VIRGINIA BEACH BAR ASSOCIATION
ETHICS PRESENTATION
WITH
HON. EDWARD HANSON, JR.
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HYPOTHETICAL #1

Can a solo practitioner named Jim Stevens call his law firm "Jim Stevens & Associates"?

HYPOTHETICAL #2

During the course of criminal prosecution, defense counsel will sometimes hire a private investigator or will have access to court-appointed investigators. A few of these investigators resort to tactics that you perceive to be less than honest in attempting to obtain statements from the Commonwealth's witnesses. Examples you provide include defense investigators displaying a badge to imply they are police officers, or stating they were sent by the judge or are working with the prosecution. When working on a case where such an investigator is involved, the prosecutor would like to inform prosecution witnesses of the tactics that may be employed by these investigators. The prosecutor has also considered sending a letter to all witnesses explaining that it is the witnesses' decision whether or not they want to speak with defense investigators. The prosecutor also proposes including in that letter language warning about certain tactics that may be used by the investigators and possibly naming the investigators.

1. Is it proper for the prosecutor to prosecution witnesses as described above?
2. Is this would be in compliance with Rule 3.8(c).

Rule 3.8(c) of the Rules of Professional Conduct states:

> Rule 3.8 Additional Responsibilities Of A Prosecutor
>
> A lawyer engaged in a prosecutorial function shall:
>
> > (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense

HYPOTHETICAL #3

Attorney Susie Queue serves as an assistant public defender and was assigned the case of Mr. Smith. At the preliminary hearing, the matter was certified for trial to the Circuit Court. Local rules require that the defense attorney advise the court prior to the next docket call whether to schedule the case as a jury trial or a bench trial. If set as a bench trial, the court does not summons a jury. The attorney had been unable to contact her client[1] and was, therefore, unable to determine if he wishes to waive a jury trial and be tried by the court. Aware that juries have imposed lengthy sentences in similar cases, the attorney assumed the defendant would not want a jury trial. She advised the Commonwealth's Attorney and the court that she wished the matter to be set for trial as a bench trial. She did not inform the prosecutor or the court that she had not spoken with her client, nor had he consented to waiving the jury trial. The case was set on the

court's docket as a bench trial. On the day of the trial, with the witnesses present, the defendant was asked by the judge if he consented to waiving a jury and being tried by the court. The defendant said that he did not consent and requested a jury trial. As a result, the case had to be continued to a later date.

1. Does the fact that the lawyer had requested that the case be set as a bench trial, thereby waiving the defendant's right to a jury trial, without express authorization from the client to do so, violate Rule 1.2(a)?

2. Does the lawyer's failure to disclose to the court that she had not consulted with her client regarding waiving a jury and that she did not have authority from her client to do so constitute an affirmative misrepresentation to the court?

HYPOTHETICAL #4

Attorney Smith 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.

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, 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.

HYPOTHETICAL #5
CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

(A) Lawyer A, a solo practitioner in a small town, advertises in the local yellow pages. The advertisement details Lawyer A's areas of practice and also includes Lawyer A's office address and telephone number. After returning from court one afternoon, Lawyer A retrieves a voicemail message from an individual seeking representation in a criminal matter. The caller also provides information about the multiple felony drug charges he incurred as one of several co-defendants in a local drug ring. The caller provides his name and requests a consultation with Lawyer A, who realizes, after running a conflicts check, that he already represents one of the other co-defendants.

(B) Law Firm B maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail but the website does, however, provide contact information for every lawyer in the firm, including e-mail addresses in the biographies of each lawyer in the firm. One of the domestic lawyers in the firm receives an e-mail from a woman seeking a divorce from her husband detailing the circumstances surrounding the demise of the marriage, including her affair with another man. The lawyer reads the e-mail before he discovers that he is already representing the woman's husband.

(C) Law Firm C maintains a website where prospective clients are invited to fill out an on-line form outlining the factual details of their accidents and injuries. In exchange for this information, Law Firm C's website offers to provide prospective clients a free evaluation of their claims. Mrs. X, an accident victim, fills out the form and provides information about her accident involving a two-car collision, including the fact that she consumed three

glasses of wine in one hour before getting behind the wheel. One of Law Firm C's lawyers, after reviewing Mrs. X's online information, asks his legal assistant to run a conflicts check. The legal assistant does so and advises the lawyer that Law Firm C is currently representing a client who was the guest passenger in Mrs. X's vehicle at the time of the accident. The lawyer tells the legal assistant, "That's not a problem. I'll just tell Mrs. X we can't take her case."

HYPOTHETICAL #6

A and B were the only partners in a law firm. A and B as individuals owned the office building in which the law office was located. A was appointed the Assistant Commonwealth's Attorney for the locality. B continued as a sole practitioner in the office building. B pays no rent for the law practice, but two other tenants pay rent, which goes to the mortgage payments and for upkeep of the building. A is responsible for one-half of the real estate taxes, with B responsible for the other half, only if rents are insufficient to cover the taxes. Where the rent paid is insufficient to cover the mortgage, B pays the balance. A and B benefit from the increasing equity and from tax deductions for the building. A and B also own the office equipment, computers, and furniture used by the tenants of the building, including B's law practice. The AB law firm obtained a loan for partnership business. Monthly payments on that loan are now paid solely by B, but A remains legally responsible for the balance, along with B. B represents criminal defendants in A's jurisdiction.

