VIRGINIA BEACH BAR ASSOCIATION
ETHICS PRESENTATION
WITH
HON. EDWARD HANSON, JR.
FEBURARY 2008

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HYPOTHETICAL #1

Real estate Lawyer A has been asked to handle a real estate settlement of property, involving Relocation Company's ("Relocation") sale of property to purchaser. Relocation routinely purchases real estate on behalf of some of their client's employees who have been transferred and as a benefit of employment the company, through Relocation, agrees to purchase the employee's real estate.

Relocation purchases the real estate from Seller and Seller executes a deed to Relocation. Relocation does not record this original deed and then enters into a contract and sells the same real estate to Buyer. Lawyer B for Relocation drafts a deed for this transaction by preparing a new "page one" that contains the name of Buyer but uses the signature page of the original deed between Seller and Relocation. This is routine practice for Relocation and Lawyer B as it related to these types of transactions for their client's employees.

Relocation advises Lawyer A that the proceeds of the sale are to be payable to Relocation (not the grantor of the deed). Lawyer A recognizes that Relocation should have recorded the original deed and paid all applicable recording fees and taxes and that Seller's warranties under the original deed were made to Relocation, not the buyer.

The question posed involves whether or not this is unethical for Lawyer A to facilitate Relocation's practice of not recording the first deed and preparing legal documentation that does not accurately reflect the true chain of title to the real estate. What are Lawyer A's ethical obligations as to the chain of title and is Lawyer A obligated to report Lawyer B's conduct?

HYPOTHETICAL #2

Attorney's A and B represent opposing parties in pending litigation. A's two-member firm used secretary X for all secretarial work for the office, including the present litigation. A's firm fired X. The following week, Attorney B's firm, also a two-lawyer office, hires X as a secretary.

1. Is there a conflict of interest requiring B's withdrawal from the litigation?
2. Would the answer to question one differ if X were a paralegal rather than a secretary?
3. Would the answer to question one differ if X met alone with A's client when the client reviewed and signed discovery responses?
4. Would the answer to question one differ if X's only duty for B on the litigation at issue was to answer the telephone?

HYPOTHETICAL #3

Attorney A represented Co-executor #1 of an estate. Co-executor #2 has separate counsel. Attorney A's representation of Co-executor #1 has recently terminated, and that co-executor now has new counsel. Attorney A has transferred his file to the new attorney, but has retained a copy of the materials. During the course of Attorney A's representation of Co-executor #1, the two co-executors entered into an agreement that each would fully disclose financial information for purposes of administrating the estate. Counsel for Co-executor #2 has now contact Attorney A and asked for certain financial information from Attorney A's former client's file as a tax filing is due at the end of the month. The requested documents come within the terms of the agreement. Co-executor #1 will not consent to Attorney A's release of the documents. Attorney A declined to provide his copy of the documents and instead referred Co-executor #2's counsel to Co-executor #1's new counsel.

Is Attorney A obligated to disclose the documents to the requesting attorney?

HYPOTHETICAL #4

Attorney who regularly represents plaintiffs in personal injury, wants to include the following language in her standard fee agreement:

Either Client or Attorney has the absolute right to terminate this agreement. In the event Client terminates this agreement, the reasonable value of Attorney's services shall be value at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered. In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.

Is this ethically permissible and legally enforceable?

HYPOTHETICAL #5

Attorney represents a criminal defendant charged with capital murder. The client displays suicidal tendencies. He was suicidal before and during the time of the alleged crime. He has attempted to commit suicide not only prior to incarceration but also while in jail for the present charges. He has explained to the attorney that as those attempts were unsuccessful, he now intends to "commit suicide by state" by allowing the state to succeed in its efforts to have the death penalty imposed upon him. The client says that he does not believe that his actions necessarily meet all of the requirements for capital murder, since his actions were neither premeditated nor intentional. The client wants to plead not guilty and request a trial by jury because he believes that a jury is more likely to sentence him to death. In furtherance of that objective, the client has instructed the defense attorney not to present any evidence or defense

during either the guilt or the penalty phases of the trial. The client has previously been evaluated for competency; the forensic psychologist concluded that the client met the legal standard for competency at that time. The defense attorney has developed evidence for both the guilt and penalty phases of the trial. This attorney does not believe that the client is making a rational, stable and informed decision since his actions are motivated by his suicidal tendencies.

1. Is the lawyer ethically bound by his client's instructions that the lawyer is not to present any evidence or argument during either the guilt or penalty phase of the trial?
2. What actions should the lawyer take if he believes that his client is not making an informed, rational and stable decision?
3. What action should the lawyer take if he believes that this client is pursuing an unlawful objective?

HYPOTHETICAL #6

Attorney A's practice concentrated in the area of administrative law. The practice includes representing clients before a federal agency. During the course of each representation, the attorney generates a large number of paper documents; also, a number of electronic documents are exchanged between the agency and the attorney. The attorney's clients have generally indicated a preference for, and in some cases, a requirement for the attorney to assist in minimizing the client's file maintenance and storage costs by providing documents from the attorney to the client in an electronic format. Due to technological and economic trends, the attorney expects more clients to require that the attorney provide all documents in only an electronic format. Accordingly, the attorney proposes the following procedure:

1. Scan each paper document into an industry-standard electronic format for which free "reader" software us readily available;
2. Transmit the electronically formatted document to the client via e-mail; and
3. Subsequently destroy the paper document to prevent a disclosure of any confidence contained therein.

Under this process, paper documents would be destroyed only if the particular client consented to the destruction; otherwise, the attorney would provide the client with the paper documents. At the termination of the representation, upon client request, the attorney would provide to the client any retained paper documents and an electronic copy of the electronically formatted documents.

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

1. Must an attorney maintain a paper copy of a client's file during the representation?
2. May an attorney destroy paper documents in a current client's file once the client consents?

3. May an attorney request that a client provide such consent as a condition of the representation?

HYPOTHETICAL #7

Attorney A represents a Trust Company, governed by a board of directors. Attorney B sits on the board. Attorney C has now joined Attorney B's firm. Attorney C represents several remainder beneficiaries of a trust administered by Trust Company regarding their complaints regarding the administration of that trust. Attorneys B and C wrote a letter to the President of the Trust Company requesting that the President and other board members screen Attorney B from any information or discussion of the dispute between Attorney C's clients and the Trust Company. The letter proposed that the board excuse Attorney B from the board meetings when this agenda item would be discussed. Specifically, the letter stated:

> Completely screening Local Attorney [i.e., Attorney B] from all information and discussion, if any, to or by members of the board of directors of your company is consistent with the Rules of Professional Conduct imposed on him and at the same time enable him to continue to discharge his duties as a director of your company with respect to all other members.

Attorney C then filed the law suit against the Trust Company on behalf of the remainder beneficiaries. Several members of the board have raised objections to this arrangement with Attorney A, the board's attorney.

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

1. Is it a conflict of interest for Attorney C to sue Trust Company if his partner, Attorney B, serves on the board of directors of Trust Company?
2. If so, can the conflict be rectified by screening Attorney B from discussion and information concerning the lawsuit?
3. If there is a conflict, can the conflict be eliminated by the resignation of Attorney B from the board, or must Attorney C withdraw from his representation of the beneficiaries?

HYPOTHETICAL #8

Attorney A represents a criminal defense attorney whose client has been convicted of a crime and appealed the crime to the proper court. The attorney failed to perfect the appeal properly; therefore, the court dismissed the appeal.

To what advice and/or assistance the attorney is ethically permitted to provide to the client. Specifically, may the attorney do any or all of the following:

1. Advise the client that he may have a right to file a petition for a writ of *habeas corpus*;
2. Advise the client of the time limit for filing a petition for a writ of *habeas corpus;*
3. Advise the client how and where to file the petition for a writ of *habeas corpus;*
4. Advise the client of possible language to include in a petition for a writ of *habeas corpus*;
5. Send the client a blank form of a petition for a writ of *habeas corpus*;
6. Send the client a petition for a writ of *habeas corpus* that the lawyer has drafted;
7. Send the client an affidavit executed by the attorney stating the circumstances of the client's case and suggesting that the client might wish to attach the affidavit to any petition for a writ of *habeas corpus* the client might file;
8. Advise the client of the possible legal effect of filing a petition for a writ of *habeas corpus* on other legal remedies or on his right to file future petitions for a writ of *habeas corpus*; and
9. Offer to assist the client in securing a new attorney to assist the client in pursuing legal remedies.

HYPOTHETICAL #9

A year ago, a woman, Ms. X, called a lawyer's office for an initial consultation. Ms. X communicated only with the lawyer's secretary, who scheduled an appointment for Ms. X to meet with the lawyer. Ms. X called the secretary a second time and advised the secretary that the lawyer had previously represented her ex-husband's sister. The secretary advised the lawyer of Ms. X's relationship to that former client. Prior to Ms. X's second call, the ex-husband had made an appointment to meet with the lawyer. The lawyer advised the secretary that he would not take Ms. X's case. The lawyer agreed to represent the ex-husband regarding petitions filed by Ms. X.

Ms. X now objects to that representation. Ms. X says she told the secretary "all the facts" about her case. Despite Ms. X's claim that she told the secretary all about her case, the lawyer and his secretary maintain they are in possession of no confidential information about Ms. X.

Is it ethically permissible for this lawyer to continue to represent the ex-husband against Ms. X?

HYPOTHETICAL #10

An associate attorney worked for six years in the trademark department and was supervised by the head of that department, which reported to the firm's Executive Committee.

The associate worked primarily for firm clients, usually preparing correspondence for the signature of a firm partner but sometimes under his own signature. Many of the firm's trademark clients are foreign, especially Japanese companies and law firms. Partners in the firms have long-established relationships with firm clients, including personal relationships with some of the clients.

At the end of the six years, the associate left the firm and joined a second firm, also as an associate. At the time of his departure, there were four or five clients for whom the associate was the client originator.

After leaving the firm, the associate wrote letters to a number of clients, his own clients and the firm's clients. At least one of those letters state as follows:

After over 6 years, I have decided to leave First Firm to join Second Firm. The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: I can continue representing you in trademark matters, you can hire other counsel, or you can stay with First Firm.

The associate did not inform the first firm of his intention to contact the clients and did not copy the first firm on the letters to clients. After learning that the associate had been contacting clients, the first firm requested him to provide a list of the clients who were contacted and copies of those letters. The associate refused both request.

1. Whether is was unethical for the associate to refuse to provide the first firm with copies of the letters to the clients and the list of clients to whom the letters were sent; and
2. Whether the letter sent by the associate was misleading, or otherwise violated Rule 7.1 ("Communications Concerning a Lawyer's Services").

HYPOTHETICAL #11

Attorney A manages a public defender's office, which provides criminal defense representation exclusively to indigent clients. Many of these clients also have no relatives to provide them with funds needed to buy items from jail commissary while the client is incarcerated. Clients frequently request attorneys and/or support staff to give the clients nominal amounts of money for that purpose. The money is used primarily to buy personal items or food beyond that regularly provided to inmates. At times, staff is simultaneously trying to persuade some of these clients to accept plea agreements to which the clients are initially resistant. Your request asks whether it is improper for the attorney and/or their support staff to provide this money to the clients.

HYPOTHETICAL #12

The plaintiff had paid four thousand dollars to the defendant contractor for commercial refrigeration installation. The defendant's attorney advised the court that there was no viable defense to the breach of contract claim and stated that the account for the four thousand dollars now only contained a few hundred dollars. The plaintiff's attorney subsequently wrote the defendant's attorney regarding that account. In that letter, the plaintiff's attorney noted that as only $1125 of the four thousand had been spent on equipment, he assumes the defendant illegally diverted the remainder. The letter states that the plaintiff's attorney plans to advise his client to file criminal charges against the defendant for that diversion and that repayment of the diverted funds will not stop that course of action.

If the provision in the plaintiff's attorney's letter regarding criminal charges constitutes an improper threat? If that particular provision is not improper, would it then be proper for you to include in a form letter, to be sent to debtors who write bad checks to your clients, a provision indicating that you would advise your client at some future date that the client should institute criminal proceedings for larceny and that repayment will not cease that pursuit once initiated.

HYPOTHETICAL #13*

Your five-person law firm is located in Anywhere County, and its practice is general in nature. Your particular practice has always included a variety of land use related matters. At any given time you are likely to have a few rezoning and special exception applications pending before the Board of Supervisors and a special permit or variance application or two pending before the Board of Zoning Appeals. Neither you nor anyone else in your firm has ever brought suit against the Board of Supervisors or the BZA.

Several months ago, one of your partners was retained by the County to appeal a Circuit Court decision that a taking of real property by the County in the exercise of it eminent domain authority was not for a public use and was therefore invalid. The case will be argued next year.

Last night, you presented before the Board of Supervisors of Anywhere County an application for a special exception which would allow your client to operate a concrete plant on property it has under contract. Although you had done all your homework and had every reason to believe that the application would be granted, it was denied by the Board. Immediately after the hearing you explained to your client that he could challenge the denial in Circuit Court. This morning, he calls and asks you to file a challenge. Should you do so?

HYPOTHETICAL #14*

Four years ago you graduated from law school, passed the Virginia Bar, and hung out a shingle in your hometown. Your practice consists largely of domestic relations work, court appointed criminal defense work, and collection work. Today, a long time friend of your family

comes into the office and tells you that his country club wants to build a large wing on the clubhouse and add a driving range and a 100-space parking lot. The chairman of the building committee has talked to the local zoning office and been advised that while the club was a "by right" use when originally built in 1956, it is now a special permit use, and the proposed expansion will require the granting of a special permit by the Board of Zoning Appeals ("BZA"). Your family friend has been authorized to ask you to take the case on behalf of the club.

You very much want to represent the club since (a) the family friend operates a substantial business and you could use this case to impress him as well as other club members in the business community with your legal talents, and (b) you see this case as a good opportunity to begin developing what you believe could be a lucrative land use practice. Under what circumstances should you take the case?

HYPOTHETICAL #15*

You and the others in your law firm, Gow & Getum, have just attended a marketing seminar put on by a high-priced law firm consultant. You are all pumped up and set a personal goal of bringing in 25 good land use clients within the next year. It occurs to you that the Comprehensive Plan amendment process which will soon commence in the county in which you practice provides a golden opportunity to contact (and hopefully reel in) some potential clients. You devise a plan to send the following letter to everyone in the county who owns at least 50 acres:

Gow & Getum
Attorneys at Law
1 Court Street
Anywhere, Virginia

Dear Property Owner,

In two months Anywhere County will commence its periodic review of its Comprehensive Plan and begin accepting applications for amendments to the Plan. As the owner of substantial property in Anywhere County, you should recognize that the Comprehensive Plan review process affords you an opportunity to lay the groundwork for rezoning your property to a higher use and thus increase its value.

Gow & Getum limits its practice to land use and development work. Call us for an appointment to discuss how you can benefit from the Comprehensive Plan review process and how our experience and connections can work for you.

Yours truly,

Gow & Getum

Would this letter violate any of the Rules?

HYPOTHETICAL #16*

A veterinarian who prides himself on being a "rugged individualist" retained you to pursue a special exception for a major expansion of his animal hospital, which abuts a residential neighborhood. In your fee letter you agreed to do the work on an hourly basis, asked for a retainer of $1,000, and said the client would receive monthly bills. He paid the retainer. Shortly after the application was filed, your relationship with your client soured, and he began to complain that you were spending more time on the case than it required. To keep peace, you agree to cut some time from your most recent bills, thus reducing your fee for the case to date to $800.00

Last night you and the vet had a meeting with a citizen association about the application, and today he called to complain that you had not been "aggressive enough". He was particularly irate that, in response to a suggestion, you had stated that your client would consider sound-proofing the wall of the addition which would be closest to the neighborhood. He hints darkly at a malpractice claim, and you are concerned that he just might bring one.

