attention.

With regard to referrals, the scenario is silent as to whether the Law Firm makes referrals to the Mediation Firm. Again, there is no *per se* prohibition against such referrals. However, if these attorneys do refer clients to the Mediation Firm for which they work and which they may or may not own, the attorneys must be mindful of the potential conflict of interest regarding the attorneys' business interest, which is governed by Rule 1.7, provided above.

To reiterate, the Committee lacks sufficient information to make determinations regarding these issues regarding ancillary businesses and referrals, but refers you to the pertinent authorities for guidance.

This opinion supersedes LEO 1759 only with respect to the imputation of conflicts arising under Rule 2.10 (e). This opinion is advisory only, based on the facts presented and not binding on any court or tribunal.

Committee Opinion
March 28, 2006

[1]
This opinion request asks about a "firewall." That concept is also commonly referred to with the alternate terms, "screen," "ethical screen," and "Chinese wall." Throughout the discussion in this opinion, the Committee uses the term "screen" as that term appears in the Rules of Professional Conduct. *See, e.g.,* Rules 1.11 and 1.12.

[2]
Rule 2.11 (a) defines a "mediator" as a "third party neutral."

[3]
In some situations, while not a "cure" for a conflict, a "screen" may induce the parties to consent and waive a conflict. However, unlike other conflicts rules, Rule 2.10 does not provide for the waiver of a conflict under Rule 2.10 (e) with the consent of the parties in the mediation. The Committee notes that Rule 2.10 (d) allows the parties to consent to a conflict under that rule, but no such provision is made for a conflict under Rule 2.10 (e). Therefore, the Committee believes that the drafters of Rule 2.10 (e) intended such a conflict to be not curable.

[4]
In LEO 1759 (2002) the Committee addressed a conflict problem under Rule 2.10 (e). That opinion held that Rule 2.10 (e) prohibited an attorney who had mediated a dispute from subsequently representing either party to that mediation in a legal matter related to the subject matter of the mediation. At the time LEO 1759 was issued, conflicts under Rule 2.10 (e) were not among those that are imputed to the other lawyers in a law firm under Rule 1.10 (e). Consequently, the Committee in LEO 1759 held that the conflict was personal only to the lawyer/mediator and not her partners and associates in the firm. Since that time,

however, Rule 1.10 was amended to include conflicts under Rule 2.10 (e) and therefore those conflicts are now imputed to the other lawyers associated with the mediating lawyer. The conclusion in LEO 1759, that a mediation conflict pursuant to 2.10(e) is "personal to the attorney," is no longer the proper interpretation of the pertinent rules. Accordingly, any conflict either of the two attorneys in the present scenario may have from their mediation work under Rule 2.10(e) is imputed to the other attorney. If one of these attorneys refers her mediation clients to her partner for legal representation in the underlying dispute, that attorney receiving the referral and accepting the representation has a conflict of interest. LEO 1759 is overruled, in part, by the subsequent amendment to Rule 1.10 which became effective January 1, 2004.

[5]

The term "firm" as used in the Rules of Professional Conduct denotes a professional entity organized to deliver legal services. The mediation firm is not "firm" as defined by the Rules of Professional Conduct. Imputed disqualification under Rule 1.10 (a) applies "while lawyers are associated in a firm."

[6]

For further guidance regarding the affect of particular financial arrangements on the ethical responsibilities of these attorneys, see the final three paragraphs of this opinion, which address issues not asked in this request but highlighted by the Committee as worthy of note.

10

FOCUS - 32 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1769

2003 Va. Legal Ethics Ops. LEXIS 2

February 10, 2003

[*1] Conflict - whether an Attorney can Represent the Daughter in Gaining Guardianship of Incompetent Mother Who is Currently a Client in an Other Matter

TEXT: You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Under the facts you have presented, you have asked the committee to opine as to whether the acceptance of the daughter as a client for this guardianship petition would trigger an impermissible conflict of interest for the legal aid office.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7, which governs concurrent conflicts of interest, and Rule 1.14, which addresses representing a client with a disability. Rule 1.7 squarely addresses the conflict triggered by an attorney representing adverse parties in the same matter:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
>
> > (1) the lawyer reasonably believes the representation [*2] will not adversely effect the relationship with the other client; and
> >
> > (2) each client consents after consultation.

The committee notes that under Rule 1.10(a), any conflict arising under Rule 1.7 for one attorney would be imputed to every other attorney in the office.