Is Attorney A is precluded from prosecuting those defendants represented by B.

HYPOTHETICAL #7

Attorney has received a contract concerning a real estate transaction showing that Attorney will be the settlement agent. The contract has an addendum which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the seller's documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that Attorney's settlement statement should show no charges to the seller from Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?

    a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?

    b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorney's name?

2. If Attorney complies with the instructions of the title company, is Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?

4. Can an attorney acting in his capacity as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a non-attorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

HYPOTHETICAL #8

Attorney A represents B in a suit against Y, represented by Attorney X. Attorney X sends Y confidential information which makes reference to confidences Y has revealed to Attorney X and also outlines trial strategy and evaluation constituting work product of Attorney X. This information was sent via facsimile transmission to Y. Through an error in Attorney X's office, the information was also sent via facsimile transmission to Attorney A. Attorney A's office is able to recognize from the first paragraph of the transmission that the information has been sent in error and that it contains confidential information and work product of Attorney X.

HYPOTHETICAL #9

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.

1. Does the provision in the plaintiff's attorney's letter regarding criminal charges constitute an improper threat.

2. If that particular provision is not improper, would it then be proper for 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 #10

A criminal defense attorney represented a client charged with felony unauthorized use of a vehicle. The defendant's mother reported the incident as victim of the crime. On the day of trial, the Commonwealth Attorney attempted to interview her in the hall of the courthouse, within earshot of the defense attorney. The defense attorney joined them and asked the victim/mother, in a terse fashion, if the defense attorney could speak with her. The defense attorney then told the mother that she did not have to speak to the Commonwealth Attorney.

The Commonwealth Attorney learned from this interview that the mother, while the primary driver of the vehicle, was not the owner. The titleholder of the vehicle was the defendant's father. The victim/father came to the courthouse to discuss the matter with the Commonwealth Attorney prior to the trial. The Commonwealth Attorney observed the defense attorney speaking with the two victims/parents. The defense attorney then announced that he planned to go to trial. The Commonwealth Attorney realized that while the mother was waiting in the courtroom, the victim/father was not. The mother told the Commonwealth Attorney that the father was in the hallway. This turned out not to be the case. The defense attorney admitted that he had instructed the father that he could leave as he was not under subpoena. The defense attorney had also told the father that as he was a necessary witness to prove ownership of the vehicle, if he left the courthouse, the Commonwealth would lose the case. The defense attorney later explained he had checked the court's file for the subpoena as the father had told him he did not know why he had to be there.

Under the facts you have presented, you have asked the Committee to opine as to whether it was a violation of the Rules of Professional Conduct when:

1) The defense lawyer asked the victim/mother if he could speak with her before she spoke with the Commonwealth Attorney;

2) The defense lawyer told the victim/mother that she did not have to speak with the Commonwealth Attorney;

3) The defense lawyer told the victim/father that he had checked the court's file and that as there was no subpoena, the father was free to leave; and

4) The defense lawyer told the victim/parents that if the father left the courthouse, the Commonwealth attorney would lose the case due to the absence of the father's necessary testimony

HYPOTHETICAL #11

An attorney wishes to become a member of a lead-sharing organization, which can be either a for-profit or not-for-profit association, in which members pay a $500 membership fee, and meet once a week. The membership fee is not distributed, in whole or in part, back to any member, but rather pays administrative costs of the organization and goes towards the profit of the association. Part of the oath associated with membership is that each member will maintain a high degree of professionalism in dealing with their leads, including, inter alia, timeliness and quality of services. Membership is often dependent on the number of leads a member passes. During the meetings, members take turns giving a 30-second promotional, stating any of the following: their name, professional title, industry, place of employment, and who would represent a "good lead" for them. On an alternating basis, one member per meeting gets to present a fifteen minute presentation in which they can discuss any aspect of their industry they deem appropriate. The presentation may be educational, a plea for business, etc. The meeting then involves members passing leads to other members. These leads represent potential clients and may have been actively solicited by the lead-passing member whether they know of a particular professional in the lead-receiving member's industry. The lead-receiving member has no control over how the lead was generated, but the lead-receiving member retains full control over their representation of the client, and need not disclose any details of that relationship to any other person or entity. At the end of the meeting, the 30-second promotional process is usually repeated.

QUESTIONS PRESENTED:

1) Is it ethical for a lawyer to become a member of a lead-sharing organization and use that organization to receive leads for legal services from other members of the organization?

2) Can a lawyer have an ownership interest in a lead-sharing organization that is either for-profit or not-for-profit?

3) Under the same set of hypothetical facts, can a lawyer be a member of a lead-sharing organization when the lawyer is also a licensed title insurance agent, or any other business professional, that provides services through an ancillary business, and solicits business only with respect to real estate closings and title insurance sales or referrals directed to his non-legal business?