You want to be rid of this crazy. Could you write him a letter terminating your relationship and keep the retainer? Could you approach him about terminating the relationship on the condition that you refund $200 of the retainer and that he agree in writing not to bring a malpractice claim against you?

HYPOTHETICAL #17*

You began practicing law as an Assistant County Attorney may years ago, and you played a role in the County's adopting its first Zoning Ordinance. Under the direction of the County Attorney, you drafted much of the language of the Ordinance and prepared for the Board of Supervisors memorandum addressing the sections you drafted. At the public hearings on the Zoning Ordinance you responded to questions regarding those sections.

You left the County's Attorney's office twenty years ago and established a general practice which includes lad use work. Yesterday a client of long standing called about a problem. He wants to build a pool on his property but has been advised by the County that he cannot do so since construction of the pool would require the removal of a 400 year old black oak. This removal would violate the tree preservation ordinance portion of the Zoning Ordinance. He wants to challenge the validity of the tree preservation ordinance.

The tree preservation ordinance was once of the sections of the Zoning Ordinance you drafted so many years ago. Although the Zoning Ordinance now in effect was adopted only five

years ago, the tree preservation ordinance is, but for a few minor changes, identical to that which you drafted.

May you file suit against the County challenging the validity of the tree preservation ordinance under Dillon's Rule? Assume that the County will not consent to your representation of your client.

HYPOTHETICAL #18*

For some time your firm has represented Mrs. Brown, an elderly widow how owns and lives on a small farm on the outskirts of town. It has been Mrs. Brown's plan to sell the farm to a developer and "retire to Florida and never worry about money again". Development has in fact been moving toward Mrs. Brown's farm. Two years ago, after working closely with adjoining property owners and the powers that be, you got the Master Plan for the county in which the farm is located amended to recommend that the farm be developed for single family detached residential use of moderate density. The Master Plan also includes language about protecting a stream valley which traverses the farm and making a number of transportation improvements.

Representing Mrs. Brown, you recently negotiated with Dan Developer a contract for the sale of her property. The contract is contingent upon the property's being rezoned so that it will yield not fewer than 75 lots, each with an area of at least 15,000 square feet, The contract require Dan Developer to pursue the rezoning expeditiously and in good faith and includes a deadline for obtaining the rezoning. (If rezoning is not accomplished by the deadline, Mrs. Brown will have the option of terminating the contract). The contract also provides that Mrs. Brown as the property owner will execute proffers in connection with the rezoning. Since she and you were concerned that Dan might get the property rezoned subject to a number of expensive proffers and then walk away from the contract, as he has done in at least one other situation you know of, you insisted that the contract state that Mrs. Brown not be required to execute any proffers that deems unreasonable.

Three days after the close of the study period, Dan Developer calls you and asks you to represent him in the rezoning because you "know the property and the situation better than anybody". Can you take the case?

HYPOTHETICAL #19*

You are representing a church that has applied for a special permit to allow a large sanctuary addition to its existing facility. In the city in which the church is located, the Board of Zoning Appeals ("BZA") hears applications for special permits. The City planning staff has recommended that if your client's application is granted, it should be conditioned upon significant landscaping being added around the perimeter of the very large site and major road improvements being made. You feel that the staff recommendations go far beyond what the

zoning ordinance requires and the Constitution permits. Furthermore, you have been advised by the chairman of the church's building committee that if the recommended conditions are imposed, the church may well not have the financial wherewithal to go forward with the project. You are incensed by the staff's overreaching and concerned that the staff's position seems to be stirring up the church's neighbors, who had been supportive of the application as submitted.

You would like to contact separately some of the members of the BZA informally prior to the public hearing on the application. May you do so?

HYPOTHETICAL #20*

You are a solo practitioner in an area which was until recently predominantly rural. Over the last several years, however, the area has begun to develop. Your practice has expanded to include land use work, and you have established a reputation for effectiveness in this field. A professional land planner you have come to know approaches you about setting up with him a business devoted exclusively to land use matters. What ethical principles should you bear in mind in considering this offer?

* Originally prepared by David S. Houston, Pillsbury Winthrop Shaw Pittman for use in collaborative presentation with panel in which I participated.
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Virginia State Bar

An agency of the Supreme Court of Virginia

Legal Ethics Opinion 1840 adopted

LEGAL ETHICS OPINION 1840

CAN A LAWYER REPRESENTING A SETTLEMENT COMPANY FACILITATE THAT COMPANY'S PRACTICE OF RE-DEEDING PROPERTY THROUGH A RELOCATION INTERMEDIARY WITHOUT PROPER RECORDATION?

In this hypothetical real estate Lawyer A has been asked to handle a real estate settlement of property, involving Relocation Company's ("Relocation") sale of property to purchaser. Relocation routinely purchases real estate on behalf of some of their client's employees who have been transferred and as a benefit of employment the company, through Relocation, agrees to purchase the employee's real estate.

Relocation purchases the real estate from Seller and Seller executes a deed to Relocation. Relocation does not record this original deed and then enters into a contract and sells the same real estate to Buyer. Lawyer B for Relocation drafts a deed for this transaction by preparing a new "page one" that contains the name of Buyer but uses the signature page of the original deed between Seller and Relocation. This is routine practice for Relocation and Lawyer B as it relates to these types of transactions for their client's employees.

Relocation advises Lawyer A that the proceeds of the sale are to be payable to Relocation (not the grantor of the deed). Lawyer A recognizes that Relocation should have recorded the original deed and paid all applicable recording fees and taxes and that seller's warranties under the original deed were made to Relocation, not the buyer.

The question posed involves whether or not this is unethical for Lawyer A to facilitate Relocation's practice of not recording the first deed and preparing legal documentation that does not accurately reflect the true chain of title to the real estate. What are Lawyer A's ethical obligations as to the chain of title and is Lawyer A obligated to report Lawyer B's conduct?

There are two principal issues involved with these facts. The first issue involves the failure of Relocation to properly record the chain of title of said property and pay all applicable recording fees and taxes. The facts you provide indicate that Lawyer B clearly knew that he was substituting a second front page over the original deed thereby misrepresenting the actual conveyance of the property. The committee believes that this conduct clearly involves fraud and is a violation of the Rules of Professional Conduct. A lawyer cannot knowingly assist a client in committing fraud. Rule 1.2 (c)[1]

When the client's course of conduct has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. Rule 1.2 Comment [10]. In this scenario Lawyer A must counsel

the client as to any past fraudulent conduct and cannot continue with this closing knowing that Lawyer B and Relocation's offered deed is fraudulently constructed and does not legally reflect the chain of title and deeds in this conveyance.

The second issue involves the misconduct of Lawyer B, who is employed by Relocation and has advised Relocation in this course of conduct and misrepresentation. Whether Lawyer A has a duty to report Lawyer B under Rule 8.3 (a) is based upon a two-prong test: first, a lawyer must have information indicating that another lawyer has committed a violation of the Rules of Professional Conduct. Rule 8.4 (c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on that lawyer's fitness to practice law. Rule 8.4(c). Since the committee has opined above that Lawyer B's conduct involved fraud the committee believes that the first prong of the test has been met.

Second, the lawyer in possession of information regarding the conduct of another lawyer must determine whether the misconduct "raises a substantial question as to that lawyer's fitness to practice law in other respects." Following the analysis used in LEO 1522,[2] the committee is of the opinion that Lawyer B's knowing failure to record the first deed and thereby fraudulently substituting a second front page on the deed does raise a substantial question as to the lawyer's fitness to practice law in other respects and thereby triggers Lawyer A's duty to report, unless there are additional mitigating circumstances.[3] This opinion is advisory only, based only upon the facts presented and not binding on any court or tribunal.

Committee Opinion
September 25, 2007

Footnotes

1 RULE 1.2 Scope of Representation

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

2 RULE 8.3 Reporting Misconduct

(a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:
(c) engage in conduct involving dishonest, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

3 LEO 1522 involved a similar fact pattern in that a lawyer knowingly stated an incorrect consideration on a deed for the purpose of avoiding the payment of the grantor's tax on a higher amount and the committee found that lawyer to have made a false statement of fact in violation of DR 7-102(A)(5) and DR 1-102(A)(4), which trigged the requestor's duty to report under DR 1-103(A). LEO 1522 analysis was based upon DRs 1-102(A)(4), 1-103(A) and 7-102(A)(5) which are substantially the same as Rule 8.4, 8.3 and 3.3(a)(1).
The Committee cautions that this conduct may involve criminal conduct in altering a document that was attested to and notarized, however that involves a legal analysis.

LEGAL ETHICS OPINON 1800

ARE NON-ATTORNEY STAFF SUPPORT SUBJECT TO THE CONFLICTS OF INTEREST PROHIBITION?

You have presented a hypothetical situation in which Attorneys A and B represent opposing parties in pending litigation. A's two-member firm used secretary X for all secretarial work for the office, including the present litigation. A's firm fired X. The following week, Attorney B's firm, also a two-lawyer office, hires X as a secretary.

With regard to the facts of your inquiry, you have asked the following questions:

1) Is there a conflict of interest requiring B's withdrawal from the litigation?
2) Would the answer to question one differ if X were a paralegal rather than a secretary?
3) Would the answer to question one differ if X met alone with A's client when the client reviewed and signed discovery responses?
4) Would the answer to question one differ if X's only duty for B on the litigation at issue was to answer the telephone?

The fundamental issue for this series of questions is whether an attorney's hiring of opposing counsel's secretary creates an impermissible conflict for the hiring attorney. The general conflict of interest provisions in the Rules of Professional Conduct are Rules 1.7 and 1.9, dealing with current and former clients, respectively. Those rules state as follows:

RULE 1.7 Conflict of Interest: General Rule

(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 will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client

unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Each paragraph of these rules begins with the clear phrasing, "a lawyer." There are no paragraphs in these rules directed at non-lawyer staff, nor are there any paragraphs addressing a lawyer hiring non-lawyer staff. Nothing in Rules 1.7 and 1.9 creates a conflict of interest for an attorney hiring non-lawyer staff. This committee declines to adopt the conclusion drawn in a minority of states that Rules 1.7 and 1.9 can be read, despite their clear language to the contrary, to apply to support staff as well as attorneys. [1]

This application of the current Rules of Professional Conduct is in line with a previous opinion finding that under the former Code of Professional Responsibility no conflict of interest arose for an attorney hiring non-lawyer staff of the opposing counsel's firm during the course of the representation. *See*, LEO 745. Nonetheless, the Committee cautioned in that opinion, and reiterates here, that the hiring attorney must be mindful of the ethical supervisory duties regarding support staff.

Rule 5.3 governs an attorney's ethical responsibilities regarding non-lawyer assistants. As explained in the Comment to the rule:

> A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client..."

Thus, Attorney A and his partner should have made sure secretary X understood during his employment with the firm the critical importance of maintaining client confidentiality. Similarly, when X joined attorney B's firm, those attorneys should have made sure X understood that principle; any attempt by attorney B or his firm members to learn or use the confidential information acquired by X regarding a client of his former employer would be in violation of the requirements of Rule 5.3. [2] A minority of

states have concluded that nothing more specific is required than a general nod to this Rule 5.3 supervisory duty.[3] However, this committee prefers the position taken in a majority of states, which is outlined in ABA Informal Op. 88-1526.[4] That position interprets Rule 5.3 such that the hiring firm must effectively screen the new employee with regard to the matter in question to ensure Rule 5.3 compliance.

Numerous factors will determine what is necessary for effective screening in any given instance; the size of the original firm, the size of the hiring firm, and the nature of the work performed by the employee at the first firm are only some examples of what a firm should consider in developing an appropriate screen. Thus, while there is no "one size fits all" screen, this committee presents the following list of possible elements that could support an effective screen:

1) educate the new staff member both about the general concept of client confidentiality and should be specific that he not discuss his work at the former firm on the matter in question;

2) confirm that the newly hired staff member brought no files or documents with him regarding the matter in question;

3) educate all of the attorneys and other staff members not to discuss the matter in question with that new staff member;

4) preclude in some practical way access to and/or involvement with the pertinent file by the staff member;

5) develop a written policy statement regarding confidentiality, which would include that the above steps are to be followed whenever staff members are hired from an opposing counsel's firm; and

6) note, on the cover of the file in question, the key information regarding confidentiality.

To reiterate, the committee presents this list as a suggestion; the list is not meant to be mandatory or exhaustive.

In conclusion, in answer to your first question, Attorney B is not automatically required to withdraw from the representation merely for having hired his opponent's secretary. Absent consent from the opposing party, Attorney B could remain in the case only if his firm effectively screened the secretary with regard to the matter in question. As to questions two through four, the answer to question one applies regardless of the specific title or duties of the non-lawyer staff. Those duties could however determine what screening elements were needed.

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

Committee Opinion
October 8, 2004

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[1]
See Zimmerman v.Mahaska Bottling Co. 19 P.3d 784 (Kan. 2001); D.C. Ethics Op. 227 (1992); and Kansas Ethics Op. 90-5 (1990).

[2]
Note that Rule 8.4(a) prohibits an attorney from violating an ethics rule indirectly through the act of another.

[3]
See Williams v. TransWorld Airlines, Inc., 588 F.Supp. 1037 (W.D.Mo. 1989); Alabama Ethics Op. 2002-01; and South Carolina Ethics Op. 93-29 (1993).

[4]
See also Kapco Mfg. Co., Inc. v. C & O Enter., Inc. 637 F. Supp. 1231 (N.D. Ill. 1985); *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000); *Herron v. Jones, Inc.*, 637 S.W.2d 569 (Ark. 1982); *Smart Industries Corp. Mfg. v. Yuma County Superior Court*, 876 P.2d 1176 (Ariz. Ct. App. 1994); *Liebowitz v. Eighth Judicial District*, 78 P.2d 515 (2003); *Hayes v. Central Orthopedic Specialists, Inc.* Okla. No. 96,663 (4/23/02); *In re American Home Products Corp.*, Tex. No. 97-0654 (1998); Maine Ethics Op. 186 (2004); Illinios-Chicago Ethics Op. 93-5; Tennessee Ethics Op. 2003-F-147; New Jersey Ethics Op. 665 (1992); and Vermont Ethics Op. 92-12.

LEGAL ETHICS OPNION 1811

ATTORNEY'S OBLIGATION TO PROTECT CONFIDENCES AND SECRETS OF A FORMER CLIENT

You have presented a hypothetical situation in which Attorney A represented Co-executor #1 of an estate. Co-executor #2 has separate counsel. Attorney A's representation of Co-executor #1 has recently terminated, and that co-executor now has new counsel. Attorney A has transferred his file to the new attorney, but has retained a copy of the materials. During the course of Attorney A's representation of Co-executor #1, the two co-executors entered into an agreement that each would fully disclose financial information for purposes of administering the estate. Counsel for Co-executor #2 has now contacted Attorney A and asked for certain financial information from Attorney A's former client's file as a tax filing is due at the end of the month. The requested documents come within the terms of the agreement. Co-executor #1 will not consent to Attorney A's release of the documents. Attorney A declined to provide his copy of the documents and instead referred Co-executor #2's counsel to Co-executor #1's new counsel.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney A is obligated to disclose the documents to the requesting attorney.