Applying Rule 1.7(a) to the attorney in the present hypothetical presents insurmountable problems. This committee does not see how that attorney could fulfill either of the two requirements listed under paragraph (a), above. As for the first requirement, that the representations not be adversely affected, it seems unlikely that the representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence. Even were that hurdle cleared, the second requirement can not be met. This committee sees no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

Should the attorney in this hypothetical actually consider his client to be incompetent, that attorney can look to Rule 1.14 for guidance. That rule specifically addresses the difficulties in representing a client under a disability. [*3] The rule does suggest that the lawyer should, Aas far as reasonably possible, maintain a normal client-lawyer relationship. @ However, should the lawyer reasonably believe that Athe client cannot adequately act in the client's own interest, @ then the lawyer Amay seek the appointment of a guardian or take other protective action. @ Rule 1.14(a) and (b). Thus,

should the attorney in this hypothetical reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

This committee's two conclusions in this matter - that there would be an impermissible conflict of interest for the attorney to represent the daughter in seeking a guardian and that, under certain circumstances, the attorney may permissibly seek appointment of a guardian under Rule 1.14 - are not contradictory. This committee believes that in addressing this same dilemma regarding Rule 1.7 and Rule 1.14, the ABA correctly made a critical distinction. See, ABA 98-405 (1997) n1. In its opinion on this same question, the ABA distinguished between an attorney representing a third party petitioner and filing the petition himself:

> Rule 1.14(b) creates a narrow exception [*4] to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as Aadverse@ to the client. However Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to this client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as Aadverse@ to the client and prohibited by Rule 1.7(a)...
>
> n1 The ABA, in this opinion, is interpreting Model Rules 1.7 and 1.14, which are substantially similar to Virginia's corresponding rules.

This committee concurs with the ABA's analysis of the interplay between Rule 1.7 and Rule 1.14 in the present context. Neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney's office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by [*5] the daughter regarding the mother in determining this attorney's duties toward the mother with regard to Rule 1.14. That rule would be the proper source for guidance for this attorney should he believe the mother's competence is questionable.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsConflicts of Interest

Committee Opinion
February 10, 2003

FOCUS - 44 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1755

2001 Va. Legal Ethics Ops. LEXIS 11

May 7, 2001

[*1] Threatening Criminal Action in a Civil Matter; Contact between Opposing Parties

TEXT: You have presented a hypothetical situation in which Owner entered into a contract with Contractor, who employed Subcontractor F. Litigation ensued between Owner, Contractor and subcontractors on issues of breach of contract, fraud claims at law and mechanic's liens actions in equity. In one lawsuit, a mechanic's lien was filed in the name of Subcontractor F against Owner, who settled the mechanic's lien suit and was subrogated in whole or part to Subcontractor F's claim for the payment against Contractor. Subsequently, a suit was filed in Subcontractor F's name against Contractor ("the suit"). Owner's lawyer is counsel of record for Subcontractor F. After becoming aware of the suit, but prior to service of process, Contractor contacted Subcontractor F to discuss a possible monetary settlement of the suit. Thereafter, counsel of record for Subcontractor F wrote a letter to Contractor's lawyer, stating: "I just learned that after Monday's hearing [in another case not related to the suit] Contractor contacted F and requested that F or F's counsel in the mechanic's lien action call Contractor's lawyer 'to [*2] work something out.' If these ex parte communications continue and if Contractor/Contractor's lawyer are attempting to bribe F or influence his action against Contractor or his testimony in any way, we will take the matter up with Judge and the Commonwealth's Attorney. Contractor/Contractor's lawyer are to have no further communications with F. Any and all communications regarding the F action should be directed to me."

Under the facts you have presented, you have asked the committee to opine as to whether the portion of the attorney's letter highlighted herein constitutes a threat of criminal or disciplinary charges solely to obtain an advantage in a civil matter.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 3.4(h), which states that a lawyer "shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter," and Rule 4.2, which directs a lawyer not to "communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The Committee [*3] has previously opined that, under Rule 3.4(h), a lawyer should not allude to criminal prosecution in correspondence to an opposing party or their attorney if the allusion is made solely to obtain an advantage in a civil matter. See, LEOs 715, 716, 1388, 1569, 1582, and 1753. The Committee has developed a two-part test for analyzing communications regarding Rule 3.4(h)'s prohibition: is the communication a threat and, if so, was the threat made solely to obtain an advantage in a civil matter.