4) Assuming that the lawyer may participate in this lead-sharing organization, are there any restrictions on what may be included in their 15-minute presentation?

HYPOTHETICAL #12

Can two law firms use the term "affiliated" or "associated" to describe the relationship between the firms on their letterhead?

HYPOTHETICAL #13

A law firm represents a number of creditors in the collection of delinquent consumer/retail accounts. The firm maintains a separate trust account for each major client, into which they deposit only those funds collected on behalf of that client from account debtors. All of these funds held in each individual account belong only to one client, but are collected from a multitude of different debtors.

1. When an attorney trust account holds funds for only one client, is it necessary to remit only on irrevocably credited funds in a trust account, or may remittances be made on a more prompt basis without violating the Rules of Professional Conduct?

2. If the answer to the first question is that disbursements on uncollected funds are permissible under those circumstances, is the same conclusion reached if the retail accounts that are being collected by the client have been "securitized", leaving the client with only servicing and perhaps some residual rights under the securitization process?

HYPOTHETICAL #14

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 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.

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 #15

Three Virginia law firms ("Law Firms") are involved in plaintiffs' personal injury claims arising out of exposure to asbestos. Law Firms are located in a Virginia metropolitan area of one million. The Law Firms include general practice attorneys, but for the past 25 years the Law Firms' practice has consisted primarily of the representation of individuals seeking compensation for personal injuries and wrongful death arising from exposure to asbestos. The clients represented by Law Firms were employed at X Corporation, which at that time, was the largest private industrial employer in the State. Along with several other law firms across the country, the Law Firms have developed a substantial expertise in the area of asbestos litigation, have a national reputation regarding same, and have successfully represented thousands of individuals in asbestos-related disability and death claims. These law firms with a national reputation for expertise in asbestos-related disability and death claims often represent plaintiffs outside the geographic areas in which they have offices.

The Law Firms include other lawyers who practice in other areas, including government contracts, general business, banking, real estate, and personal injury that is not asbestos-related. The Law Firms have represented a large number of claimants employed by X Corporation for asbestos-related injuries and death. Law Firms entered into an agreement (Agreement) with X Corporation which set forth the terms and conditions under which X Corporation would consider formal approval of settlements entered into between plaintiffs represented by the Law Firms and individual defendants in ongoing third-party asbestos litigation where X Corporation had actual or potential liability under workers' compensation laws for the plaintiffs' asbestos-related injuries.

As part of the Agreement, twenty attorneys ("plaintiffs' attorneys") who were then associated with the Law Firms were required to personally and individually agree not to file or cause to be filed any future lawsuits against X Corporation, its parent company, its subsidiaries and any of their officers, directors, agents or employees under any theories of liability for asbestos exposure except actions for workers' compensation. In addition, the Agreement further required that all future partners or associates of the Law Firms, as a condition of their future employment, execute a copy of the Agreement and be personally and individually bound thereby. Examples

of the restrictions on the right of plaintiffs' attorneys to practice law were listed in the Agreement as follows:

> (1) No action shall be filed by plaintiffs' attorneys based on workplace exposure based on any theory other than workers' compensation.
>
> (2) No action shall be filed by plaintiffs' attorneys for a present or former employee and/or his family for asbestos exposure outside the workplace.
>
> (3) No action shall be filed by plaintiffs' attorneys arising out of the ... asbestos litigation...which involves exposure at locations other than (X Corporation) on (structures) which were built or repaired by (X Corporation).
>
> (4) No action shall be filed by plaintiffs' attorneys arising out of asbestos exposure of non-employees on premises owned or controlled or used by (X Corporation).

In addition, the Agreement provided that the restrictions pertaining to the practice of law would be submitted to the appropriate ethics committee of the Virginia State Bar for review. Any provision found to violate "any ethical standards or canons of the professional practice of law" would be deemed to be void and of no effect.

Over the past 25 years, plaintiffs represented by the Law Firms who were employees or former employees of X Corporation have settled thousands of third-party asbestos-related personal injury or death claims pursuant to the terms of the Agreement. In addition, since 1983, the Law Firms, with the knowledge of X Corporation, have represented eighteen family members of former employees of X Corporation who contracted disabling and/or fatal asbestos-related diseases as a consequence of household exposure to asbestos-contaminated work clothes of a spouse, parent, sibling or other immediate family member.

Lawsuits were not filed against X Corporation in any of these household exposure cases. However in each instance, plaintiffs' attorneys submitted pertinent exposure history and medical data to X Corporation with a demand for payment. X Corporation negotiated and settled each of these claims with one of the plaintiffs' attorneys. The settlements were then approved by the appropriate circuit court upon petitions and orders prepared by plaintiff's attorneys and agreed upon by the plaintiffs and X Corporation. At no time did X Corporation object to plaintiffs' attorneys' representation of these claimants nor did it ever invoke the restrictions on plaintiffs' attorneys' right to practice law contained within the Agreement.