This committee has opined in numerous prior opinions that the contents of a client's file come under the confidentiality protections afforded under Rule 1.6. *See, e.g.*, LEOs 967, 1628, 1664. Rule 1.6 establishes an attorney's duty of confidentiality and outlines the parameters of that duty. Rule 1.6 states as follows:

> (a) 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).
>
> (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
>
> (1) such information to comply with law or a court order;
>
> (2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> 3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
>
> (4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
>
> (5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program; or

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

Comment 22 to Rule 1.6 clarifies that the "duty of confidentiality continues after the client-lawyer relationship has terminated." *See also* LEOs 812, 1207, 1664. Thus, even though Attorney A no longer represents Co-executor #1, Attorney A must nevertheless maintain the confidentiality of his former client's information according to Rule 1.6.

If the disclosure of such information would be embarrassing or detrimental to the client, or if the client has requested that the information be kept confidential, Rule 1.6 prohibits a lawyer from disclosing the contents of a client's, or former client's, file unless one of the exceptions to Rule 1.6 applies. As the facts include that the client has withheld consent to the disclosure, these materials do come within the Rule 1.6's protection.

The hypothetical as presented highlights the existence of an agreement between the executors as calling into question whether the attorney can respect the former client's request to protect the documents or whether the attorney must provide them to Co-executor #2. Interpretation of the contract language itself and of its application to Attorney A is outside the purview of this committee. However, this committee does not find that such interpretation is necessary to resolve this issue. While the attorney in this hypothetical appears to be weighing possible contractual obligations against the duty of confidentiality, the committee considers such a balance inappropriate.

The exception at issue here is Rule 1.6(b)(1), which permits an attorney to make a disclosure of confidential information in order to comply with "law or a court order."[1] In the present case, the

counsel for Co-executor #2 has not obtained a court order; therefore, the committee turns next to whether the attorney may disclose the materials in order to comply with "law".

Rule 1.6(b)(1) carves out an exception to the general ethical duty of confidentiality when needed to comply with "law." This committee opines that a contract is not "law." *Black's Law Dictionary* provides an extensive discussion of the concept encompassed by that term, with suggested definitions including, "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force," and "that which must be obeyed and followed by citizens subject to sanctions or legal consequences." The entry in *Black's* for "law" includes an extensive list of judicial authorities finding a laundry list of items within the reach of that term.[2] In sum, that list is limited to statutes, judicial rulings, and various types of administrative regulations and rulings. Contracts, such as the agreement in this hypothetical, are not within that list. Similarly, the committee agrees with the American Bar Association's discussion of the term, "law" in an ABA opinion regarding a different ethics rule. In ABA Formal Op. 95-396, the ABA shed light on what is meant by "law" for purposes of Model Rule 4.2, which states:

> In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party[3] 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.*

(Emphasis added.) With respect to the term "law" in that rule, the ABA explains as follows:

> The "authorized by law" exception to the Rule is also satisfied by a constitutional provision, statute or court rule, having the force and effect of law…

The opinion goes on to include administrative agency positions where "adopted in accordance with the procedural requirements imposed by Congress." ABA Formal Op. 95-396. This committee adopts this construction of the term "law" as including statutory, judicial and administrative items, but not contracts or agreements between private parties for interpretation of Rule 1.6(b)(1)'s permissive disclosure for compliance with law.

According to the facts presented, Attorney A's former client has requested that the attorney not provide the tax materials to the other co-executor. The dispute between the co-executors regarding the agreement's application to the situation should be handled by Co-executor #1's current attorney, rather than for Attorney A to interpret the agreement and decide his former client's obligations deriving from that agreement. This approach is ethically permissible under Rule 1.6 as the exception for confidentiality found in (b)(1) is inapplicable here. In order to preserve his former client's confidentiality, the attorney must not disclose the documents requested by the co-executor, unless and until a court orders the attorney to do so.

In response to your inquiry, the committee notes another pertinent rule. Rule 1.15 addresses an attorney's handling of the property of others. Paragraph (c)(4) of that rule requires a lawyer to:

> Promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

In applying this provision to the present situation, the committee distinguishes the situation in LEO

1747. The scenario in that opinion involved an attorney in receipt of settlement proceeds for his plaintiff client, who then requests the funds despite a lien in favor of the client's medical provider. The analysis in that LEO in no way involved the confidentiality issue underlying the present scenario. An application of Rule 1.15(c)(4) to Attorney A's handling of the financial information in his former client's file is tenuous at best. There remains the issue of whether Co-executor #2 is "entitled" to the very documents in Attorney A's possession, as opposed to other copies of the same documents in possession of the new attorney. That is a legal issue regarding contract interpretation and is, as such, outside the purview of this committee. However, the committee maintains it can nevertheless opine that the application of Rule 1.6 outlined above should prevail over this uncertain extension of Rule 1.15 because Comment 21 to Rule 1.6 establishes a presumption against any other provision superseding Rule 1.6. The committee sees no basis for a rebuttal of that presumption in the present instance. As the committee concludes that Rule 1.6 is the proper authority for resolving the present question, the committee opines that Attorney A properly declined to provide the requested documents and instead referred the requester to the former client's new attorney.

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

Committee Opinion
April 25, 2005

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[1] While there are of course other exceptions to Rule 1.6, the facts as presented do not suggest the applicability of any of the other exceptions to the rule.

[2] *See Black's Law Dictionary*, "law" and opinions cited therein.

[3] Note that Virginia's Rule 4.2 substitutes the term "person" for "party" – a difference that does not affect the present discussion.

LEGAL ETHICS OPINION 1812 CAN LAWYER INCLUDE IN A FEE AGREEMENT A ALLOWING FOR ALTERNATIVE FEE ARRANGEMENT CLIENT TERMINATE REPRESENTATION MID-CASE WITHC

You have presented a hypothetical in which an attorney who regularly represents plaintiffs in persona wants to include the following language in her standard fee agreement:

> Either Client or Attorney has the absolute right to terminate this agreement. In the event C terminates this agreement, the reasonable value of Attorney's services shall be valued at $20(hour for attorney time and $65 per hour for legal assistant time for all services rendered. It alternative, the Attorney may, where permitted by law, elect compensation based on the ag contingency fee for any settlement offer made to Client prior to termination.

Based on the facts presented, you have asked the committee to opine as to whether the provision in the l of that language is ethically permissible and legally enforceable. First, the committee notes that the enforceability would involve an application of contract law to this provision and, as such, is outside tl this committee. The committee will limit its response to the question of ethical permissibility. The Com limits its response to situations where the client has terminated the attorney's services *without cau:* committee notes that this request does not specifically ask about the permissibility of the *second* se proposed language, the committee nonetheless will address that provision as well.

The attorney in this hypothetical would insert the above language in contingent fee contracts for pe plaintiffs. The proposed language purports to establish alternative fee arrangements if the client t representation prior to the natural conclusion of the matter. When a client terminates a contingent f before the contemplated services are fully performed, and the fee agreement does not contain an a arrangement applicable upon early termination by the client, the discharged attorney is entitled to a fe *quantum meruit* (the reasonable value of the attorney's services up to the date of termination). *Heinz Fine, Legum, & Fine,* 217 Va. 958 234 S.E. 2d 282 (1977). The *Heinzman* decision holds that tl attorney, under the circumstances of that case, is not entitled to recover the contractual contingent fee, discharged attorney is limited to recovery on a *quantum meruit* basis. As noted in LEO 1606, the *Heinz* explained that:

> When, as here, an attorney employed under a contingent fee contract is discharged without cause and the client employs another attorney who effects a recovery, the discharged attorn entitled to a fee based upon *quantum meruit* for services rendered prior to discharge...
>
> [1]

Heinzman at 964.

The committee notes, however, that the court in *Heinzman* did not have before it a termination or conver the type presented in your inquiry. Thus, the *Heinzman* court did not have an opportunity to consid attorney and client may properly agree upon alternative fee arrangements in the event the client elects to contingent fee agreement before the contemplated services have been fully performed. However, the S did state the following in *Heinzman:*

> We agree that, absent overreaching on the part of the attorney, contracts for legal servic valid and when those services have been performed as contemplated in the contract, the attor entitled to the fee fixed in the contract . . . .

Heinzman at 962 (footnote omitted).

While an attorney may consider including discharge conversion clauses in the contingent fee agreeme must be mindful of the court's characterization in *Heinzman* of contracts between lawyer and client:

> Seldom does a client stand on an equal footing with an attorney in the bargaining proc Necessarily, the layman must rely upon the knowledge, experience, skill, and good faith o professional. Only the attorney can make an informed judgment as to the merit of the client's rights and obligations, the prospects of success or failure, and the value of the time and talent w he must invest in the undertaking. Once fairly negotiated, the contract creates a relationship ur in the law. The attorney-client relationship is founded upon trust and confidence, and wher foundation fails, the relationship may be, indeed should be, terminated.

Heinzman at 963.

As indicated by this committee in LEO 1606, *Heinzman* stands for the proposition that contracts betwee client are unique and not governed solely by principles that govern ordinary commercial contracts.

Other states' ethics opinions have held that a lawyer may ethically include in a contingent fee agreement receive as a fee in the event he is discharged by the client. Kansas Bar Ass'n Ethics Op. 93-03 (lawyer in contingent fee agreement his entitlement to a *quantum meruit* recovery which could include a stated the client's ultimate recovery); Colo. Bar Ass'n Ethics Op. 100 (1997) (lawyer not ethically preclude "conversion clause" providing for alternative fee, so long as the fee charged does not unreasonably client's absolute right to fire lawyer); Miss. Bar Ethics Op. 144 (1988) (discharge clause entitling law hour or 20% of any recovery is permissible as long as it does not result in an excessive fee); New Mexi Op. 1995-2 (1995) (approving contingent fee agreement that proposes a *quantum meruit* recovery if l without cause or if client gives lawyer cause to withdraw); Nassau County Bar Ass'n Op. 90-24 (199(lawyer may charge contingent fee if it is reasonable and represents reasonable value of services ren discharge); *cf. Kirshenbaum v. Hartshorn*, 539 So. 2d 497 (Fla. Dist. Ct. App. 1989) (lawyer loses rig when contingent fee contract did not specify compensation in event client elected to discharge l recovering anything).

The committee opines that such alternative fee arrangements are permissible in contingent fee contracts alternative fee arrangements otherwise comply with the Rules of Professional Conduct. For example, t fee arrangement must be adequately explained to the client (Rule 1.4 and 1.5(b)), be reasonable (Rule 1. unreasonably hamper the client's absolute right to discharge his lawyer, with or without cause, at an representation (Rule 1.16) [2]. Given these parameters, the committee believes that when determining re the reasonableness of the alternative fee must be evaluated and judged not only in the context of agreement was signed, but also as of the time that the lawyer's services were terminated, as well recovery, if any, was obtained. An example is in order. Client retains Lawyer A on a one-third contin an alternative hourly fee arrangement to apply if the Client terminates Lawyer A's services before re discovery is completed, Lawyer A concludes that the insurance coverages available total $25,00 defendant has no means to satisfy a judgment in any amount. Given the expenses involved in trying the risks associated with litigation, Lawyer A recommends to the Client that the Client accept the defend final offer of $22,500.00. The Client not only rejects the offer, but terminates the relationship wit Employing the alternative hourly fee arrangement, Lawyer A sends Client a bill for $20,000.00, whic calculated by Lawyer A by multiplying his stated hourly rate by the number of hours worked on the fi also claims a lien in this amount on any recovery in the case and notifies Lawyer B, who now is reviewi determine whether he will represent Client. The committee believes that while the alternative hourly fe may have been reasonable at the time the fee agreement was signed, it is not reasonable when viewed discharge. Under this scenario, the alternative hourly fee arrangement is impermissible and, therefo would only be left with a quantum meruit claim.

With these general principles in mind, the committee will address the second and third sentences of the a provision presented in your hypothetical.

Second Sentence of the Proposed Language

The second sentence states as follows:

> In the event Client terminates this agreement, the reasonable value of Attorney's services sha valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all ser rendered.

In the committee's view, this provision is unclear. The committee cannot determine whether the attempting to establish an alternative contractual hourly fee arrangement or is attempting to establish ar hourly rate to be used in employing a quantum meruit calculation. Rule 1.5(b) requires that the fee ar adequately explained to the client, preferably in writing. The committee opines that the second se proposed language fails to meet this requirement of Rule 1.5(b).

Furthermore, this provision is misleading if it purports to establish a *quantum meruit* fee. An attorney s agreement that a particular hourly rate meets *quantum meruit* standards does not in fact make it so. *Qu* is a common law concept, with case law presenting appropriate factors for determining the fee in a pa *See County of Campbell v. Howard*, 133 Va. 19, 112 S.E. 876 (1922) (discussing the pertinent facto Virginia Rule 1.5 which sets out the factors used to determine whether a lawyer's fee is reasonable. neither *Howard* nor Rule 1.5 employs the attorney's usual hourly rate or "lodestar" as a factor in de reasonableness of the fee. If an attorney states a rate in the agreement that would not be reasonable unde *meruit* concept, such a provision would be misleading to the client. Rule 1.5 places an affirmative obl attorney to adequately explain his fee to the client. While the committee believes that an attorney is not so, some attorneys may want to advise their clients that if the attorney is terminated without cause befo of the attorney's services, the attorney will present evidence of her normal hourly rate in determining a *quantum meruit* amount. It is not impermissible for the attorney to state that her normal hourly rate is $2 that is so, and to indicate to the client that in the event the client prematurely terminates the repre attorney will seek *quantum meruit* compensation based on that hourly rate for services performed up termination. Unfortunately, the second sentence of the proposed language goes too far and actually appe to set an hourly rate for *quantum meruit* analysis, which is misleading and, therefore, impermissible.

Based on the foregoing, the committee opines that the second paragraph of the termination clause in contract is improper as it is misleading and fails to fully inform the client of the basis of the attorney contingent fee representation is terminated by the client before its completion. See Virginia Rules 1.4 an

Third Sentence of the Proposed Language

The third sentence states as follows:

> In the alternative, the Attorney may, where permitted by law, elect compensation based or agreed contingency fee for any settlement offer made to Client prior to termination.

The committee is of the opinion that this provision is likewise improper as it is misleading and fail properly inform the client of the lawyer's entitlement to compensation in the event the client t representation prior to a recovery from the defendant. The committee notes that the provision does state "where permitted by law." However, the contract does not explain under what circumstances law m attorney to elect compensation based on the agreed contingent fee or any settlement offer made to c

termination. As stated by the Supreme Court in the *Heinzman* case, contracts for legal services are no other contracts. The client actually retains the lawyer for the purposes of explaining the client's legal advise the client as to what actions are "permitted by law." In this hypothetical, the lawyer's contract explain when the lawyer would be entitled to elect to receive a contingent fee "where permitted by law."

The Committee concludes that the agreement does not fully and adequately explain to the client the fee and, in fact, contains language that, without more, is likely to be confusing for and misunderstood by the

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

Committee Opinion
October 31, 2005

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[1]
While not expressly at issue here or in *Heinzman*, the committee does note a body of cases from a number of jurisdiction this notion of *quantum meruit* may not be appropriate in those extreme cases where the client terminates the representation at before accepting an award or receiving an award, with the attorney's work substantially performed and the client in bad fai circumvent the contractual agreement. *See Restatement (Third) of Law Governing Lawyers* §40 Comment c at 293 (1988), therein.

[2]
Comment 6 to Rule 1.16 ("Declining or Terminating Representation") states that a "client has the right to discharge a law with or without cause." *See also* Law. Man. On Prof. Conduct (ABA/BNA) 41:116 (2005), citing *Florida Bar v. Hollander*, (Fla. Sup.Ct. 1992); *Florida Bar v. Doe*, 550 So.2d 1111 (Fla. Sup.Ct. 1989); *Cincinnati Bar Association v. Schultz*, 643 N.I Sup.Ct. 1994).