In applying this two-part test to the letter sent in the present hypothetical, the first prong of the test is clearly established. The provision in the subcontractor's letter presents a definite threat of criminal prosecution. The thornier question in this instance is whether that threat was made solely to obtain an advantage in a civil matter. The letter does not make the usual demand for payment/settlement by threatening prosecution; rather, the letter seeks to stop the opposing party and/or his attorney from contacting the subcontractor directly. The letter demands that all contact be made with the attorney himself. Instructive in the present instance is LEO 1063, in which an attorney sends [*4] a letter to a "stalker" of his client demanding that the "stalking" cease or else criminal and civil actions would be pursued. The Committee in

LEO 1063 opined that while a threat had been made, that threat was not solely made to obtain an advantage in a civil matter but in whole, or at least in part, to stop the harassing actions of the stalker. Accordingly, the Committee opined that the attorney's letter was proper, stating that "when it appears that a letter was sent to stop a certain action rather than to gain an advantage in a civil matter, there is no violation." The attorney in the present hypothetical would seem, from the face of this letter, at least in part, to be trying to stop the opposing party from contacting his own client directly. Thus, under the reasoning of LEO 1063, as this letter is meant to stop a certain action (i.e., contact), then there would seem to be no violation of Rule 3.4(h).

The Committee does note that in LEO 1063, the conduct that the lawyer sought to extinguish was clearly prohibited by law. In the present hypothetical, the conduct is contact by one party with the opposing party. Rule 4.2 does prohibit a party's lawyer from contacting the opposing [*5] party if represented by counsel (absent that counsel's consent); nonetheless, Comment One to that rule expressly provides that "parties to a matter may communicate directly with each other." The Committee notes that Comment One should be reviewed in tandem with the prohibition in Rule 8.4(a) against violating a rule through the acts of others. Thus, while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party. In the present hypothetical, the content of the contact by the contractor was that the subcontractor or its counsel should contact the contractor's lawyer to reach a settlement. Further information is not available as to whether the contractor's lawyer was behind this conversation. The subcontractor's lawyer, from the face of his letter, appears concerned that the contractor's lawyer did direct this contact. It is further contact of this sort that the letter seeks to prevent. Applying the analysis from LEO 1063 to this hypothetical, the Committee opines that on its face, the letter seeks to prevent further contact with his client and is therefore not solely [*6] for the purpose of obtaining an advantage in the civil matter. Thus, under the two-prong test, this letter does not by itself violate Rule 3.4(h). The Committee's opinion on this point rests on an absence of any further information regarding the motive of the subcontractor's attorney.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsGeneral Overview

Committee Opinion
May 7, 2001

FOCUS - 47 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1726

1998 Va. Legal Ethics Ops. LEXIS 10

December 10, 1998

[*1] Attorney Preparing Narrative Report of Physician's Medical Opinion on Physician's Letterhead for Physician's Signature

TEXT: You have presented a hypothetical situation in which the defense counsel in a workers' compensation claim proceeding composed a typed physician's medical report on a hospital's letterhead. The medical report thus composed had been sent by facsimile back and forth between the defense counsel and the hospital emergency room physician. The physician, when contacted, conceded that he had merely signed the medical report, and that the defense counsel, or someone in his office, had prepared it for the physician's signature. The defense counsel filed the report with the Workers' Compensation Commission and sent a copy to the claimant's counsel. Thereafter, the claimant's counsel and the defense counsel reached a settlement that the Workers' Compensation Commission approved.

Based on the facts presented, you have asked the committee to opine whether it was ethically permissible for the defense counsel to prepare the medical report on the hospital's letterhead for the physician to sign and then present it as a part of the evidence for an adjudication of the claimant's claim.
[*2]
The appropriate and controlling Disciplinary Rules relative to your inquiry are DR 1-102 (A) (4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law; and DRs 7-102 (A) (5) through (8) which provide, respectively, that a lawyer shall not knowingly make a false statement of law or fact; participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent; or knowingly engage in other illegal conduct or conduct that is contrary to a Disciplinary Rule; and DR 7-105 (C) (5), which provides that a lawyer appearing before a tribunal shall not intentionally violate an established rule of procedure or of evidence where such conduct is disruptive of the proceedings.

The committee notes that Rule 2B2 of the Workers' Compensation Commission Rules permits reports of physicians to be admitted in evidence as testimony by physicians and provides that, upon timely motion, any party shall have the right to cross-examine the source of the medical [*3] report. Rule 4:2 requires such medical reports to be filed immediately with the Commission, with a copy to opposing counsel. Rule 2B3 provides that parties shall specifically designate by author the medical reports to be received in evidence.