Because the parties have heretofore always been able to reach amicable settlements, the restrictions on the practice of law contained within the Agreement have not been submitted to any ethics committee(s) of the Virginia State Bar or to any other judicial or quasi-judicial body for review. However, plaintiffs' attorneys' currently represent 17 claimants who allegedly have contracted disabling and/or fatal asbestos-related diseases as a result of household exposure to asbestos-contaminated clothing brought home from work by a family member employed by X Corporation. Plaintiffs' attorneys have submitted these claims to X Corporation with demands

for payment, but settlement of these cases appears unlikely. These claimants must now file lawsuits against X Corporation in order to receive a judicial resolution of their claims.

X Corporation objects to the involvement of plaintiffs' attorneys in these lawsuits based upon the prohibitions on the practice of law contained within the Agreement.

1. Do the restrictions contained in the Agreement violate any ethics rules which prohibit an attorney from entering into an agreement, as part of the settlement of a suit or controversy, which broadly restricts the lawyer's right to practice law?

2. Do the restrictions contained in the Agreement violate any ethics rules that prohibit a lawyer from entering into a partnership or employment agreement that restricts the lawyer's right to practice after termination of the agreement?

HYPOTHETICAL #16

A plaintiff sues a corporation in a personal injury action. The counsel for the corporation, in the course of investigation, interviews an employee who has knowledge of matters relevant to the litigation. The employee is not within the corporate control group. The interviews all occur on the corporation's premises during the employee's normal work hours. The employee is acting within the course and scope of employment in participating in the interviews. The communications are confidential in nature and no factors exist which would constitute a waiver of the attorney-client privilege as to these communications.

Thereafter, and while the litigation remains pending, the employee terminates her employment with the corporation. Upon learning this, the plaintiff's counsel initiates *ex parte* contact with the employee and inquires not only regarding the facts known to the employee, but also regarding the substance of the communications with counsel.

Is it is a violation of the Rules of Professional Conduct for counsel to:

1. Inquire into matters known or reasonably apprehended to be confidential communications when interviewing, *ex parte*, a former employee of a corporate adversary in pending litigation.

2. Induce a former employee of a corporate adversary in pending litigation to disclose matters known or reasonably apprehended to be confidential communications in an *ex parte* interview where: a) such disclosure might subject the employee to civil liability; b) the employee is unrepresented by counsel; or c) the communications fall within the attorney-client privilege and pertain directly to the matters in litigation.

HYPOTHETICAL #17

May a criminal defense attorney defend two criminal defendants in separate cases under the following facts. Defendant #1 retained the attorney to represent him on a charge of possession of a firearm as a convicted felon in state court. Defendant #1 told the police at the time of his arrest that he had a gun solely to protect himself from Defendant #2, who had shot his brother, murdered his step-father, and placed a contract on Defendant #1's life. The state weapons charge was dismissed against Defendant #1. He was then charged with a federal weapons charge for the same firearm. Defendant #1 again hired the attorney for the federal case. Defendant #2 then hired that same attorney to represent him in state court on charges of first degree murder, abduction, conspiracy to commit murder, possession of a firearm by a convicted felon, and use of a firearm in the commission of a felony. Defendant #1 told the attorney he did not want to plead guilty to the firearms charge because he had the gun solely to protect himself from Defendant #2. The case was set for trial. The attorney reviewed discovery materials which identified Defendant #2, his client, as the person Defendant #1 feared. The attorney did not disclose to either client or either court that he represented both Defendant #1 and #2. The attorney persuaded Defendant #1 to plead guilty, forego raising the self-defense issue, and forego implicating Defendant #2. Defendant #1 was sentenced to fifteen years imprisonment. Defendant #2 was sentenced to 105 years imprisonment. The attorney accepted the court appointment to represent Defendant #1 in his appeal; he again did not disclose to clients or the court that he represented each of these defendants. Defendant #1's conviction and sentence were affirmed.

Does the attorney have an impermissible conflict of interest under the Rules of Professional Conduct by representing these two defendants.

HYPOTHETICAL #18

The Commonwealth's Attorneys Office of Metro County, has seven assistants. Based on staffing standards developed by the state agency that funds the Commonwealth's Attorney's Office, the office should have at least 3 additional prosecutors to handle the felony caseload of that jurisdiction. As a result, Assistant Commonwealth's Attorney Smith is assigned far more cases than the state standards suggest he should be handling. Due to recent reductions in staff, Smith is also required to take over the caseload of another prosecutor that left the office and the position cannot be filled. Because of his heavy caseload, Smith does not have adequate time to prepare the cases he takes to trial. Smith tells his boss, the Commonwealth's Attorney, that his caseload is too high and that he does not have the time needed to properly prepare his cases for trial. The Commonwealth's Attorney responds that he knows the office is understaffed, but given the current lack of funding, there is nothing he can do about it. Despite his acknowledgement that the Commonwealth's Attorney has the authority to decline cases for prosecution, and is not mandated by statute to prosecute misdemeanor cases, Smith's boss tells him it would not be wise politically to say no to any victim regardless of the caseload.