LEGAL ETHICS OPINION 1816

MUST AN ATTORNEY COMPLY WITH THE CLIENT'S REQUEST NOT TO PRESENT A DEFENSE AT TRIAL WHEN THE CLIENT IS SUICIDAL?

You have presented a hypothetical involving an attorney's defense of a criminal defendant charged with capital murder. The client displays suicidal tendencies. He was suicidal before and during the time of the alleged crime. He has attempted to commit suicide not only prior to incarceration but also while in jail for the present charges. He has explained to the attorney that as those attempts were unsuccessful, he now intends to "commit suicide by state" by allowing the state to succeed in its efforts to have the death penalty imposed upon him. The client says that he does not believe that his actions necessarily meet all of the requirements for capital murder, since his actions were neither premeditated nor intentional. The client wants to plead not guilty and request a trial by jury because he believes that a jury is more likely to sentence him to death. In furtherance of that objective, the client has instructed the defense attorney not to present any evidence or defense during either the guilt or the penalty phases of the trial. The client has previously been evaluated for competency; the forensic psychologist concluded that the client met the legal standard for competency at that time. The defense attorney has developed evidence for both the guilt and penalty phases of the trial. This attorney does not believe that the client is making a rational, stable and informed decision since his actions are motivated by his suicidal tendencies.

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

1) Is the lawyer ethically bound by his client's instructions that the lawyer is not to present any evidence or argument during either the guilt or penalty phase of the trial?

2) What actions should the lawyer take if he believes that his client is not making an informed, rational and stable decision?

3) What action should the lawyer take if he believes that this client is pursuing an unlawful objective?

This committee first analyzed this phenomenon of criminal defendants electing execution in LEO 1737. That opinion involved a competent client requesting that the attorney refrain from presenting mitigating evidence at sentencing. The opinion acknowledged the difficulty of these situations as involving both moral and ethical issues for the attorney. Also adding to the complexity of the analysis of such situations are the constitutional issues regarding criminal defendants. [1]

In LEO 1737, the analysis focused on the attorney's duty to pursue the lawful objectives of his client. The conclusion of that analysis was that

> Where the attorney has a reasonable basis to believe that the client's preference for the death penalty is rational and stable, the client's decision controls.

The present scenario differs from that of LEO 1737 in two ways. First, the client is asking the attorney to forgo the presentation of evidence not only at sentencing but also at the guilt phase of the trial. Second, while the client has been found competent, the attorney, in whole or in part because of the suicidal tendencies, does not consider his client able to make a rational decision about this important matter.

Is the ethical dilemma different for this attorney considering evidence for trial than for the LEO 1737

attorney, asked only to refrain from presenting mitigating evidence at sentencing? You inquiry raises a question of the scope of the attorney's authority. Who gets to decide what, if any, evidence should be put forward – the attorney or the client? Rule 1.2 governs issues of scope. That rule, in pertinent part, states as follows:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer may limit the objectives of the representation if the client consents after consultation.

Comment One to the rule elaborates upon this distinction between means and objectives:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

As acknowledged in that Comment, distinguishing between means and objectives in a particular instance is not always easy to make.

The committee does not read Rule 1.2(a)'s list of four decisions that must be made by the client in criminal cases as an exclusive list. To the contrary, as quoted above, Comment One suggests other possible examples that could arise: "questions as to the expenses to be incurred and concern for third persons." The committee concludes that Rule 1.2 presents no exhaustive list of decisions that must be made by the client; rather, the rule and its comments provide a standard and guidance for that determination to be made on a case-by-case basis.

The Criminal Justice Section of the American Bar Association provides similar guidance for defense attorneys in the form of Standards. Pertinent here are paragraphs (a) and (b) of Standard 4-5.2, "Control and Direction of the Case," stating:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused; others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation include:

(i) what pleas to enter;

(ii) whether to accept a plea agreement;

(iii) whether to waive jury trial;

(iv) whether to testify in his or her own behalf; and

(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

Thus, rather like Rule 1.2's delineation of decisions involving means as within the purview of the attorney, this standard places "strategic and tactical decisions" in that category.[2] The judicial decisions addressing this issue, frequently in the context of ineffective assistance of counsel claims, make similar distinctions. Courts have identified a number of decisions involving the basic objectives of the representation, and therefore in the purview of the client: whether to plead guilty[3], whether to waive a jury trial[4], whether to testify[5], whether to take an appeal[6], whether to be represented by counsel[7], what types of defenses to present[8], whether to submit a lesser-included-offense instruction[9], and whether to refrain from presenting mitigating evidence at sentencing.[10] In contrast, identified as tactical decisions of strategy, within the purview of the attorney, are which witnesses to call[11], how to conduct cross-examination[12], choice of jurors[13], which motions to file[14], whether to request a mistrial[15], whether to stipulate to easily provable facts[16], and when to schedule court appearances.[17]

The judicial decisions provide two categories, which are consistent with the distinction made in Rule 1.2 between "objectives" and "means."

The answer to your first question involves this difficult distinction regarding the scope of the attorney/client relationship. Critical to that determination for the attorney in this hypothetical is the issue raised in your second question: what if the attorney does not believe his client is able to make an informed, rational and stable decision on this matter. The facts of the hypothetical suggest that the client has had repeated suicide attempts and is seeking to limit the representation in his case as just one more suicide effort.

A client's mental state is relevant to the scope determination discussed above. Specifically, Comment 2 to Rule 1.2 states as follows:

> In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14.

Rule 1.14 addresses how an attorney's representation is affected when the client has impairment. That rule provides the following direction:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Thus, the committee opines that the answers to questions 1 and 2 for this attorney are inextricably linked. The committee concludes, based on both the facts and the particular questions asked in this request, that this attorney does consider that, as described in Rule 1.14(a), his "client's ability to make adequately considered decisions in connection with the representation is diminished," as contemplated in Rule 1.14(a). The facts state that a forensic psychologist evaluated the client and concluded that he is competent to stand trial. The committee suggests that the evaluation's conclusion does not necessarily remove this attorney and client from the application of Rule 1.14. The determination of competency to stand trial is specific enough such that a client may have been determined competent for trial but nonetheless under impairment with regard to making decisions involving the matter. Also, the facts do not state when the evaluation was done; if the client's mental state has deteriorated since that time, the attorney again should consider obtaining a new evaluation.

LEO 1737 suggests that for an attorney properly to follow a client's directive regarding an important decision, the attorney should have a reasonable basis to believe that the client is able to make a rational, stable decision. In contrast, the attorney in the present scenario believes that the client is unable to make such a decision. Accordingly, assuming the attorney has a rational basis for that belief, Rule 1.14 permits this attorney to take such protective action as is necessary to protect his client. Such action may properly include, but is not limited to, seeking further evaluation of the client's mental state, seeking an appointment of a guardian, and/or going forth with a defense in spite of the client's directive to the contrary. The precise steps appropriate will depend on the attorney's conclusion regarding the degree of the client's impairment.

Finally, your third question suggests that perhaps the attorney need not follow this client directive as it seeks an unlawful objective. The committee disagrees with that characterization. The imposition by the state of the death penalty is a lawful process, governed by constitutional parameters. A client's election preference for that penalty does not convert the imposition of that sentence to an unlawful act. As one commentator explained it, a client's preference for the death penalty is not "state-assisted suicide" as the

[18]
state's imposition of the penalty is not a homicide. In LEO 1737, the committee concluded that an attorney should respect a client's wishes to refrain from presenting mitigating evidence at the sentencing hearing, so long as the client was capable of a rational decision, even where that decision was "tantamount to a death wish." As the committee does not consider this client's objective "unlawful," the committee rejects the suggestion raised by the third question. However, as stated above, Rule 1.14 may nonetheless support this attorney disregarding this particular directive of his client should the attorney conclude, as discussed above, that his client cannot make "adequately considered decisions" regarding the representation such that protective action is needed.

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

Committee Opinion
August 17, 2005

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[1]
A distinction can be made between the questions of what decisions should all attorneys leave to their clients to comply with Rule 1.2's concept of scope and what decisions must any defense attorney leave to a criminal defendant to preserve that client's constitutional protections. This opinion addresses the first question, but of course any decisions of the latter variety would necessarily come within the category established by the first question. For discussion of those decisions derived from constitutional protections, such as the right to a jury trial, see *Jones v. Barnes*, 463 U.S. 745 (1983).

[2]
As with Rule 1.2, the committee reads neither category presented in Standard 4-5.2 as establishing an exhaustive list; both paragraphs (a) and (b) use the word "include" before listing examples. Decisions not listed in that standard's examples could, depending on the character of the decision, belong to either category.

[3]
See Jones v. Barnes, 463 U.S. 745 (1963)

[4]
Id.

[5]
Id.

[6]
Id.

[7]
See, e.g., U.S. v. Boyd, 86 F.3d 719 (7th Cir. 1996).

[8]
See, e.g. Meeks v. Berg, 749 F.2d 322 (6th Cir. 1984); *State v. Hedges*, 8 P.3d 1259 (Kan. 2000); *State v. Debler*, 856 S.W.2d 641 (Mo. 1993); *People v. Frierson*, 705 P.2d 396 (Cal. 1985).

[9]
People v. Segoviano, 725 N.E.2d 1275 (Ill. 2000).

[10]
See LEO 1737 and cases cited therein.

[11]
See, e.g., People v. McKenzie, 668 P.2d 769 (Cal. 1983); *State v. Davis*, 506 A.2d 86 (Conn.1986).

[12]
Id. and see, e.g., United States v. Claiborne, 509 F.2d 473 (D.C. Cir. 1974).

[13]
Id. and see, e.g., State v. Burnette, 583 N.W.2d 174 (Wis. Ct. App. 1998).

[14]
Id; and see Sexton v. French, 163 F.3d 874 (4th Cir. 1998); *State v. Gibbs*, 758 A.2d 327 (Conn. 2000); *State v. Mecham*, 9 P.3d 777 (Utah 2000); *State v. Oswald*, 606 N.W.2d 207 (Wis. Ct. App. 1999).
[15]
See, e.g., United States v. Washington, 198 F.3d 721 (8th Cir. 1999).
[16]
See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

[17]
New York v. Hill, 528 U.S. 110 (2000).
[18]
Bonnie, "The Dignity of the Condemned", 74 Va. L. Rev. 1363, 1375 (1988).

LEGAL ETHICS OPINIONS 1818

WHETHER THE CLIENT'S FILE MAY CONTAIN ONLY ELECTRONIC DOCUMENTS WITH NO PAPER RETENTION?

You have presented a hypothetical involving an attorney with a practice concentrated in an area of administrative law. The practice includes representing clients before a federal agency. During the course of each representation, the attorney generates a large number of paper documents; also, a number of electronic documents are exchanged between the agency and the attorney. The attorney's clients have generally indicated a preference for, and in some cases, a requirement for the attorney to assist in minimizing the clients' file maintenance and storage costs by providing documents from the attorney to the client in an electronic format. Due to technological and economic trends, the attorney expects more clients to require that the attorney provide all documents in only an electronic format. Accordingly, the attorney proposes the following procedure:

1) Scan each paper document into an industry-standard electronic format for which free "reader" software is readily available;

2) Transmit the electronically formatted document to the client via e-mail, and

3) Subsequently destroy the paper document to prevent a disclosure of any confidence contained therein.

Under this process, paper documents would be destroyed only if the particular client consented to the destruction; otherwise, the attorney would provide the client with the paper documents. At the termination of the representation, upon client request, the attorney would provide to the client any retained paper documents and an electronic copy of the electronically formatted documents.

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

1) Must an attorney maintain a paper copy of a client's file during the representation?

2) May an attorney destroy paper documents in a current client's file once the client consents?

3) May an attorney request that a client provide such consent as a condition of the representation?

Your first question asks whether an attorney must maintain a client's file in the form of paper. The committee believes the answer is "no." The Rules of Professional Conduct do not contain a provision specifically directing what items a lawyer must keep in the client's file or in what form. [1] Rule 1.16's paragraphs (d) and (e) address what items in a client's file must be provided to the client, upon request at termination of the representation. However, they do not dictate the form in which such items must be kept.

In determining whether an attorney is meeting his ethical responsibilities for a particular client, it matters not generally what form the documents in the file take, but instead whether all the documents necessary for the representation are present in the file. This is not to say that there are not instances where a paper document might be required. There may be any number of circumstances where keeping

an original paper document in the file is critical, for example, testamentary documents, marriage certificates, or handwriting exemplars, to name a few. Clients without access to computers would require the attorney to keep a paper file. As to file materials other than documents, such physical evidence, an attorney must always safeguard, maintain and account for such items. Any other instances where lack of a physical item may prejudice the interests of the client would also mean that an exclusively electronic file would not be permissible. The committee opines that there is not a *per se* prohibition against electronic files in all instances. However, when making decisions as to what to keep in the file and in what form, while an attorney may consider storage expediency, those decisions must be made such that the attorney's duties of competence, diligence, and communication are not compromised. [2]

See Rules 1.1, 1.3, and 1.4. The preference for electronic storage cannot reduce a lawyer's obligation to fulfill these ethical duties for each client.

Your second question is whether the attorney can destroy paper documents with the client's consent. The committee's answer is generally "yes." As discussed above, the Rules of Professional Conduct do not specify the form of file maintenance. In line with the response to Question One, an attorney may ask for the client's consent to destroy the paper documents, retaining only the scanned version, so long as that procedure does not prejudice that client's interests. The attorney is in the better position to know in what circumstances there may be legal significance in keeping the paper versus the electronic version of file contents; the attorney's recommendation to the client should be consistent with that determination. In determining what to destroy or retain in the client's file, the attorney should be mindful of the committee's recommendations in LEO 1305 that before destroying a client's paper file the lawyer should review that file to make sure that any documents that may be of continued use or benefit to the client only if they are maintained in paper form are not destroyed. In deciding whether to destroy a paper document that was provided by the client to the lawyer, for example, the lawyer should consult with the client and obtain consent to destroy it, after it has been converted to an electronic document.

Your third question is whether the attorney can require, as a condition for representation, that each client consent to an "electronic-only" file. Again, the committee's answer is generally "yes," so long as the client's interests are not prejudiced by such a condition for representation. As with Questions One and Two, the committee concludes that there is no *per se* prohibition against such a condition; nevertheless, if the choice to destroy a hard copy of a particular item would prejudice that client, then in that instance, the attorney should not require the client to agree to that destruction to obtain legal representation. Such a condition in that instance would violate Rule 1.3's directive not to "intentionally prejudice or damage a client."

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

Committee Opinion
September 30, 2005

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[1] Note that Rule 1.15 does provide such direction for trust account records; however, there is no equivalent provision for client files.

[2] The Committee notes that an electronic storage system frequently brings with it a need for outside technical assistance and support. The Committee cautions that in such instance the attorney should be mindful of the requirements of Rule 1.6(b)(6), which permits an attorney to disclose:

> information to an outside agency necessary for statistical, bookkeeping, accounting, data processing,

printing, or other similar office management purposes, *provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.*

(Emphasis added).

LEGAL ETHICS OPINION 1821

POTENTIAL CONFLICT OF INTEREST WHERE AN ATTORNEY IS SUING A CORPORATE BOARD WITH MEMBER THAT IS A PARTNER OF THE ATTORNEY.

You have presented a hypothetical situation in which Attorney A represents a Trust Company, governed a board of directors. Attorney B sits on the board. Attorney C has now joined Attorney B's firm. Attorney C represents several remainder beneficiaries of a trust administered by Trust Company regardir their complaints regarding the administration of that trust. Attorneys B and C wrote a letter to the Presid of the Trust Company requesting that the President and other board members screen Attorney B from an information or discussion of the dispute between Attorney C's clients and the Trust Company. The lette proposed that the board excuse Attorney B from the board meetings when this agenda item would be discussed. Specifically, the letter stated:

> Completely screening Local Attorney [i.e., Attorney B] from all information and discussion, if any, to or by members of the board of directors of your company is consistent with the Rules of Professional Conduct imposed on him and at the same time enables him to continue to discharge his duties as a director of your company with respect to all other matters.