The facts presented omit any statement of whether the defense counsel, in compliance with Rule 2B3, had made a designation by author of the medical report to be received in evidence. The appearance is that, because of the settlement, the claim had not progressed to the point of the Rule 2B3 designation with the Commission. The meaning of designate by author under Rule 2B3 is, in any case, an issue of interpretation for the Commission and not the committee. The committee observes, however, that the dictionary definition of "author" is "one that originates or gives existence." Webster's Ninth New Collegiate Dictionary (1986).

On the facts presented, it is significant that the medical report had been sent back and forth between the defense counsel and the physician. It can be inferred that, although the defense counsel was the scrivener, the physician reviewed the medical report for accuracy before he signed it as his medical report. Under those [*4] circumstances, the defense counsel did not dictate the physician's testimony in the report. There is no suggestion in the facts presented that the phy-

sician took exception to the content of the report as an inaccurate or misleading presentation of his own findings or opinions, nor is there any suggestion that the physician did not adopt and voluntarily sign the report as his own.

Lawyers often, if not routinely, prepare writings that others sign. A familiar illustration consists of affidavits presented on summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Traditionally, those affidavits are not prepared by the affiants. They are prepared by lawyers, in some cases by lawyers for a party and in other cases, by lawyers for the affiants themselves. The practice is ethically permissible as long as the affidavit honestly captures the affiant's testimony as opposed to the lawyer "putting words in the affiant's mouth." Even though the lawyer composes the affidavit, the content embodies the testimony of the affiant who knowingly and willingly executes it. The form of expression may be that of the lawyer, but the substantive content is that of the affiant.

To the extent [*5] that the form of expression may accentuate substantive content, examination of the affiant at depositions or at trial has a leveling effect. In the situation presented, it is noted that Va. Code § 65.2-703 permits discovery depositions, and Rule 2B2 permits cross-examination of the source of a medical report.

Lawyers also commonly prepare the answers to an expert witness interrogatory under Supreme Court Rule 4:1 (b) (4) (A) (i). In doing so, lawyers use their own form of expression to present information derived from the expert. In turn, the lawyer's client signs the answers under oath but has not composed them.

The committee is aware of your concern that the lawyer-composed medical report was on the hospital's letterhead. There is no suggestion, however, that the emergency room physician's use of the hospital's letterhead was unauthorized, or that the lawyer had reason to believe presenting the medical report on the letterhead was improper. There is also no suggestion that the lawyer misrepresented the medical report as having been written by the physician personally. On the facts presented, the lawyer conceded when asked that his office had composed the medical report.

The [*6] fact of the lawyer's composition, which the physician reviewed, adopted and signed, is not alone a misrepresentation or dishonest conduct under DR 1-102 (A) (4). The committee cautions, however, that the lawyer must be circumspect in his presentation of the medical report. It is one thing to write "I enclose the medical report of Dr. X to be filed." It is something else, however, to write "I enclose the medical report that Dr. X prepared to be filed." The latter statement would be a misrepresentation with respect to the fact of preparation.

In sum, the committee is of the opinion that defense counsel's writing of the medical report for submission to and review, adoption and signature by the physician does not violate the Disciplinary Rules. The applicable ethical constraint is that the content of the lawyer-composed medical report must honestly capture the testimony that the physician wishes to present (as opposed to lawyer-created testimony that the lawyer wishes to present irrespective of the physician's own testimony) and must be reviewed, adopted and signed by the physician voluntarily. In addition, the lawyer must be alert to the DR 7-103 (B) requirement that, in dealing with [*7] an unrepresented person, a lawyer shall not state or imply that he is disinterested and may have to clarify his role in the matter to the physician.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsPerjuryLegal EthicsLegal Services MarketingFirm Letterhead & NamesLegal EthicsSanctionsGeneral Overview

Committee Opinion
December 10, 1998

FOCUS - 43 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1768

2002 Va. Legal Ethics Ops. LEXIS 9

November 26, 2002

[*1] Prosecutor Threatening Trial by Jury to Dissuade a Defendant from Appealing a Crimminal Conviction to the Circuit Court

TEXT: You have presented a hypothetical involving comments made by a prosecutor in open court. The represented defendant just after sentencing had asked the court about his right of appeal. The Commonwealth Attorney then informed the court that if the defendant appeals, he will be tried by a jury and requests that the clerk of court note that on the warrant. In this jurisdiction, it is commonly known that a jury will usually impose a longer sentence than the judge for this offense. The defendant subsequently chose not to exercise his right of appeal.