Hypothetical 1
Assistant Commonwealth's Attorney Smith is assigned to prosecute Defendant Jones for rape. As a direct result of his high caseload, Smith does not have time to start preparing the Jones case for trial until two weeks prior to the trial date. When he reviews the file, he learns that the only evidence against Jones is DNA that was discovered on the victim. By statute, the Commonwealth is required to give the defense attorney 21 days notice of its intent to present DNA evidence. This notice had not been provided. The trial judge refuses to grant a continuance, and the case is dismissed.

Hypothetical 2
Assistant Commonwealth's Attorney Smith is also assigned to handle the General District Court misdemeanor docket. Although the Commonwealth's Attorney is not required by statute to appear and prosecute misdemeanor cases, Smith's boss wants a prosecutor present for all cases in which the defendant is represented by an attorney. The General District Court docket contains approximately one hundred misdemeanor cases each day. Smith is not provided with any police reports prior to trial for purposes of preparation, nor is he able to review the court papers to verify that lab reports or breath test certificates have been properly filed. In most cases, his first knowledge of the facts comes a few moments prior to the case being called for trial. In a prosecution for misdemeanor possession of marijuana, Smith has the officer describe the arrest. As Smith listens to the facts, he realizes that a necessary witness was not subpoenaed by the officer. In addition, when he attempts to admit the lab analysis to prove the item seized was marijuana, he learns that it has not been filed with the court seven days prior to trial as required by statute. As a result of the missing witness and the inadmissibility of the lab analysis, the case is dismissed.

1) Has Assistant Commonwealth's Attorney Smith violated Rule 1.1's duty of competence and Rule 1.3's duty of diligence in the above hypothetical scenarios when his failure to do that which is required is directly attributable to the exceptionally high caseload he is required to carry?

2) Has the Commonwealth's Attorney violated his supervisory duties under Rule 5.1 by assigning Smith more cases than he can reasonably be expected to prosecute in a competent and diligent manner?

HYPOTHETICAL #19

A criminal defendant was charged with possession with intent to distribute controlled substances. During the course of the defendant's arrest certain property was seized that was alleged to bear substantial connection with the illegal sale or distribution of controlled substances and subject to being condemned pursuant to the Code of Virginia

May an attorney is able to represent the criminal defendant on a contingent fee basis in a civil forfeiture proceeding to recover the seized property?

HYPOTHETICAL #20

1. May a lawyer legally pass along the transactional/service fees to the client who is using a credit card to pay legal fees?

2. Is it ethical for the lawyer to allow those transactional/service fees to be deducted from the lawyer's escrow account?

3. Is it ethical for the lawyer to allow the credit card company to "chargeback" the payment against the lawyer's escrow account?

HYPOTHETICAL #21

In this hypothetical, "A" is a paralegal who worked for "Lawyer B" for twenty years until "Lawyer B's" death. Lawyer B, a solo practitioner, limits his practice to trust and estate work. Through the years, under Lawyer B's supervision, "A" became quite proficient in preparing wills and powers of attorney for clients. In the process of assisting in the closing of the practice, "A" collected and took with her forms that "Lawyer B" had used for preparing wills, advanced medical directives and powers of attorney ("POAs"). "Lawyer B" practiced in a relatively small community and both "Lawyer B" and "A" were known and highly regarded. "A" did not seek new employment after "Lawyer B's" practice was closed. Instead, over the ensuing years "A," through word of mouth, offered legal services to people she knew and to others who were referred to her, by providing assistance in preparing wills, POAs, and advanced medical directives—using the forms she had kept from "Lawyer B's" practice. "A" did not, however, advertise or publicly hold herself out as providing such services.

Recently, a circuit court clerk filed an unauthorized practice of law complaint with the Virginia State Bar's Standing Committee on Unauthorized Practice of Law ("UPL Committee") against "A" alleging that "A" has made a business of preparing wills and POAs and these wills are now turning up years later as testators die and as wills are admitted to probate. Certain problems are being discovered in how the documents were drafted and questions asked about the circumstances under which they were prepared. The clerk's information is based almost exclusively on hearsay and documents the clerk has seen admitted to probate.

Proving the allegations in the complaint is extremely difficult. No one involved, either those presenting the wills or attorneys or court personnel reviewing the wills, has ever had any direct contact with "A" or was present when she drafted the documents, which are now years old. "A" has not responded to the complaint and no one can/will provide any information as to whether "A" is still engaged in this activity or substantiate what, if anything, she has done in the

past. Also, no source exists to contradict the circumstantial evidence that "A" indeed engaged in what is alleged. The evidence on the face of the complaint is insufficient for the UPL Committee to make a finding of unauthorized practice or to make a referral to the Office of the Attorney General or a Commonwealth's Attorney. Moreover, because of the absence of witnesses who can testify or produce substantive evidence, there is no way that the UPL Committee can meet its burden of proof in an enforcement proceeding against "A."