Attorney C then filed the law suit against the Trust Company on behalf of the remainder beneficiaries. Several members of the board have raised objections to this arrangement with Attorney A, the board's attorney.

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

1) Is it a conflict of interest for Attorney C to sue Trust Company if his partner, Attorney B, serves on th board of directors of Trust Company?

2) If so, can the conflict be rectified by screening Attorney B from discussion and information concernir the lawsuit?

3) If there is a conflict, can the conflict be eliminated by the resignation of Attorney B from the board, o must Attorney C withdraw from his representation of the beneficiaries?

The pertinent legal authority for resolving these questions is Rule 1.7, governing concurrent conflicts of interest. Rule 1.7 states as follows:

> (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.

Your first question asks whether Attorney C has a conflict of interest in bringing this action on behalf of client against the Trust Company, when C's partner, Attorney B, sits on the Trust Company's board. [1] Critical to evaluating this issue is the imputation effect of Rule 1.10. Specifically, Rule 1.10 (a) states as follows:

> While 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 and 2.10(e).

Therefore, the starting point for analysis of this question is actually whether Attorney B could represent a party suing the Trust Company. If Rule 1.7 would preclude him from taking such a case against the company upon whose board he serves, then Rule 1.10 would preclude all members of his firm, including Attorney C, from representing that client in that matter. Accordingly, the Committee will first analyze whether Attorney B could represent the remainder beneficiaries against the Trust Company.

Rule 1.7(a) establishes concurrent conflicts of interest in two types of situations. The first is not applicable here; the representation of the beneficiaries would not be directly adverse to another client of Attorney B. *See* Rule 1.7(a)(1). While the party adverse to the remainder beneficiaries *is* the Trust Company, Attorney B serves only as a board member and not as counsel to the company. Thus, Attorney B would not have a direct adversity concurrent conflict.

It is the second type of concurrent conflict that is at issue here. Rule 1.7(a)(2) establishes a concurrent conflict when certain kinds of interests of the attorney may materially limit the representation. Here, "responsibility to a third person or personal interest of the lawyer" results in this scenario from Attorney B's fiduciary duty to the Trust Company as a board member. Is there a "significant risk" that the fiduciary duty will materially limit the representation of the claimant? The Committee thinks so. The specifics of this fiduciary duty are determined by corporate law generally and the company's articles of incorporation specifically and thus those parameters are outside the purview of this Committee. Nevertheless, this Committee assumes a general duty of loyalty and protection would be part of that fiduciary duty, yet Attorney B would be bringing a suit to collect money damages from the Trust Company. In the simplest terms, in one role, Attorney B would be seeking damages from the Trust Company, and in another role, Attorney B would be working to avoid paying such damages as part of a general goal of maximizing the assets/profits of the Trust Company. It is also possible that Attorney B's own personal interest could give rise to the conflict. If the subject matter of the litigation is related to decisions that Attorney B has made personally as a Board member, then he may have a natural inclination to defend the Board's (and his own) decision.

Courts have repeatedly found this tension between corporate fiduciary duty and the duty to a client as the source of a conflict of interest. *See, e.g., Berry v. Saline Memorial Hospital*, 322 Ark. 82, 907 S.W.2d 7 (Ark. 1995) (court disqualifies firm of former hospital board member from representing patient against th

Board); *Allen v. Academic Games Leagues of America, Inc.*, 831 F.Supp. 785 (C.D. Calif. 1993)(court disqualifies firm of organization's advisory board member from representation of party suing that entity) *Graf v. Frame*, 177 W.Va. 282, 352 S.E.2d 31 (1986)(court disqualifies attorney who serves on a university's board of regents from representing persons with claims against faculty members); *William E. Raley Co. v. Superior Court*, 149 Cal.App.3d 1042, 197 Cal.Rptr. 232 (1983)(court disqualifies firm of bank trustee from representation of plaintiff adverse to the bank). In line with those authorities, and its own interpretation of Virginia's Rule 1.7, the Committee opines that it would be a concurrent conflict of interest for Attorney B to represent the remainder beneficiaries against the Trust Company.

As the Committee has determined that Attorney B would have a conflict of interest with this representati the Committee must look to Rule 1.10 to determine the effect of that prohibition on Attorney C, his partn As highlighted above, Rule 1.10(a) prohibits an attorney from accepting a representation if any other member of his firm is precluded from that representation. Therefore, as Attorney B would have conflict i representing this plaintiff, so would Attorney C.

The Committee notes that Rule 1.7 *does* have a curative provision, allowing for the "cure" of some conflicts. Rule 1.7(b) will allow a lawyer to continue with a representation that met the definition of a concurrent conflict of interest under paragraph (a) of the rule so long as each requirement of (b) is met. ' second and third of your questions ask just what might cure a conflict in the present scenario.

The first requirement in Rule 1.7(b) is that the affected client must provide consent after consultation. Ir this instance, the "affected client" is the remainder beneficiaries, as the company is not a client. For Attorney B to be able to represent these plaintiffs, among other things, he must explain the consequences the conflict to the plaintiffs and the plaintiffs must then consent. Rule 1.7(b)(4) requires that the attorne memorialize in writing that the consultation and consent occurred. Comment 10 to Rule 1.7 clarifies tha while best practice is to actually have the client provide the consent in writing, any written memorializat (such as a note to the file) will suffice.

While consent is a requirement to cure this conflict, it is not alone sufficient. Assuming the plaintiffs provide the consent after consultation, the additional requirements of Rule 1.7(b) must be met. Rule 1.7((1) requires that the lawyer must reasonably believe he can provide competent, diligent representation to client. [2] Comment 1 to Rule 1.3 ("Diligence") elaborates upon what is required:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

As stated above, the Committee believes that Attorney B may not sue a company on whose board he ser That conflict is imputed to Attorney C by operation of Rule 1.10. Question Two suggests Attorney B c recuse himself from all discussion and voting on the matter as a possible cure to the conflict. While such recusal is not mentioned in the rule itself, it certainly is a factor to consider in Rule 1.7(b)(1). In this instance, would recusal resolve the tension between the attorney's fiduciary duty to the board and his professional obligation to his clients? The Committee thinks that this is possible, if the board has appro of the recusal strategy, after consultation with its attorney. Presumably the Board would consider such matters as whether the litigation is "routine" or "non-routine" in the course of the board's business; whet the claim goes to matters that have been determined by the board, or by lower level administrative staff; whether the claim involves matters on which Attorney B has voted or has been involved in. Under the ri circumstances, the risk of diluted loyalty to this client could be significantly reduced. Attorney B's recu

could be effective in two ways. First that recusal would substantially reduce the opportunity for improp influence between Attorney B and the board. Similarly, Attorney B's recusal lessens the risk that Attorn C would be improperly loyal to the corporation at the expense of his clients. Attorney B's recusal could facilitate the competent, diligent representation of the plaintiffs.

Rule 1.7(b) has two additional requirements for an effective conflict "cure": that the conduct is legal and that the representation not involve the assertion of a claim against another client in the same proceeding. *See* Rule 1.7(b)(2) and (3), respectively. Nothing in the facts suggests that Rule 1.7(b)(2) would in any preclude curing this particular conflict; illegality does not seem to be an issue here. The requirement of Rule 1.7(b)(3) is similarly not a block to curing this conflict. The potential conflict of interest was not between two clients, but instead between client interest and duty to a third person, namely the board. Accordingly, the requirement of Rule 1.7(b)(3) does not impede a consent cure to this conflict. If Attorn B and his board create a proper screen for him, including recusal from all discussion of the matter, then Attorney C can properly seek consent from his clients to cure what would otherwise be a conflict of inte preventing that representation.

Question Three raises two other possible cures for Attorney C's conflict. First, would the resignation of Attorney B from the board cure the conflict for Attorney C? The Committee opines that such an action i likely, but not guaranteed, to cure this conflict. The end of Attorney B's role as a board member presumably would end his fiduciary duty to the Trust Company. As he never represented the company, Rule 1.9's requirements regarding duty of loyalty to former clients would not be triggered. However, if corporate documents establishing the specifics of the duties of Trust Company board members included some duty to avoid adverse business actions regarding the Trust Company for some period after board membership, then Attorney B's resignation would not necessarily cure this conflict. That lingering duty could possibly create the sort of conflict already established for current board membership. Similarly, if corporate documents establish a duty to keep certain corporate information confidential, that duty may al continue beyond the term of the attorney's service on the board. The factual scenario lacks sufficient de to make that determination. The Committee notes that absent any such fiduciary duty, Attorney B and, i turn, Attorney C would not be precluded from this representation once Attorney B resigned. However, t presence of any such duties would render Attorney B's resignation alone ineffective in curing this confli Nevertheless, as with the recusal option discussed with Question 2, if this resignation were combined wi proper consent from the plaintiffs, Attorneys B and C could effectively cure this conflict.

The final suggestion in Question Three is that Attorney C withdraw from the representation. If Attorney withdraws from representing the plaintiffs, no conflict would remain in need of a cure. The firm of Attorneys B and C would no longer have any members representing a party against the Trust Company.

The Committee wants to respond to two points that, while not presented as a formal question, were discussed in the materials provided with this request. The first issue is whether the income beneficiarie would have cause to object to Attorney B's firm representing the remainder beneficiaries, whose interest adverse to the income beneficiaries. The implication is that Attorney B's firm has a special connection t the Trust Company, via Attorney B's board membership, that could give Attorney B and C's firm an unf advantage over the income beneficiaries. The Committee notes that neither Attorney B nor Attorney C represents, nor has ever represented, the income beneficiaries in this matter. Therefore, neither attorney ethical obligations of loyalty, competence or diligence with regard to the income beneficiaries. Accordingly, the interest of those parties is not a factor in the analysis of the potential conflicts of interes for Attorneys B and C.

Finally, the Committee wishes to note that there is an Attorney *A* in this scenario. Attorney A represents Trust Company. The facts suggest that Attorney B and C together sent a letter to the company president and each board member regarding the potential conflict of interest providing advice as to what would cu

the conflict. The facts do not include any contact by Attorney C with Attorney A, the company's attorne prior to sending that letter regarding the litigation. Rule 4.2 requires that:

> In representing a client, a lawyer shall not 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.

With an entity client, like this company, a lawyer should treat anyone within the entity's "control group" within the protection afforded by Rule 4.2. *See* Rule 4.2, Comment 4. The company president and boar members are without question within that group. Attorney C should have only sent this letter regarding l client's litigation against the company if Attorney A had consented in advance to the communication.

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

Committee Opinion
January 11, 2006

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[1]
The Committee stresses that the analysis in this opinion rests on the facts provided; the hypothetical presents Attorney B a serving on the board but not representing the Trust Company. However, the committee notes that even if B does not consider himself counsel for the Trust Company, if his actions and statements gave fellow board members a reasonable impression tha was providing them with legal advice and protecting the legal interests of the board and company, then Attorney B would fin himself with the duties and conflicts associated with legal representation. *See* LEO 1819. Those duties and conflicts would include, among other things, the duty to maintain confidentiality as prescribed by Rule 1.6. That duty of confidentiality, if ov to the Trust Company, could constitute a conflict of interest as a "responsibility to a third person" under Rule 1.7, in addition the other sources of conflict of interest discussed in this opinion. However, as the limited facts presented do not include such scenario, the analysis in this opinion rested on the provided premise that Attorney B does not represent the board or the Trust Company.

[2]
The Committee notes that the duty of competent, diligent representation is present for all clients, regardless of the existen a potential conflict. *See* Rules 1.1, 1.3.

LEGAL ETHICS OPINIONS 1817

WHAT SHOULD A CRIMINAL DEFENSE ATTORNEY DO WHEN HE IS THE CAUSE OF A MISSED APPEAL DATE?

You have presented a hypothetical in which an attorney represents a criminal defense attorney whose client has been convicted of a crime and appealed the crime to the proper court. The attorney failed to perfect the appeal properly; therefore, the court dismissed the appeal.

With regard to that hypothetical, you have asked the committee to opine as to what advice and/or assistance the attorney is ethically permitted to provide to the client. Specifically, may the attorney do any or all of the following:

1) Advise the client that he may have a right to file a petition for a writ of *habeas corpus*;

2) Advise the client of the time limit for filing a petition for a writ of *habeas corpus*;

3) Advise the client how and where to file the petition for a writ of *habeas corpus*;

4) Advise the client of possible language to include in a petition for a writ of *habeas corpus*;

5) Send the client a blank form of a petition for a writ of *habeas corpus*;

6) Send the client a petition for a writ of *habeas corpus* that the lawyer has drafted;

7) Send the client an affidavit executed by the attorney stating the circumstances of the client's case and suggesting that the client might wish to attach the affidavit to any petition for a writ of *habeas corpus* the client might file;

8) Advise the client of the possible legal effect of filing a petition for a writ of *habeas corpus* on other legal remedies or on his right to file future petitions for a writ of *habeas corpus*; and

9) Offer to assist the client in securing a new attorney to assist the client in pursuing legal remedies.

Conversely, you ask, would it be unethical as a dereliction of the attorney's duty to the client *not* to assist him in those ways in this situation.

The committee's analysis of these questions begins with the lawyer's duty to communicate with the client under Rule 1.4 of the Virginia Rules of Professional Conduct. Rule 1.4 requires the lawyer to keep the client reasonably informed of the status of a matter, to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and to inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

When counsel is notified by the court of a dismissal of the client's appeal of a criminal conviction, and the lawyer knows or is informed that the dismissal was caused by the lawyer's failure to timely file or perfect the appeal, there is an ethical duty under Rule 1.4 for the lawyer to notify the client of the

dismissal of the appeal, the reasons for the dismissal and what rights or recourse the client has under those circumstances. This would include advising the client of the right to file a petition for a writ of habeas corpus alleging ineffective assistance of counsel; or a claim for legal malpractice based upon the lawyer's act or omission. If a lawyer fails to act on a client's case, the lawyer has a duty to promptly notify the client of this failure and of the possible claim the client may thus have against the lawyer, even if such advice is against the lawyer's own interests. *See Tallon v. Committee on Professional Standards*, 447 N.Y.S.2d 50 (1982); *In re Higginson*, 664 N.E.2d 732 (Ind. 1996); *Olds v. Donnelly*, 150 N.J. 424, 443, 696 A.2d 633, 643 (1997). For example, a lawyer who fails to file suit within the statute of limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw. Rest. (2d) of the Law Governing Lawyers § 20, cmt. (c). Even if the lawyer concludes that he must withdraw because of the conflict of interest, the lawyer must, under Rule 1.16 (d) take reasonable steps to protect the client's interests. This would include informing the client of possible actions that client might take and any deadlines within which such actions must be taken. Thus, in regard to your first three questions, the committee believes the lawyer has an ethical duty to:

1) Advise the client that he may have a right to file a petition for a writ of *habeas corpus*;
2) Advise the client of the time limit for filing a petition for a writ of *habeas corpus*; and
3) Advise the client how and where to file the petition for a writ of *habeas corpus*.