Under the facts you have presented, you have asked the committee to opine as to whether the prosecutor has violated any provision of the Rules of Professional Conduct by making this statement in the presence of the defendant.

The Rule that specifically addresses conduct of a prosecuting attorney is Rule 3.8. That provision places special restrictions on the activities of a prosecutor; however, none of those apply here. Those provisions deal with probable cause, unrepresented defendants, communication with witnesses, disclosure [*2] of exculpatory evidence, and extrajudicial statements. The statements made by this prosecutor in court regarding a jury trial are not prohibited by any of the provisions in Rule 3.8.

As the specific rule regarding prosecutors does not preclude the statements made in your hypothetical, the permissibility of those statements is governed by the Rules' general provisions regarding restrictions on an attorney's professional communications.

The committee opines that nothing in the provisions of broad application governing attorney communications, nor the specific provisions directed at prosecutors prohibit the remarks of this Commonwealth's Attorney in the presence of this represented defendant.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsProsecutorial Conduct

Committee Opinion
November 26, 2002

LEO #1679 CONFLICT OF INTEREST; SECRETS AND CONFIDENCES;
REPRESENTATION ADVERSE TO FORMER CLIENT; CO-DEFENDANTS

You have presented a hypothetical situation in which there were four co-defendants, A, B, C and D in a criminal matter in which each were charged with manufacturing marijuana. Attorney X was appointed to represent co-defendant A and Attorney Y was hired to represent co-defendant D. After the preliminary hearing, Attorney X became employed by the Commonwealth's Attorney's office, withdrew from representing A and had no further involvement with this case. The Commonwealth's Attorney's office entered into an agreement with three of the co-defendants, including co-defendant A previously represented by Attorney X. A, B and C were granted transactional immunity in exchange for their testimony against D. A special prosecutor was appointed to prosecute the remaining co-defendant, D, who continued to be represented by Attorney Y. At the trial of co-defendant D's case, B and C testified that D manufactured the marijuana without any assistance from them. Co-defendant A was not called to testify. The trial resulted in a hung jury, and the prosecutor announced he intended to retry the matter. By this time, Attorney X had left the Commonwealth's Attorney's office and was employed as a associate of Attorney Y.

Under the facts you have presented, you have asked the committee to opine as to the propriety of Attorney Y continuing the representation of his client, D.

The appropriate and controlling disciplinary rules relative to your inquiry are DR 4-101 which requires an attorney to preserve confidences and secrets of a client; DR 5-105(D) which states that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure; and DR 5-105(E) which states that if a lawyer is required to decline employment under DR 5-105, no partner or associate may accept or continue such employment.

The committee has previously opined that conflicts and confidences and secrets issues arise when an attorney undertakes to represent codefendants in a criminal matter, especially when one of the codefendants, pursuant to an agreement with a prosecutor, will testify against the other. In Legal Ethics Opinion No. 986, for example, an attorney represented two codefendants on charges arising out of the same criminal conduct. One of the codefendants entered into a plea agreement with the Commonwealth agreeing to cooperate by testifying against the other in exchange for a suspended sentence. The plea bargaining defendant obtained new counsel, but the attorney continued to represent the other codefendant. The Committee concluded that the testifying codefendant was a former client and that the trial of the other codefendant at which the former client was expected to testify was substantially related. DR 5-105(D). Since the interests of the former client and the client standing trial were adverse, the attorney could not continue to represent the client standing trial without the consent of the former client after full disclosure. In addition, the Committee opined that there was a grave risk that DR 4-101 would be violated if the attorney continued to represent the other client facing trial. Continued representation would also

place the attorney in the untenable position of having to cross-examine and impeach his former client at trial in order to defend the existing client. See, e.g., Legal Ethics Opinion No. 1181.

In the facts you present, the committee believes that co-defendant A is a former client of Attorney X, to whom Attorney X owes duties under DR 5-105(D) and DR 4-101. Co-defendants A and D are adverse, assuming that Codefendant A plans to testify for the Commonwealth at D's upcoming trial. Now that Attorney X is employed by Attorney Y, any confidences and secrets Attorney X acquired in his prior representation of A, are imputed to Attorney Y. See, e.g., Legal Ethics Opinion No. 1082 (merger of two law firms representing adverse parties creates conflicts; information obtained may be carried to merged firm). Similarly, Attorney X's former client conflict vicariously disqualifies Attorney Y from continuing the representation of D, absent A's consent. DR 5-105(E).