Furthermore, the UPL Committee has reason to believe that "A" continues to provide these services to the public to their detriment. To obtain evidence that "A" is providing legal services to the public, Ethics Counsel and/or Assistant Ethics Counsel who staff the UPL Committee ("staff counsel") need to direct a Virginia State Bar ("VSB") investigator or some other willing outside volunteer to contact "A" under the pretext of wanting a will and/or POA prepared, collect and pay for these services, and report back the results. In effect, staff counsel and the investigator propose to employ an "undercover"/ "sting" operation to catch "A" engaging in unlawful or criminal activity.

1. Is it ethical for staff to direct a bar investigator or other outside investigator/volunteer to engage in covert investigative techniques in the investigation of the unauthorized practice of law described in this hypothetical?

2. Is it ethical for the staff counsel to direct a bar investigator or other outside investigator/volunteer to engage in covert investigative techniques in the investigation of the unauthorized practice of law in *any* case in which similar circumstances of lack of witness cooperation, lack of substantive evidence and significant harm to "clients" exist and no other reasonable alternative is available for obtaining information against the person engaging in unauthorized practice?

HYPOTHETICAL #22

An attorney has been appointed to serve as Commissioner in Chancery in a suit brought by a homeowner's association to enforce its lien for unpaid assessments. The lot owner ("Defendant A") and several creditors are defendants. The lot owner's daughter, ("Defendant B"), who is one of the defendants by virtue of being a beneficiary of a deed of trust, has alleged a conflict in the Commissioner's appointment based upon the following two incidents:

> Incident #1: Two years prior to the Commissioner's appointment, the Commissioner's law partner represented a realtor in connection with a real estate ethics complaint filed by Defendant B. The realtor worked for the realty company associated with the development where Defendant's A's lot is located. A letter of reprimand was issued against the realtor for failing to provide Defendant B with a copy of the ratified contract of purchase and commission reduction agreement upon signing or initialing. All other allegations of wrongdoing by the realtor were dismissed. The representation was concluded two to three weeks prior to the Commissioner's association with the law partner and the formation of their law firm. The Commissioner

was unaware of the representation prior to Defendant B's allegations of a conflict.

Incident #2: Several years ago (the exact date is unknown), Defendant B consulted with one of the other defendants, an attorney then in private practice, regarding a possible fraud claim against Defendant A. The alleged basis of the fraud claim is unknown. Defendant B believes that the attorney with whom she consulted, in turn, contacted the Commissioner's law partner about her case. The law partner has no recollection of the matter.

Is it a conflict of interest for this attorney to serve as Commissioner in Chancery in this case or would it be impermissible as involving the appearance of impropriety?

HYPOTHETICAL #23

Attorney Smith is representing Plaintiffs in a discrimination claim. Plaintiffs contend hat Defendants are attempting to force them to move from the neighborhood because of their race, and Defendants contend that the problem is Plaintiffs' disruptive behavior. Prior to the lawsuit, a resident of the neighborhood who is a nonparty witness wrote to the homeowner's association complaining of the Plaintiffs' behavior. Plaintiffs' attorney has written the nonparty witness, accusing the witness of making defamatory statements and indicating that if the witness stands by the statements, Plaintiffs' attorney will seek "appropriate legal action." Plaintiffs' attorney has now subpoenaed this witness for depositions and also subpoenaed witness's homeowner's insurance policy "just in case appropriate legal action is necessary."

Are the actions by Attorney Smith unethical? Do Attorney Smiths actions constitute threatening and harassing a nonparty witness, or an attempt to intimidate the witness not to testify about the Plaintiffs' behavior as reported to the homeowner's association.

HYPOTHETICAL #24

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?

HYPOTHETICAL #25

Attorney D. Resources has 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.

Questions Presented:

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?

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Virginia Lawyers Weekly **http://valawyersweekly.com**

Q: Can a solo practitioner named Jim Stevens call his law firm "Jim Stevens & Associates"?

by Paul Fletcher

Published: July 9th, 2009

A: Doubtful. Jim is a solo, and the term "and associates" implies other lawyers work in the firm. The smart money says the Virginia State bar would vote thumbs down.

The VSB has twice weighed in on related issues.

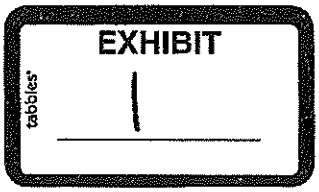
In Legal Ethics Opinion 1492, issued in 1992, the VSB ethics committee told a solo that he couldn't tack on "Attorneys at Law" to his letterhead. Use of the plural, the committee said, was misleading and violated old DR 2-102(A), which held that a lawyer couldn't hold himself out in a fashion that was false, fraudulent, misleading or deceptive.

Rule 7.2 of the current Rules of Professional Conduct lays out much the same requirement.

The VSB committee also took a lawyer to task in LEO 1532, issued a year later. There, a lawyer with one associate wanted to use "and Associates" in his firm name. That lawyer couldn't use the plural unless he "employs at least two lawyers," said the committee.