The resolution of the remaining issues you present trigger a tension between two competing and fundamental interests served in the Rules of Professional Conduct: an attorney's general ethical duties to protect his client's interests versus an attorney's specific duty to avoid impermissible conflicts of interest. There are limits on the nature and extent of the assistance an attorney can provide to a client whose interests may have been prejudiced by the attorney's own acts or omissions. An attorney cannot remain in a representation where doing so would involve an impermissible conflict of interest. Specifically, Rule 1.7(b), in pertinent part, prohibits the attorney from continuing with any representation where the lawyer's own interest may materially limit the representation unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

Until recently, this committee addressed such situations with the following inquiry: which takes precedence for the attorney - the duty to protect his client or the duty to avoid conflicts of interest? However, that dilemma has recently changed. As of July 1, 2005, new legislation in a sense resolves that quandary for the attorney in this context of the missed appeal by taking the choice out of his hands. [1] Under new Virginia Code §§19.2-321.1 and 19.2-321.2, when due to an attorney's error his client's appeal has never been filed or has been dismissed for failure to adhere to requisite time requirements, that attorney must cooperate with that client by preparing an affidavit to be filed with the client's motion for leave to pursue a delayed appeal. That affidavit must certify that the attorney, and not the client, is responsible for the error. *Id.* The committee concludes that this requirement significantly alters the application of Rule 1.7(b) to these situations. Specifically, the attorney no longer must wrestle with protecting himself versus protecting the client. The natural extension of this first issue, regarding what the lawyer may do to assist his client, is the latter issue raised with your hypothetical. Namely, while an attorney is permitted to provide the assistance of the sort delineated in the hypothetical, is the attorney actually *required* to do so?

Assisting the client with the logistics of the motion to accompany the required affidavit does not create the impermissible conflict of interest suggested in prior LEOs 1122 and 1558.[2] In LEOs 1122 and 1558, this committee addressed the potential conflict of interest when an attorney's own conduct becomes at issue in his client's case. In LEO 1122, the committee concluded that generally an attorney should not represent his own client in raising a claim of ineffective assistance of counsel as "he would have to assert a position which would expose him to personal liability." Similarly, in LEO 1558, the committee concluded that an attorney could not argue on behalf of a client that the attorney himself had improperly pressured the client into accepting a guilty plea. The committee found that the conflict between the attorney's need to pursue the interest of the client yet also protect himself meant that consent could not properly "cure" the conflict of interest. To the extent that those prior opinions are inconsistent with the assistance the lawyer is permitted, if not required, to provide under the new statute, they are overruled.

The natural extension of this first issue, regarding what the lawyer may do to assist his client, is the latter issue raised with your hypothetical. Namely, while an attorney is permitted to provide the assistance of the sort delineated in the hypothetical, is the attorney actually *required* to do so? The answer to this issue returns to those general duties highlighted at the start of the opinion: the duty to diligently pursue the objectives of the client and the duty to terminate the representation in a way that protects the client. *See* Rules 1.3 and 1.16, respectively. For an attorney to decline to assist his current client's need to seek leave to pursue a delayed appeal would be a derogation of the original agreement with the client to defend against the criminal charges faced by the client. Similarly, for an attorney to withdraw from the representation leaving the client unadvised and unassisted with respect to the need for and availability of leave to pursue the delayed appeal, would violate that attorney's duty under Rule 1.16(d) to take practicable steps upon termination to protect a client's interests. The committee opines that as the new statute now lays to rest the conflict of interest concerns in the context of your hypothetical, the assistance in the outlined list must be pursued by the attorney.

Whether the attorney considers the defendant a current or a former client, that attorney must assist the defendant with his right to file for leave to pursue a delayed appeal. The precise steps required for a particular client will depend on the particular circumstances of that representation, such as whether the defendant is a current or former client, the amount of time remaining available, and the resources and sophistication of the defendant. The committee opines that the attorney in the hypothetical should not allow concerns regarding a potential conflict of interest to interfere with taking those steps warranted under Rule 1.3 and/or Rule 1.16 to assist this client.

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

Committee Opinion
August 17, 2005

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[1] Effective July 1, 2005.

[2] Those opinions are in line with ethics opinions in many other jurisdictions around the country finding a conflict of interest where an attorney would need to question his own conduct to defend a client. *See, e.g.,* Oregon Ethics Op. 2000-160; Pennsylvania Ethics Op. 98-42; Missouri Ethics Op. 120 (1997); Arizona Ethics Op. 96-03; California-San Diego Ethics Op. 1995-1; Nebraska Ethics Op. 90-1; Kentucky Ethics Op. 321 (1987). A reading of those opinions, as well as LEOs 1122 and 1558, reveals the nature of the conflict of interest for the attorney—that he would be torn between admitting his mistakes to protect the client and denying those mistakes to protect himself. Such a dilemma may in certain instances fail to survive an application of Rule 1.7(b); the conflict of interest would be too substantial to cure with consent. Virginia Code §§19.2-321.1

and 19.2-321.2 remove the present scenario from that result.

LEGAL ETHICS OPINION 1832

POTENTIAL CONFLICT OF INTEREST WHEN PROSPECTIVE CLIENT SPEAKS ONLY WITH THE SECRETARY AND HAS NO DIRECT CONTACT WITH THE LAWYER

You have presented a hypothetical request in which a year ago, a woman, Ms. X, called a lawyer's office for an initial consultation. Ms. X communicated only with the lawyer's secretary, who scheduled an appointment for Ms. X to meet with the lawyer. Ms. X called the secretary a second time and advised th secretary that the lawyer had previously represented her ex-husband's sister. The secretary advised the lawyer of Ms. X's relationship to that former client. Prior to Ms. X's second call, the ex-husband had ma an appointment to meet with the lawyer. The lawyer advised the secretary that he would not take Ms. X' case. The lawyer agreed to represent the ex-husband regarding petitions filed by Ms. X.

Ms. X now objects to that representation. Ms. X says she told the secretary "all the facts" about her case Despite Ms. X's claim that she told the secretary all about her case, the lawyer and his secretary maintai they are in possession of no confidential information about Ms. X.

With regard to this hypothetical scenario, you have asked the Committee to opine as to whether it is ethically permissible for this lawyer to continue to represent the ex-husband against Ms. X. Resolution c your question involves a determination of whether this lawyer has a conflict of interest in representing th ex-husband after his office acquired information from Ms. X. The source of the conflict of interest is the lawyer's duty of confidentiality under Rule 1.6. [1] As set out below, the Committee believes that Ms. X communication with the secretary is information the lawyer is obligated to keep confidential under Rule 1.6. Thus, any information obtained from Ms. X could not be used by the lawyer in representing the ex-husband.

Based on the facts you present, there was no agreement, express or implied, that the lawyer would undertake representation of Ms. X. [2] However, Ms. X's contact with the law firm via the secretary doe raise ethical obligations with respect to any confidential information given the secretary.

In prior opinions, the Committee has stated that a person who consults with a lawyer may reasonably exp that confidential information a person shares with a lawyer is protected under Rule 1.6, even if the lawye and client do not agree to a professional engagement. *See* LEO 629 (1984) (A lawyer who learns confidences during a professional discussion at a social engagement may not reveal the contents without client's consent); LEO 1453 (1992) (potential client's initial consultation with lawyer creates reasonable expectation of confidentiality which must be protected even if no lawyer-client relationship arises in othe respects); LEO 1546 (1993) (wife who had initial consult with lawyer during which confidential information was disclosed precluded another lawyer in the same firm from representing husband in divorce).

In LEO 1794 (2004), the Committee observed that the ethical obligation to protect confidential informati of a prospective client encourages people to seek early legal assistance and such persons must be comfortable that the information imparted to a lawyer while seeking legal assistance will not be used against them. That Ms. X in the present scenario never retained the lawyer and never became a client do not relieve the lawyer of this duty of confidentiality.

There is, however, a significant factual difference between the present scenario and that of LEO 1794. I LEO 1794, the prospective client actually meets with the lawyer. In contrast, in the present scenario, the prospective client speaks only with the secretary and has no direct contact with the lawyer. The questior

then is whether the duties of Rule 1.6 are triggered by the provision of information to support staff rathe than to a lawyer.

While the secretary in your scenario is not governed by the Rules of Professional Conduct applicable to lawyers, Rule 5.3 (b) imposes a duty on the lawyer to ensure that the secretary's conduct is compatible w the professional obligations of the lawyer. Comment [1] of that rule adds that: "[a] lawyer should give s assistants appropriate instruction and supervision concerning the ethical aspects of their employment, *particularly regarding the obligation not to disclose information relating to representation of the client.* ." (emphasis added).

The Committee applied these ethical precepts in LEO 1800. In that opinion, the Committee analyzed whether the conflicts rules apply when a firm hires the secretary of the law firm representing the opposir party in a litigation matter. The opinion concludes that Rules 1.7 and 1.9 apply exclusively to lawyers, n to support staff. However, that conclusion did not end the discussion or the lawyer's duties in that situation. The opinion looked to Rule 5.3, which governs a lawyer's duty to supervise support staff so th staff conduct is consistent with the lawyer's ethical responsibilities. In other words, lawyers are requir to train support staff to preserve client confidences and secrets.

In LEO 1800, the Committee opined that the lawyer in the hiring firm is directed to screen the secretary from the matter so that the secretary will not disclose information regarding the former employer's client the lawyer. For prospective clients to feel comfortable divulging information about their legal matters tc law firms, those clients need assurance that the information will remain confidential, regardless of which individual at the firm does the intake interview and/or initial consultation. Without screening procedures information obtained by support staff is imputed to the lawyers in a firm.

Returning to analysis of the present scenario, your facts state that Ms. X claims to have "told everything' the secretary, but the lawyer and the secretary claim to have no confidential information. Further, when secretary advised the lawyer of Ms. X's relationship to a former client, the lawyer advised that he had already agreed to represent the husband and that he would not represent Ms. X.

The Committee believes that LEO 1800 offers appropriate guidance in your scenario. To avoid the imputation of confidential information to the lawyer, and possible disqualification, the lawyer has an eth duty to establish a screen between the secretary and lawyer as to Ms. X and the ex-husband's case. The lawyer must instruct the secretary that she cannot reveal to the lawyer any confidential information obtai from Ms. X. To preserve information protected by Rule 1.6, the lawyer must use another staff person in lieu of the secretary for any work performed relating to the representation of the ex-husband against Ms. and should send a written communication to Ms. X or her lawyer that these measures have been taken.

In the event that the ethics "screen" is breached and the lawyer learns confidential information communicated by Ms. X to the secretary, the lawyer may find it necessary to withdraw from representin the ex-husband. The lawyer's duty of confidentiality to Ms. X may materially limit the lawyer's representation of the ex-husband, since he would be foreclosed from using any information Ms. X may h given the secretary. *See* Rule 1.7 (a)(2) (a conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to anothe client, a former client or *a third person* or by a personal interest of the lawyer) (emphasis added). Even assuming that Ms. X is not a "client" or "former client" she is a third person to whom the lawyer owes a duty of confidentiality which may "materially limit" the lawyer's representation of the ex-husband. Whether such a conflict exists depends, of course, upon the extent that the "screen" was breached and th nature of the information actually learned by the attorney.

For the protection of clients, the law firm, and public, the Committee recommends that the firm train nor

lawyer support staff to minimize confidential information obtained from prospective clients before they perform the necessary conflicts analysis.

In rendering this opinion the Committee continues to reiterate its position that if confidential information learned by one lawyer in a firm results in disqualification that disqualification is imputed to all lawyers in the firm and a screen can only be used to cure a client conflict with client consent, pursuant to Rule 1.7 (Exceptions exist for conflicts that are carried with a departing lawyer pursuant to Rule 1.10 and governm lawyers pursuant to Rule 1.11.

This opinion is advisory only, and not binding on any court or tribunal.

Committee Opinion
May 10, 2007

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[1] Rule 1.6 would require the lawyer and the secretary to preserve the confidentiality of any confidences and secrets Ms. X claims to have imparted to the secretary. A lawyer has an ethical duty to ensure that non-lawyer employees comply with the of confidentiality. Rule 5.3.

[2] Whether or not a lawyer-client relationship was created is a legal issue outside the purview of the Committee. However, t Restatement (3d) of the Law Governing Lawyers, § 14 (2000) offers some guidance:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either:
>
> (a) the lawyer manifests to the person consent to do so; or
> (b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with the power to do so appoints the lawyer to provide the services.

See also LEO 1546 (1993) holding that a prospective client's initial consultation with an attorney creates an expectation of confidentiality that would conflict the firm if it later represented the opposing party in the same matter.

LEGAL ETHICS OPINION 1822 WHETHER ATTORNEY, WHO LEAVES A FIRM, IS REQUIR TO INFORM FIRM WHICH CLIENTS HE CONTACTED ABOU HIS DEPARTURE AND ABOUT THE CONTENT OF THE COMMUNICATION.

You have presented a hypothetical involving a lawyer's departure from a firm. An associate attorney worked for six years in the trademark department and was supervised by the head of that department, wh reported to the firm's Executive Committee. The associate worked primarily for firm clients, usually preparing correspondence for the signature of a firm partner but sometimes under his own signature. Ma of the firm's trademark clients are foreign, especially Japanese companies and law firms. Partners in the firms have long-established relationships with firm clients, including personal relationships with some o the clients.

At the end of the six years, the associate left the firm and joined a second firm, also as an associate. At t time of his departure, there were four or five clients for whom the associate was the client originator.

After leaving the firm, the associate wrote letters to a number of clients, his own clients and the firm's clients. At least one of those letters stated as follows:

> After over 6 years, I have decided to leave First Firm to join Second Firm. The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: I can continue representing you in trademark matters, you can hire other counsel, or you can stay with First Firm.

The associate did not inform the first firm of his intention to contact the clients and did not copy the first firm on the letters to clients. After learning that the associate had been contacting clients, the first firm requested him to provide a list of the clients who were contacted and copies of those letters. The associa refused both requests.

Based on this hypothetical scenario, you have asked the Committee to opine on the following questions:

1) Whether it was unethical for the associate to refuse to provide the first firm with copies of the let to the clients and the list of clients to whom the letters were sent, and
2) Whether the letter sent by the associate was misleading, or otherwise violated Rule 7.1 ("Communications Concerning a Lawyer's Services").

In determining the permissibility of this associate's letter-writing, this Committee will focus its remarks whether the content and transmission of the letters conformed to the requirements of the Rules of Professional Conduct, as interpretation of those rules is the role of this Committee. *See* Rules of the Virginia Supreme Court, Pt. 6, IV, Para. 10. There may be other sources governing this associate's conduct, such as a possible fiduciary relationship between the lawyer and his firm, which would be governed both by the general law regarding partnerships as well as this specific firm's partnership and/o employment agreements. Interpretation of that law or those agreements would be outside the purview of this Committee. This opinion exclusively addresses the application of the Rules of Professional Conduc this attorney's departure. [1] The Committee endorses the following advice in this context:

> Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition.

ABA Formal Op. 99-414.

Your first inquiry questions the permissibility of the associate refusing to provide both the list of clients contacted and the content of the letters sent. The primary ethical provisions governing this firm departu are Rule 1.4 ("Communication") and Rule 1.16 ("Declining or Terminating Representation"). Rule 1.4 provides as follows:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Rule 1.16, in pertinent part, provides as follows:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

This Committee has addressed the ethical obligations of both a departing attorney and the firm he leaves [2] LEO 1332. LEO 1332 discusses the duty of an attorney to notify clients of his departure from a firm. Rule 1.4 requires an attorney to inform clients of pertinent facts about their case and to keep them updat regarding the status of that case. That the attorney, or one of the attorneys, representing a client is depar the firm is the sort of information that must be provided to a client. LEO 1332 recommends but does no require that the firm and the departing attorney prepare a joint letter to all appropriate clients that:

> (1) identifies the withdrawing attorneys;
> (2) identifies the field in which the withdrawing attorneys will be practicing law, gives their addresses and telephone numbers;
> (3) provides information as to whether the former firm will continue to handle similar legal matters, and;
> (4) explains who will be handling ongoing legal work during the transition.