Therefore, the Committee is of the opinion that Attorney Y may not continue the representation of D absent A's consent after full disclosure of the conflict. Attorney X must be able to disclose the information acquired by Attorney X during his prior representation of A, and the risks or consequences to A if Attorney Y is permitted to continue the representation of D. DR 5-105(D). Also, A must consent to the use and disclosure of any information that would otherwise be protected under DR 4-101 as a confidence or secret. DR 4-101(C)(1).

[DRs 4-101, 5-105; LEOs 986, 1082, 1181]

Committee Opinion
May 16, 1996

FOCUS - 40 of 50 DOCUMENTS

VIRGINIA
Opinions of the Standing Committee on Legal Ethics

Legal Ethics Opinion No. 1363

1990 Va. Legal Ethics Ops. LEXIS 29

June 13, 1990

[*1] Confidences and Secrets--Conflict of Interests: Interviewing Codefendants Simultaneously

TEXT: You wish to know whether it is ethically permissible for an attorney to conduct the initial interview with two/multiple codefendants who have sought that attorney's advice, or whether that attorney must interview one defendant first and then the other in order to avoid having to decline representation of both clients.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR 4-101(B), DR 5-105(A) and DR 5-105(C). Disciplinary Rule 4-101(B) provides that a lawyer shall not knowingly reveal a confidence or secret of his client, use a confidence or secret of his client to the disadvantage of the client or for the advantage of himself or a third person, unless the client consents after full disclosure. The term "confidence" has been defined in the Disciplinary Rules as information protected by the attorney-client privilege under applicable law and a "secret" is other information gained in the professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. See DR 4-101(A). [*2]

Disciplinary Rules 5-105(A) and (C) are responsive to conflicts which may arise that may impair the attorney's independent judgment on behalf of another client. Taken together, the rules provide that a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect on the exercise of his independent professional judgment on behalf of each.

The committee directs your attention to Legal Ethics Opinion No. 307 in which the committee has previously opined that where A has given a statement implicating both himself and codefendant B, and B has denied complicity, it is improper for the attorney to represent both parties. If B is not to be a witness at the time of the Commonwealth's case against A, the attorney could represent A. If B will testify, the attorney should refrain from representing either party.

Likewise, the facts of Legal Ethics Opinion No. 986 indicate that an attorney represented codefendants A and B on various charges arising from the same criminal conduct; however, before accepting the representation, the attorney interviewed each defendant [*3] separately to ensure that no conflict of interest existed. One week before the trial, the Commonwealth's Attorney's office proposed a plea bargain to B conditioned upon his testimony against defendant A. Subsequent to the plea bargain proposal, a hearing was held and the court determined that a conflict for representation existed and B was to obtain new counsel. The attorney continued to represent defendant A even after learning that B would accept the plea arrangement and would testify against A, and after learning that B had divulged the work product of attorney for A. The committee opined that under the circumstances, it was improper for attorney to continue to represent A even if B consented to the representation after full disclosure and that the continued representation of A could result in a violation of DR 4-101 as to defendant B.

The committee believes that where multiple representation of codefendants is contemplated, the problem of confidentiality is not necessarily avoided by separate interviews of each defendant, since it is possible for the attorney to gain information during the separate interviews which could be construed to be a confidence or secret from an individual [*4] defendant which may preclude the multiple representation. Once an attorney has talked privately with an individual about that person's legal problem or question, the committee believes the relationship of attorney-client is deemed to have existed.

Therefore, the committee opines that it is possible that, after interviewing one defendant whose interests are potentially adverse to the interests of another codefendant, interviewing of another codefendant charged in the same or substantially related crime may result in a violation of DR 5-105(C) if it is obvious that the attorney could not have ade-

quately represented the interests of each client. Even if the initial client would have consented to the potential adverse representation, the committee opines that the potential for prejudicing a client by the use of or divulging a confidence or secret would outweigh any informed consent. See DR 7-101(A)(3) and LEO # 1181.

The committee opines that the determination of whether to engage in the multiple representation of codefendants should be made on a case-by- case basis depending on the charges and circumstances surrounding the incident. An attorney should consider the fact that, because [*5] of the potential for the interests of one defendant being adverse to the another, undertaking multiple representation of codefendants may not be ethically permissible and may eventually require withdrawing from the representation of both or all codefendant clients. Therefore, where there is any doubt as to whether a conflict may exist, an attorney should represent only one of the similarly charged codefendants in a criminal matter.