The Ethics Chalkboard is intended as a general resource for discussion of legal ethics questions. Virginia CLE provides an online library of Legal Ethics Opinions from the Virginia State Bar. The Virginia State Bar's legal staff includes an ethics unit that maintains an ethics hotline, (804) 775-0564. Lawyers at the hotline serve members of the bar and the public by answering questions regarding ethics and the unauthorized practice of law.

Complete URL: **http://valawyersweekly.com/blog/2009/07/09/q-can-a-solo-practioner-named-bob-stevens-call-his-law-firm-bob-stevens-associates/**



VIRGINIA LEGAL ETHICS OPINION 1741

PROSECUTORS: RULE 3.8(c): ADVISING WITNESSES; INVESTIGATIVE TACTICS

You have presented a hypothetical situation wherein you advise that during the course of criminal prosecution, defense counsel will sometimes hire a private investigator or will have access to court-appointed investigators. A few of these investigators resort to tactics that you perceive to be less than honest in attempting to obtain statements from the Commonwealth's witnesses. Examples you provide include defense investigators displaying a badge to imply they are police officers, or stating they were sent by the judge or are working with the prosecution. When working on a case where such an investigator is involved, the prosecutor would like to inform prosecution witnesses of the tactics that may be employed by these investigators. The prosecutor has also considered sending a letter to all witnesses explaining that it is the witnesses' decision whether or not they want to speak with defense investigators. The prosecutor also proposes including in that letter language warning about certain tactics that may be used by the investigators and possibly naming the investigators.

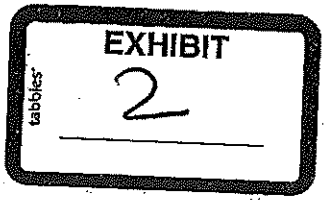
Under the facts you have presented, you have asked the committee to opine as to the propriety of the prosecutor advising prosecution witnesses as described above, and whether this would be in compliance with Rule 3.8(c).

Rule 3.8(c) of the Rules of Professional Conduct states:

> Rule 3.8 Additional Responsibilities Of A Prosecutor
>
> A lawyer engaged in a prosecutorial function shall:
>
> > (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense

In the facts you present, the committee believes that it would not be improper to inform Commonwealth's witnesses that they may be contacted by private investigators working for the defense, and identify them by name if known to the prosecutor. Also, the committee believes that it is not improper for a prosecutor to inform his or her witnesses that they have the right to speak or not speak with an investigator working for the defense. Beyond that, however, the committee believes that Rule 3.8 (c) prohibits the prosecutor from making any remarks, including the references to the questionable tactics employed by some investigators, that would explicitly or implicitly instruct or encourage a witness to withhold information from the defense.

Committee Opinion
April 13, 2000



LEGAL ETHICS OPINION 1823 CAN A DEFENSE ATTORNEY WAIVE A CLIENT'S RIGHT TO A JURY TRIAL AND FAIL TO DISCLOSE TO THE COURT THAT THE CLIENT HAS NOT AUTHORIZED THE WAIVER?

You have presented a hypothetical involving a criminal defense attorney's selection of a bench trial for her client. The attorney serves as an assistant public defender and was assigned the case of Mr. Smith. At the preliminary hearing, the matter was certified for trial to the Circuit Court. Local rules require that the defense attorney advise the court prior to the next docket call whether to schedule the case as a jury trial or a bench trial. If set as a bench trial, the court does not summons a jury. The attorney had been unable to contact her client [1] and was, therefore, unable to determine if he wishes to waive a jury trial and be tried by the court. Aware that juries have imposed lengthy sentences in similar cases, the attorney assumed the defendant would not want a jury trial. She advised the Commonwealth's Attorney and the court that she wished the matter to be set for trial as a bench trial. She did not inform the prosecutor or the court that she had not spoken with her client, nor had he consented to waiving the jury trial. The case was set on the court's docket as a bench trial. On the day of the trial, with the witnesses present, the defendant was asked by the judge if he consented to waiving a jury and being tried by the court. The defendant said that he did not consent and requested a jury trial. As a result, the case had to be continued to a later date.

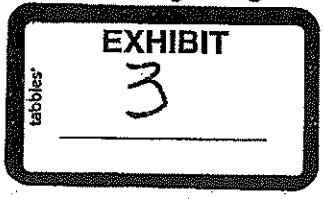
Regarding this hypothetical, you have asked the following questions:

1) Does the fact that the lawyer had requested that the case be set as a bench trial, thereby waiving the defendant's right to a jury trial, without express authorization from the client to do so, violate Rule 1.2(a)?

2) Does the lawyer's failure to disclose to the court that she had not consulted with her client regarding waiving a jury and that she did not have authority from her client to do so constitute an affirmative misrepresentation to the court?

Rule 1.2 governs the parameters of the scope of an attorney's authority. Rule 1.2 provides 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.
>
> (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.
>
> (d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.