LEO 1332, citing California Bar Op. 1985-86. This notion of a joint letter is also recommended in ABA Formal Op. 99-414. In addition to the above four items for inclusion in a departure notice letter, the AB. suggests that such a letter be written as follows:

> 1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);
> 2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
> 3) the departing attorney must make clear that the client has the ultimate right to decide

who will complete or continue the matters; and
4) the departing lawyer must not disparage the lawyer's former firm.

The Committee endorses this advice from the ABA.

The recommendation is for a *joint* letter. However, should a departing attorney conclude that his firm is being uncooperative regarding such a letter, either by a direct refusal or by stalling the actual production and transmission of the letter, then the departing attorney should send the letter unilaterally. In the prese scenario, there is no indication that the attorney ever sought that cooperation from the firm before sendin his letters, but the Committee would recommend that departing attorneys, where feasible, do so. Howev as noted in ABA Formal Op. 99-414:

> Unfortunately, this [joint letters] is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt her immediate termination. When the departing attorney reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services...

The facts provided with the present scenario do not shed light on the climate of this firm and the nature c its relationship with this attorney to allow for determination of whether a joint letter was feasible. In the facts you present, the departing associate did not write his letters until after he left the firm. In the end, t idea of a joint letter sent by a firm and departing attorney to clients about the upcoming departure is only strong Committee recommendation, and not a requirement. Either the departing attorney or the attorney: the remaining firm will have met their independent 1.4 obligation to provide notice to the clients of the employment change by unilaterally sending an appropriate letter. [3] Of course, a firm that would like a departures to go smoothly could develop a firm policy, with formal agreement by all partners and associates, laying out the procedure to be followed by any attorney departing the firm. Such a policy coı include a requirement that a joint letter be sent, containing language in line with the discussion in this opinion and LEO 1332 regarding proper notice to clients.

In considering whether this attorney was required to provide to the firm the list of clients to whom he ser the letter as well as the content of the letter, the standard of Rule 1.16(d) governs. That standard is not o: of courtesy to colleagues, but rather avoiding prejudice to clients. While certainly the departing attorney secretive manner regarding these letters may sour his relationship with the firm, that manner is not *per se* prohibited. The issue for ethical permissibility is whether that secretiveness hurt the clients in some way Rule 1.16(d) requires that termination of representation includes "steps to the extent reasonably necessar protect a client's interest." Thus, an attorney may not simply disappear; he must depart a firm and client a way that protects the clients. However, the Committee does not see any facts in the present scenario indicating that notice to the clients was insufficient protection such that providing the firm with a mailing list and a copy of the letters was in some way essential for client protection. So long as the letters contai the appropriate notice language, as discussed above and in LEO 1332, then the requisite protection had already occurred with no further action required, including this sharing of information with the firm. [4]

The request raises the concern as to how the firm is to ensure that the letters are appropriate in content ar the list of clients contacted is not overly inclusive if the departing attorney is not required to provide that information. The Committee opines that while the departing attorney has this duty to communicate, noth in the rules establishes a right on the part of the firm to police the exercise of that duty. The Committee sees no provision in the Rules of Professional Conduct creating an affirmative duty to provide that

information to the firm. Nonetheless, the Committee recognizes that this sort of lack of cooperation serv no valuable purpose beyond continuing the hostilities between a departing attorney and the firm which h leaves.

Your second question asks whether the letters themselves were misleading. The facts do not provide th content of most of the letters but do provide language from one letter. The Committee can only answer t question with regard to that language; consideration of any other letters would only be speculative.

Your question regarding whether these letters were misleading refers to Rule 7.1 ("Communications Concerning a Lawyer's Services"). Rule 7.1 states, in pertinent part, as follows:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> (1) contains false or misleading information;...

Your request suggests three different aspects of the present situation that potentially render the quoted language as misleading. The first is that the letter refers to the Virginia State Bar. Specifically, the lette states:

> The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: ...

The implication in your request is that this reference to the Bar's Ethics Counsel creates an impression o the reader that the firm is in some sort of ethical trouble, perhaps triggering this attorney's departure. W it is not implausible that some reader might draw that particular conclusion, there are no facts to support that such was the case. On the contrary, the language presumably is intended to formalize advice the attorney apparently obtained from Ethics Counsel as to his obligations when departing the firm, with the letter serving as the implementation of that advice. Was it necessary to explain to the clients that the attorney consulted with Ethics Counsel? No. Was it misleading to reference that consultation? No. Any confusion on the part of the reader regarding this language would be speculative at best, with nothing indicating that the attorney intended anything other than a recitation of his notice obligation.

A second aspect of the present situation that your request implies renders the letter misleading is the ider of these particular clients. Specifically, the clients are foreign citizens living overseas. Thus, the implication is that these clients would more easily be confused by the quoted language. Again, while the Committee understands the concern, the Committee finds it to be too speculative to support a determinat that the attorney impermissibly used misleading language. Certainly, with all client communications, an attorney must be cognizant of any language or cultural barrier or disability calling for extra effort to ensu effective communication. However, the mere fact that these clients are from another country does not render this letter to them misleading; the language is not especially technical or complex. Absent any additional facts, the Committee does not consider the citizenship or residency of the clients alone sufficie to render this language misleading.

Finally, your request suggests that the language is misleading in that the order of options presented place the choice of staying with the firm *last*. While the Committee recognizes a time-honored etiquette tradit of always mentioning oneself last, the Committee finds no provision in the Rules of Professional Conduc requiring that particular courtesy in these departure letters. So long as nothing in the language attempts t persuade the client to make one choice over another regarding choice of counsel, the particular order in

which the choices are presented is not an issue. The listing of the choices in the quoted language compo with proper notice requirements as articulated earlier in this opinion and in LEO 1332.

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

Committee Opinion
January 10, 2006

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[1]
The Committee notes that a serious breach of a clear fiduciary duty by an attorney in any context could rise to the level of some ethical impropriety, such as a violation of the prohibition against deliberately wrongful acts in Rule 8.4. Nevertheless, t identity of the parameters of the fiduciary duty and what constitutes a breach is, to reiterate, outside the purview of this Committee. Moreover, parameters can not be determined with the limited facts presented, especially without reference to an partnership or employment agreements in effect at this firm.

[2]
The Committee clarifies that as this opinion request is specifically about the letters used as notice to clients when an attor departs a firm, the discussion will focus on that issue and LEO 1332's prior discussion of it. However, the Committee notes t prior LEOs, involving departing attorneys, that address other ethical responsibilities in this situation. *See* LEO 1757 (provisi of client list to departing attorney to perform conflicts checks); LEO 1732 (fee arrangement regarding cases departing attorne takes with him); LEO 1556 (financial arrangements with departing attorneys); LEO 1506 (firm's refusal to provide contact information for departed attorney); LEO 1403 (handling of client files and fees when attorney departs).

[3]
The Committee notes from the facts that the departing attorney actually sent the letters to clients *after* departure from the firm. The limited facts provided do not allow the Committee to determine whether the timing of those letters rendered their transmission insufficient to fulfill the attorney's Rule 1.4 communication obligation to clients. *See* LEO 1332.

[4]
The Committee reiterates at this point that, as discussed at the introduction of this opinion, the conclusions drawn here analyze exclusively the obligations of the attorney under the Rules of Professional Conduct and not the law of fiduciary relationships or any partnership/employment agreements that may have been in effect.

LEGAL ETHICS OPINION 1830

MAY CRIMINAL DEFENSE ATTORNEY MAKE DE MINIMUS GIFT TO CLIENT OF MONEY FOR JAIL COMMISSARY PURCHASES?

You have presented a hypothetical involving a public defender's office, which provides criminal defense representation exclusively to indigent clients. Many of these clients also have no relatives to provide the with funds needed to buy items from the jail commissary while the client is incarcerated. Clients freque request attorneys and/or support staff to give the clients nominal amounts of money for that purpose. Th money is used primarily to buy personal items or food beyond that regularly provided to inmates. At tim staff is simultaneously trying to persuade some of these clients to accept plea agreements to which the clients are initially resistant. Your request asks whether it is improper for the attorneys and/or their supp staff to provide this money to the clients.

Rule 1.8(e) establishes a prohibition against a lawyer providing certain financial assistance to his clients. Specifically, that provision directs as follows:

> 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.

In applying this rule to a particular situation, three questions need to be answered: is the attorney providi financial assistance to a client; is that assistance "in connection with" litigation; and (if so) does the assistance come within either of the two exceptions. Clearly, in the present scenario, an attorney is providing financial assistance to the client in each instance where he provides money for the client's commissary account. The critical question then is whether that assistance is "in connection with" the client's litigation, which would bring the assistance within the prohibition.

Former DR 5-103(B), while similar, did not contain this key phrasing of "assistance in connection with pending or contemplated litigation."[1] Therefore, this Committee's prior opinions do not provide an interpretation of this phrase. In the present instance, the attorney represents the client in the defense of a criminal case; thus, the representation does involve litigation. Does that mean any financial assistance provided to a client is "in connection with" that litigation? The Committee thinks not. The rule does no its face prohibit providing *all* types of financial assistance to clients who are involved in litigation; rathe the prohibition is narrower, precluding only the assistance that is rendered *in connection with the client's litigation*. In making the distinction between those expenses that come within this prohibition and those that do not, it is useful to consider the purpose of the prohibition. The Virginia Supreme Court, in considering the earlier, but similar, DR 5-103(B)[2], described that purpose as follows:

> [T]he rule in question is intended and designed to maintain the independent judgment of counsel in the representation of clients. If a client owes his attorney money, the attorney may have his own pocket book in mind as he handles litigation. That attorney might settle for an amount sufficient to cover the loan to his client, while foregoing the risk of a trial where his client could recover a larger amount *or lose everything*. The policy

embodied in DR 5-103(B) is that a lawyer simply should not face this risk to independent judgment.

Shea v. Virginia State Bar, 236 Va. 442, 327 S.E.2d 63 (1988). Thus, the spirit of the prohibition is that financial assistance is problematic when it over-involves the attorney in the client's case to such a degree that the attorney's professional judgment is compromised.

In the *Shea* opinion, the Virginia Supreme Court interpreted DR 5-103(B) and rejected all forms of finan assistance to litigation clients. *See Shea v. Virginia State Bar*, 236 Va. 442, 327 S.E.2d 63 (1988). This Committee respectfully notes that the current language of Rule1.8(e) was not before the Court in that cas Thus, the Committee is looking at the phrasing of the Rule 1.8(e) prohibition for the first time. While th provision of this commissary money appears to have nothing to do directly with the litigation that is the subject of the representation, the attorney must be mindful of the considerations of maintaining independence in judgment. For example, a very nominal amount placed in a commissary account for gu or toothpaste is a de minimus gift that may be permissible. The lawyer must be mindful, however, of the duty to maintain independent judgment. If ever the de minimus gift occasions the lawyer to reexamine either his/her relationship with the client or his/her own personal interests of settling or handling the case then the gift is improper. However, if the nominal funds are given on an occasional basis to assist an indigent client for small and assorted commissary purchases that have nothing to do with the litigation, F 1.8 does not create a *per se* prohibition against those gifts to clients, nor does any other provision of the Rules of Professional Conduct.

The Committee recognizes that this interpretation seems to be a departure from prior opinions and places the Virginia position in line with only a minority of jurisdictions. In prior LEOs, interpreting former DR 103(B), the Committee prohibited various forms of assistance, but a majority of those opinions do not interpret the prohibition itself but rather one of the exceptions to that prohibition. *See e.g* LEOs ##1256, 1237, 1182, 1133, 1060, 997, 941, 892, 820, 582, 485, 317, 297. However, in LEO 1269, this Committe prohibited an advancement to a client for living expenses as the loan was a business transaction which c affect the personal judgment of the lawyer. Also, in LEO 1441, the Committee opined that a lawyer may not loan money to a litigation client, with no distinction made regarding how the client would spend the money (i.e., on personal versus litigation expenses).

The Committee recognizes that this interpretation is a minority position. The current Rule 1.8(e) mirrors that provision in the ABA's Model Rules of Professional Conduct. The Committee notes that neither the Comments to Virginia's rules nor those of the Model Rules squarely address this issue of which, if any, expenses would not fall within this prohibition. A majority of jurisdictions with rules containing the language at issue interpret the "in connection with" prohibition as including any and all expenses of a [3]
litigation client. However, the Committee does not agree with this majority position as-applied to occasional de minimus humanitarian gifts as long as the independent professional judgment of the attorn is and can be maintained.

The Committee finds persuasive the approach of those minority jurisdictions, which find that neither the language nor the spirit of this prohibition create a *per se* ban on all financial assistance, regardless of the [4]
purpose or size of the assistance. In *Florida Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994), the lawyer' gift of second-hand clothing to a litigation client was deemed permissible under Rule 1.8(e) as humanita in nature, not made in attempt to maintain employment and not made with any expectation of repayment from the litigation proceeds or otherwise. The Committee concurs with the Florida court's reasoning tha there can be gifts to clients, unrelated to the litigation itself and not involving a loan giving the lawyer ar improper stake in the matter, that do not violate Rule 1.8(e). A total prohibition on all such giving paints

with an unnecessarily broad brush.

Nevertheless, the Committee acknowledges, for example, in the situation you describe, a *substantial* gift could violate ethical requirements by compromising the representation of a client if the lawyer is also at time trying, with some difficulty, to persuade the client to accept a plea agreement unappealing to the client. It would be too sweeping to suggest that all gifts, of all sizes, in all circumstances would be permissible. Such a scenario is better addressed by the application of other ethics rules, instead of an ov broad interpretation of Rule 1.8(e).

For example, Rule 1.7 governs conflicts of interest. In particular, Rule 1.7(a) prohibits conflicts of inter where an attorney's personal interest poses significant risk of materially limiting the representation. Cou the making of a gift to a client create such a conflict? The Committee acknowledges that a client continually asking for monetary gifts from a lawyer could interfere with the independent professional judgment of the lawyer. Nevertheless, the Committee does caution that an attorney in the present scenar if he is to make these gifts, should do so in such a way that avoids any impression on the part of the clier that the gift is a "reward" or inducement for accepting the plea agreement encouraged by the attorney. T attorney's advice on that point should in no way be linked to the offer of the financial gift.

Rule 1.8 governs various prohibited transactions. As discussed above, the Committee does not consider these gifts to come within the prohibition established in Rule 1.8(e). Moreover, as these are gifts and no loans, Rule 1.8(a) regarding business transactions with a client is not triggered. The Committee opines t these gifts do not constitute any of the other forms of prohibited transactions under Rule 1.8. The gifts contemplated in this hypothetical are presumably of appropriately small amounts.

The second part of the question in this request was whether gifts of this small type may be made by nonattorney staff. The Rules of Professional Conduct regulate members of the Virginia State Bar and do not directly regulate nonattorneys.[5] However, to the extent that the Committee has opined that gifts of sort described pose no ethical problem for the attorneys, the Committee sees no problem in the attorneys allowing their staff to make these occasional, de minimus gifts as well. The attorney must be mindful of prohibition in Rule 8.4(a) that an attorney cannot do indirectly though another, in this case a staff person what they cannot do directly.

This opinion is advisory only, and not binding on any court or tribunal.

Committee Opinion
September 7, 2006

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[1] DR 5-103(B)'s phrasing established a broader prohibition, precluding assistance whenever "representing a client in connection with contemplated or pending litigation." Thus, on the face of these rules, the prohibited litigation connection referred to in the original language was with regard to the client's matter, while in the present Rule 1.8, the prohibited litigati connection refers to the expenses themselves.