Finally, the committee opines that the attorney has no principled basis on which to decide which of two codefendants to interview first. Therefore, the committee would suggest that it would be best, although not required by the Code of Professional Responsibility, for the attorney to explain to the codefendants the problem and the possible consequences and let the prospective clients make the choice. If they cannot decide, then the two choices open are (1) to represent neither, or (2) to make an unprincipled or arbitrary decision, e.g.: flip a coin, as to whom to interview first.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsGeneral Overview

Committee Opinion
June 13, 1990

16

LEGAL ETHICS OPINION 1794 CONFIDENTIALITY OF INITIAL CONSULTATION

You have presented a hypothetical situation in which a husband and wife are planning to divorce. They live in a small community with a limited number of attorneys. The husband wishes to prevent his wife from obtaining adequate counsel. Therefore, he visits each family law attorney in succession, shares his situation, but with no intent to hire them. He in fact already knows that he will retain Attorney A. The wife goes to one of the visited attorneys, Attorney B, seeking representation. When Attorney B writes the husband's attorney (A) establishing B's representation of the wife, Attorney A sends a letter back stating the wife's attorney (B) has a conflict of interest and must withdraw from the representation.

Prior to hiring her attorney, the wife first had gone to Attorney A for representation. Before their initial interview, Attorney A had the wife sign a disclaimer stating that:

> I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney.

He then listened to her story. After the interview, the attorney did a conflicts check, and announced he could not represent her as he already represented her husband. As part of their discussion, the wife had shared information regarding her finances and her personal life, including details that would relate to child custody issues. The wife tells her own attorney, Attorney B, of that appointment, and he writes Attorney A and asks him to withdraw from representing the husband.

Under the facts presented you have asked the committee to opine as to whether either attorney needs to withdraw from this matter.

Rule 1.6(a) establishes the basic duty of client confidentiality:

> A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

The committee notes that the exceptions outlined in paragraphs (b) and (c) are not at issue in the present hypothetical.

At first blush, Rule 1.6 may seem to apply only to those instances where the potential client actually hires the attorney. The committee opines that such a literal reading of Rule 1.6 is too narrow. This committee has on more than one occasion stressed the importance of an attorney's duty of confidentiality as a "bedrock principle of legal ethics." See, LEOs ##1643, 1702, 1749, and 1787. As such, the principle should be interpreted broadly to assure that the public feels safe in providing personal information to attorneys to obtain legal services. The "Scope" section of the Rules of Professional Conduct specifically references application of Rule 1.6's confidentiality duty to the context of initial consultations. That section states, in pertinent part:

> Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be

established.

This committee has consistently applied Rule 1.6 to initial consultations in prior opinions. The court in Gay v. Lihuin Food Systems, Inc., 54 Va. Cir. 468 (Isle of Wight County 2001) agreed with that line of opinions and outlined them as follows:

> A long line of Legal Ethics Opinions issued by ... the Virginia State Bar likewise recognizes that a prospective client's "initial consultation with an attorney creates an expectation of confidentiality which must be protected by the attorney even where no attorney-client relationship arises in other respects." Va. Legal Ethics Op. 1546, LE Op. 1546 (Aug. 12, 1993); *see also* Va. Legal Ethics Ops. 1697, LE Op. 1697 (June 24, 1997); 1642, LE Op. 1642 (June 9, 1995); 1638, LE Op. 1638 (April 19, 1995); 1633, LE Op. 1633 (June 9, 1995); 1613, LE Op. 1613 (Jan. 13, 1995); 1453, LE Op. 1453 (March 24, 1992); 1189, LE Op. 1189 (Nov. 17, 1988); 1039, LE Op. 1039 (Feb. 17, 1988); 949, LE Op. 949 (July 8, 1987); 629, LE Op. 629 (Nov. 13, 1984); 452, LE Op. 452 (Apr. 12, 1982); 318, LE Op. 318 (June 6, 1979). An attorney, therefore, has a "duty to keep confidential those consultations that occur outside formal attorney-client relationships which nonetheless create an expectation of confidentiality." Va. Legal Ethics Op. 1642, LE Op. 1642 (June 9, 1995).

[1]

Gay v. Luihn Food Systems, Inc., 5 Cir. CL00121, 54 Va. Cir. 468 (2001).

As stated in Comment 2 to Rule 1.6, the ethical obligation to hold inviolate confidential information of the client "encourages people to seek early legal assistance." To enable that result, people must be comfortable that the information imparted to an attorney while seeking legal assistance will not be used against them.