[2] As noted in Footnote 1, the old rule and the new rule are not identical. Nevertheless, the Committee sees nothing in the rephrasing that changes the basic purpose of this prohibition, only its scope. Thus, the Committee looks to the *Shea* discussio this point as relevant.

[3] *See e.g., Attorney Greivance Comm'n v. Pennington,* 733 A.2d 1029 (Md. 1999); *In re Pajerowski,* 721 A.2d 992 (N.J. 19 *Cleveland Bar Ass'n v. Nusbaum,* 753 N.E.2d 183 (Ohio 2001); *State ex rel. Oklahoma Bar Ass'n v. Smolen,* 17 P.3d 456 (Ok 2000); *In re Strait,* 540 S.E.2d 460 (S.C. 2000); *In re Mines,* 612 N.W.2d 619 (S.D.2000); Md. Ethics Op. 2001-10(prohibitin

most assistance); S.D. Ethics Op. 2000-3.

[4]

See e.g., Florida Bar v. Taylor, 648 So.2d 1190 (Fla. 1994); *In re G.M.,* 797 So.2d 931 (Miss. 2001); *Attorney AAA v. Missisppi Bar,* 735 So.2d 294(Miss. 1999) (note that Miss. rule contains unique language); Conn. Ethics Op. 99-42 (1999); P Ethics Op. 99-8, Md. Ethics Op. 00-42(opinion limited to outright gift of small sum of money).

[5]

Rule 5.3 does establish supervisory accountability for support staff's operation in a manner consistent with the Rules of Professional Conduct:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

LEGAL ETHICS OPINION 1753

COLLECTIONS BY ATTORNEY: ADVISING DEBTOR THAT NONPAYMENT WILL RESULT IN ATTORNEY ADVISING CLIENT TO PURSUE CRIMINAL PROSECUTION

You have presented a hypothetical situation concerning language in correspondence between attorneys for the parties in a breach of contract action. The plaintiff had paid four thousand dollars to the defendant contractor for commercial refrigerator installation. The defendant's attorney advised the court that there was no viable defense to the breach of contract claim and stated that the account for the four thousand dollars now only contained a few hundred dollars. The plaintiff's attorney subsequently wrote the defendant's attorney regarding that account. In that letter, the plaintiff's attorney noted that as only $1125 of the four thousand had been spent on equipment, he assumes the defendant illegally diverted the remainder. The letter states that the plaintiff's attorney plans to advise his client to file criminal charges against the defendant for that diversion and that repayment of the diverted funds will not stop that course of action.

Under the facts you have presented, you have asked the committee to opine as to whether the provision in the plaintiff's attorney's letter regarding criminal charges constitutes an improper threat. You also ask whether, if that particular provision is not improper, would it then be proper for you to include in a form letter, to be sent to debtors who write bad checks to your clients, a provision indicating that you would advise your client at some future date that the client should institute criminal proceedings for larceny and that repayment will not cease that pursuit once initiated.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 3.4 (h), which states as follows: "A lawyer shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter."

The Committee notes that Comment 5 to Rule 3.4(h) expressly allows a lawyer to advise his client of "the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution." Thus, the plaintiff's attorney in this hypothetical may advise his client of his right to pursue criminal charges against the defendant without triggering the prohibition of Rule 3.4(h). However, in the hypothetical, the plaintiff's attorney does not merely advise his client of his rights; he also communicates to the defendant's attorney the intent to provide that advice. That communication warrants close scrutiny regarding whether it constitutes an improper threat as contemplated by Rule 3.4 (h).

This Committee has rendered several opinions establishing that it is improper, under 3.4(h)'s similar predecessor DR 7-104, for an attorney to allude to criminal prosecution in a letter to a debtor of the lawyer's client solely to obtain an advantage in the civil suit. *See* LEOs 715, 716, 1388, and 1569. The most recent review of that provision occurred in LEO 1582. In the hypothetical presented in that opinion, a part-time Commonwealth's Attorney wrote a letter to his civil client's sister regarding concerns about the mother's finances. In that letter, the attorney stated that if the sister does not take certain steps, the attorney "will have no choice but to seek assistance through legal enforcement and legal avenues." LEO 1582. In considering whether such a letter in that context violated the improper threat prohibition, the Committee developed a two-part test for that analysis: "(1) is the letter a threat; and (2) if so, is the threat solely to obtain an advantage in a civil matter." *Id.*

While the test presented in LEO 1582 involved an application of DR 7-104, the newer Rule 3.4(h) is substantially similar enough to DR 7-104 that the Committee opines that the test continues to be appropriate. In applying the two-part test to the present hypothetical, the Committee does consider the

communication to include a threat. Specifically, the provision informing the defendant's attorney of the plan to advise the plaintiff to pursue criminal charges does operate as a threat to present criminal charges. The harder part of the test to apply is the second part: was the threat made solely to obtain an advantage in a civil matter. Determination of whether a threat is made "solely" for that reason becomes a matter of determining the subjective motive on a factual case-by-case basis. LEO 1388. In LEO 1582, the hypothetical contained information that despite the letter threatening criminal prosecution, the attorney had in fact stated elsewhere that he had no intention of ever pursuing a criminal complaint. Based on that information, the Committee believed that the purpose of the reference to legal action by the Commonwealth Attorney was to intimidate the sister into taking the actions requested by the attorney. Thus, the Committee opined that the sole purpose of the threat was to obtain an advantage in a civil matter and, therefore, that the letter violated the prohibition. In contrast, in the present hypothetical, the letter states that even if the defendant takes remedial action, the criminal prosecution will not cease. On its face, the language does not seem to be an attempt to affect the conduct of the defendant or to change the outcome of the breach of contract suit. Rather, it seems to be a giving of notice of the criminal prosecution. Unlike in LEO 1582, no other information is provided regarding motive to contradict the plain language of the letter: that regardless of any action taken by the defendant, the plaintiff's attorney was advising a course of criminal prosecution. As no advantage is sought in the breach of contract claim, the "threat" provision of this letter does not alone seem to constitute a Rule 3.4 (h) violation. Absent some other information regarding the plaintiff's attorney's motive, the letter is not improper.(1)

Your request asks whether, if such language is found to be proper, could you insert similar language in a form letter you use for transmittal to people who write bad checks to your clients. Returning to the two-part test from LEO 1582, the Committee does find that such use of a form letter in that context would constitute a "threat" of criminal prosecution. As for whether that threat would be made solely for the purpose of obtaining an advantage in a civil matter, your request provides no information as to whether you would indeed pursue criminal prosecution in each instance. Accordingly, the Committee cannot make that determination from the information provided. Certainly, if you were to send such a letter with no intention of pursuing criminal charges and with the hope of encouraging payment for the bad check, then the letter would not be permissible.

Committee Opinion
May 17, 2001

1. The committee also observes that since the defendant's attorney advised the court that there was no viable defense to the breach of contract claim, the letter was not necessary to obtain an advantage in any event.

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. *See* also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

VIRGINIA CODE COMPARISON

Rule 1.1 is substantially similar to DR 6-101(A). DR 6-101(A)(1) provided that a lawyer "shall undertake representation only in matters in which . . . [t]he lawyer can act with competence and demonstrate the

specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters." DR 6-101(A) (2) also permitted representation in matters if a lawyer "associated with another lawyer who is competent in those matters."

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* verbatim, but added the third paragraph of the Comment to make it clear that legal representation, in which a lawyer is expected to be competent, involves not only litigation but also negotiation techniques and strategies. In addition, the Committee added the second sentence under Maintaining Competence Comment section to note Virginia's Mandatory Continuing Legal Education requirements.

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RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.
(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] *ABA Model Rule* Comment [2] not adopted. Virginia comment [2] is as follows:
Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the clients's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

[5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."
Paragraphs (b) and (c) adopt the language of DR 7-101(A) (2) and DR 7-101(A) (3) of the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added DR 7-101(A)(2) and DR 7-101(A)(3) from the *Virginia Code* as paragraphs (b) and (c) of this Rule in order to make it a more complete statement about fulfilling one's obligations to a

client. Additionally, the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy.
The amendments effective February 28, 2006, added Comment [5].

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RULE 1.7 Conflict of Interest: General Rule.

(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.

COMMENT
Loyalty to a Client
[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.
[2] *ABA Model Rule* Comment not adopted.
[3] The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.
[4] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See* Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.
[5] *ABA Model Rule* Comment not adopted.
[6] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.
[7] *ABA Model Rule* Comment not adopted.
[8] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation — specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

Conflict Charged by an Opposing Party

[9] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Lawyer's Interests

[10] A lawyer may not allow business or personal interests to affect representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. *See* Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.

Interest of Person Paying for a Lawyer's Service

[11-12] *ABA Model Rule* Comment not adopted.

[13] A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See* Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

[14-18] *ABA Model Rule* Comment not adopted.

Consultation and Consent

[19] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

[20] Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

[21–22] *ABA Model Rule* Comment not adopted.

Conflicts in Litigation

[23] Paragraph (a) (1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a) (2). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

[23a] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[24] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

[25] *ABA Model Rule* Comment not adopted.

Other Conflict Situations

[26] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[27] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[28] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. The lawyer should make clear his relationship to the parties involved.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining

each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(b).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *ABA Model Rule* Comment not adopted.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

VIRGINIA CODE COMPARISON

This Rule is similar to DR 5-101(A) and DR 5-105(C). DR 5-101(A) provided that "[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances." DR 5-105(C) provided 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 of such representation on the exercise of his independent professional judgment on behalf of each." Rule 1.7(b) clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the lawyer must believe that he can provide competent and diligent representation, that the representation must be lawful, and the representation must not involve asserting a claim on behalf of one client against another client in the same litigation or other proceeding before a tribunal. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it [be] obvious that [the lawyer] can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires may affect adversely the advice to be given or services to be rendered the prospective client."

COMMITTEE COMMENTARY

Although there are few substantive differences between this Rule and corresponding provisions in the Virginia Code, the Committee concluded that the ABA Model Rule provides a more succinct statement of a general conflicts rule.

The amendments effective June 30, 2005, substituted entirely new paragraphs (a) and (b) for the former paragraphs (a) and (b); in Comment [1], the first sentence, substituted "and independent judgment are" for "is an," and added "s" to the word "element"; in Comment [2], deleted the reference to former Rule 2.2; in Comment [3], deleted the last sentence which stated "Paragraph (a) applies only when the representation of one client would be directly adverse to the other"; in Comment [4], deleted the former third sentence which stated "Paragraph (b) addresses such situations"; in Comment [4], substituted the new last sentence for "Consideration should be given to whether the client wishes to accommodate

the other interest involved"; Comments [5] – [9] are new, re-designating former Comments [5] – [15] as Comments [10] – [20]; in present Comment [10], the first paragraph, second sentence, deleted "as indicated in paragraph (a)(1) with respect to representation directly adverse to a client and paragraph (b)(1) with respect to material limitations on representation of a client" between present words "However" and "when a disinterested . . ."; in present Comment [10], the first paragraph, added the last sentence, and added the second paragraph; in present Comment [12], added the references to the current (a)(1) and (a)(2) and deleted the reference to the former Rule 2.2; in present Comment [14], the first sentence, substituted "materially limited" for "adversely affected"; in present Comment [16], the second sentence, inserted "a" before the word "potential" and substituted "conflict" for "for adverse effect" after the word "potential."

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RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(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.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

(k) While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

COMMENT

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. Similarly, paragraph (b) does not limit an attorney's use of information obtained independently outside the attorney-client relationship.

[2-5] *ABA Model Rule* Comments not adopted.

[6] A lawyer may accept ordinary gifts from a client. For example, an ordinary gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[7-8] *ABA Model Rule* Comments not adopted.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

[10] *ABA Model Rule* Comments not adopted.

Person Paying for a Lawyer's Services

[11] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality, Rule 1.7 concerning conflict of interest, and Rule 5.4(c) concerning the professional independence of a lawyer. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[12] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

[13-15] *ABA Model Rule* Comments not adopted.

Acquisition of Interest in Litigation

[16] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances or payment of the costs of litigation set forth in paragraph (e).

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure. . . ." EC 5-3 stated that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

Paragraph (b) is substantially similar to DR 4-101(B) (3) which provided that a lawyer should not use "a confidence or secret of his client for the advantage of himself, or a third person, unless the client consents after full disclosure."

Paragraph (c) is substantially similar to DR 5-104(B) which stated that a lawyer "shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee." EC 5-5 stated that a lawyer "should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Except in those instances in which the client is related to the donee, a lawyer may not prepare an instrument by which the client gives a gift to the lawyer or to a member of his family."

Paragraph (d) has no direct counterpart in the *Virginia Code*. EC 5-4 stated that in order to avoid "potentially differing interests" a lawyer should "scrupulously avoid [literary arrangements with a client] prior to the termination of all aspects of the matter giving rise to the employment, even though [the lawyer's] employment has previously ended."

Paragraph (e)(1) incorporates the provisions of DR 5-103(B), including the requirement that the client remain "ultimately liable" for such advanced expenses.

Paragraph (e)(2) has no direct counterpart in the *Virginia Code*, although DR 5-103(B) allowed a lawyer to advance or guarantee expenses of litigation as long as the client remained ultimately liable.

Paragraph (f) is substantially similar to DR 5-106(A) (1) and DR 5-106(B). DR 5-106(A) (1) stated: "Except with the consent of his client after full and adequate disclosure under the circumstances, a lawyer shall not . . . [a]ccept compensation for his legal services from one other than his client." DR 5-106(B) stated that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

Paragraph (g) is substantially similar to DR 5-107, but also covers aggregated plea agreements in criminal cases.

The first portion of Paragraph (h) is essentially the same as DR 6-102(A), but the second portion of Paragraph (h) has no counterpart in the *Virginia Code*. The new provision allows in-house lawyers to arrange for the same indemnity available to other officers and employees, as long as their employers are independently represented in making the arrangement.

Paragraph (i) has no counterpart in the *Virginia Code*.

Paragraph (j) is substantially the same as DR 5-103(A).

Paragraph (k) had no counterpart in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added "for the advantage of himself or a third person" from DR 4-101(B) (3) to paragraph (b) as a further limitation on a lawyer's use of information relating to representation of a client. The Committee added a further time limitation to paragraph (d), a restriction. Borrowing language from EC 5-4, the restriction on agreements giving a lawyer literary or media rights extends through the conclusion of "all aspects of a matter giving rise to the representation." In Rule 1.8(e) (1), the Committee retained the requirement in DR 5-103(B) that a client must "remain ultimately liable for [litigation] expenses." However, the Committee adopted the limited exception for indigent clients that appears in Rule 1.8(e) (2). After lengthy debate, the Committee adopted 1.8(h), which retains the general prohibition on lawyers prospectively limiting their malpractice liability to clients (which appeared in *Virginia Code* DR 6-102). However, the Committee added a limited exception that allows in-house lawyers to arrange for the type of indemnity that other officers and employees of entities may obtain. The Committee voted to insist that the client be independently represented in agreeing to any such arrangement. In 1.8(i), the Committee adopted the *ABA Model Rule* approach, which permits lawyers who are members of the same nuclear family to represent clients adverse to each other, as long as both clients consent after full disclosure. The *Virginia Code* was interpreted to create a non-waivable *per se* conflict of interest in these circumstances. *See* LEO 190 (April 1, 1985).

The amendments effective January 1, 2004, in paragraph (c), added new first and second sentences in current third sentence, deleted "as parent, child, sibling, or spouse" between the present words "lawyer" and "any substantial," and substituted "unless the lawyer or other recipient of the gift" for "except where the client," substituted "client" for "donee" and added the third sentence; added paragraph (k); in Comment [1], added the last sentence.

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