In the present scenario, Attorney A agreed to an interview with the wife as she was seeking legal representation in that divorce. As part of that interview, she disclosed to the attorney information regarding her finances and her personal life, in particular information that would be relevant to the child custody issue that is part of this divorce. As Attorney A received confidential information that is pertinent to his representation of the husband against the wife, this attorney may not represent the husband unless the wife consents to his use of the information in this case.

This committee is not dissuaded from that conclusion by the use of a disclaimer by Attorney A. The disclaimer he provided to the wife for signature disclaimed only that no attorney/client relationship had been formed; it did not on its face address confidentiality. As outlined earlier in this opinion, an attorney/client relationship is not required for the duty of confidentiality to be triggered; that duty arises also during a person's initial consultation with a lawyer in seeking possible representation if facts are such that no attorney/client relationship is formed. Accordingly, the disclaimer of an attorney/client relationship by this attorney is ineffective to permit him the unconsented use of information imparted by the wife. As stated above, he can only use this information, and in turn, represent the husband, only if the wife consents to that use, after consultation.

The committee notes that the conclusion that this disclaimer failed to eliminate the attorney's duty of confidentiality is limited to this particular disclaimer. While general disclaimers regarding the attorney/client relationship may not be effective, there may be others that would be. To be effective, the disclaimer must clearly demonstrate that the prospective client has given informed consent to the attorney's use of confidential information protected under Rule 1.6. Nonetheless, in the present scenario, as the particular disclaimer used failed to address the confidentiality of information provided

and as important information was communicated by the wife to Attorney A, A's duty to keep that information confidential prevents A from properly representing the husband, absent the wife's consent. [2] Attorney A must withdraw from the representation unless that consent from the wife is obtained.

Your request also inquires whether Attorney B has a conflict of interest arising from his earlier appointment with the husband. The potential for a conflict of interest for Attorney B is distinguishable from that for Attorney A. The basis for the conclusions drawn in the discussion of Attorney A's conflict is that the potential client (in that discussion, the wife) has a reasonable expectation of confidentiality. The committee maintains that when most members of the public contact a lawyer to discuss obtaining legal services from that lawyer, those members of the public assume the details of the conversation will remain private. However, the husband did not meet with Attorney B for the legitimate purpose of obtaining legal representation; he in fact had already decided he would retain Attorney A. His primary purpose in meeting with Attorney B was to preclude him from representing the wife. The husband's purpose does not create the sort of "reasonable expectation of confidentiality" Rule 1.6 exists to protect. Accordingly, no duty of confidentiality is created for Attorney B out of the visit with this husband who misrepresented his purpose for the appointment. The committee opines that as Attorney B has no duty to maintain the confidentiality of information received from the husband, no conflict of interest was triggered by that initial consultation. [3] Attorney B is not required to withdraw.

While not present in this hypothetical, the committee notes that were an attorney to direct a new client to undertake this sort of strategic elimination of attorneys for the opposing party, that attorney would be in violation of Rule 3.4(j)'s prohibition against taking any action on behalf of a client "when the lawyer knows or when it is obvious that such action would merely serve to harass or maliciously injure another." That such an attorney would not himself be attending the initial consultations does not remove the attorney from ethical impropriety; Rule 8.4(a) establishes that it is improper for an attorney to violate the rules through the actions of another.

Committee Opinion
June 30, 2004

[1]
This Virginia view that the duty of confidentiality may be triggered by an initial consultation is shared by other state bars, such as Vermont and Kansas. *See*, Vermont Legal Ethics Opinion 96-9; Kansas Legal Ethics Opinion 91-4.

[2]
This Committee recommends the detailed advice provided by the Kansas Bar as to how to avoid conflicts arising from initial consultations in Kansas Ethics Opinion 91-04. In summary, that advice is as follows:

1) Run a conflicts check before the initial consultation;
2) Caution the potential client not to provide confidential information at that point;
3) Ask whether the potential client has met with other attorneys;
4) Send a "non-engagement" letter if declining the representation; and
5) Be prepared for responding to a motion to disqualify should the opposing party become a client.

See, Kansas Legal Ethics Opinion 91-04

[3]
The Committee notes that in analyzing the present hypothetical, Rule 1.6 was the pertinent authority. Rule 1.9 was not applicable as, under the facts provided, neither party was a former client of the opposing counsel. However, in any situation

where the initial consultation does create an attorney/client relationship, Rule 1.9 would need to be considered in addition to Rule 1.6.