Specifically, the rule addresses which decisions may be made by the attorney and which are within the exclusive purview of the client. In many instances, as indicated by the language of paragraph (a) of the rule, the determination of what decisions are for the lawyer and which are for the client involves a careful analysis of means versus objectives. *See e.g.,* LEO 1816 (determining whether an attorney must respect a client's directive to put on no defense where the client is hoping for the death penalty). The present situation is not such a case. Unlike the decision to be made in LEO 1816, the present situation is addressed expressly on the face of the rule. Rule 1.2 (a) highlights the decision "whether to waive a jury trial" as incontrovertibly one to be made by the client. It is outside the scope of an attorney's authority to decide that constitutional right for his client; the attorney must consult with the client as to the client's choice regarding a jury trial versus a bench trial.

When the attorney in the present scenario assumed her client would like to waive a jury trial, failed to consult with him prior to informing the court on the issue, and failed to consult with her client even *after* informing the court of the jury trial waiver, this attorney was acting outside the scope of her authority. Such unilateral action regarding the right to a jury trial was in violation of Rule 1.2.

Your second question asks, in light of the Rule 1.2 violation, whether the attorney's remarks to the court constituted an impermissible misrepresentation under Rule 3.3(a)(1). That provision establishes the following prohibition: "An attorney shall not knowingly make a false statement of fact or law to a tribunal." Similarly, Rule 8.4(c) prohibits an attorney from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law."

In the present scenario, the attorney states to the court that she wishes to have the client's case set for a bench trial. On its face and with no context, the statement does not seem to be false or involve misrepresentation; she does in fact wish to have a bench trial. However, the remark must be considered in context. The following authorities, among others, each contribute to the common understanding by the criminal bar that a client can only waive the constitutional right to a jury trial through voluntary, intelligent consent:

1) Rule 1.2, as discussed above;

2) *Jones v. Commonwealth*, 24 Va. App. 636, 484 S.E.2d 618 (1997)(noting that an attorney may not, without client authorization, surrender an accused's right to a jury trial);
3) Virginia Code Section 19.2-257 (allowing for bench trials for felony cases only where the accused consents after being advised by counsel); and

4) Rules of the Virginia Supreme Court, Rule 3A:13(b) (allowing for a bench trial in Circuit Court only after the court determines that the accused's consent was voluntarily and intelligently given).

The Committee opines that is unlikely that this defense attorney, employed as a public defender, was ignorant of this established legal principle. Assuming, therefore, that the attorney was cognizant of the requirement for proper consent from the client, the Committee opines that the attorney was presenting a falsehood, a misrepresentation to the court when she elected the bench trial on behalf of her client. The Committee notes Comment 2 to Rule 3.3, stating in pertinent part that "there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The Committee considers the present scenario to present such circumstances. When this defense attorney elected a bench trial on behalf her client, the prosecutor and the court would each have reasonably relied upon that statement as indicating that she had consulted with her client to make that election, as such consultation is a prerequisite to electing against the right to a jury trial. Thus, election of a bench trial together with a failure to disclose the lack of client consent means that this representation to the court may, under certain circumstances,

constitute an affirmative misrepresentation.

The only other, less likely, explanation for this attorney's statement, despite no consent from her client, would be that she in fact was completely ignorant of the requirement that the client must provide voluntary, intelligent consent. The Committee finds such ignorance of this established principle unlikely in an attorney whose practice is exclusively criminal defense, such as a public defender. If that nonetheless were the case, there could be no knowing falsehood or misrepresentation. However, such ignorance of the constitutional rights of a criminal defendant would raise serious question as to whether the attorney had met her duty of competence under Rule 1.1.[2] The limited facts provided of course do not establish conclusively whether this attorney was operating out of ignorance or if instead she was knowingly making a false representation. If she knew that proper consent was required, that she did not have it, and that her election statement would convince the court and the prosecutor that she *did* have that consent, then her failure to disclose that she had not discussed the matter with her client was an impermissible, affirmative misrepresentation in violation of both Rules 3.3 and 8.4.

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] Pursuant to Rule 1.16(4), the Committee notes that the appropriate course of conduct for an attorney when faced with the failure of the client to cooperate by failing to maintain contact is to move the Court for permission to withdraw. The facts presented in the hypothetical do not provide sufficient information for an opinion on that course of conduct.

[2] Rule 1.1 states as follows, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

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;

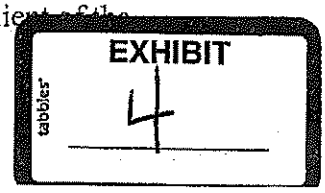
8) Advise the client of the possible legal effect of filing a petition for a writ of *habeas corpus* on other legal remedies or on his right to file future petitions for a writ of *habeas corpus*; and

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 1842

OBLIGATIONS OF A LAWYER WHO RECEIVES CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

The Committee generated this opinion in response to numerous questions posed regarding the duties a lawyer or law firm owes to prospective clients. The opinion also addresses the resulting disqualification in situations where a lawyer or law firm receives confidential information via a law firm website or by telephone voicemail. These questions most commonly arise in the following hypothetical scenarios:

(A) Lawyer A, a solo practitioner in a small town, advertises in the local yellow pages. The advertisement details Lawyer A's areas of practice and also includes Lawyer A's office address and telephone number. After returning from court one afternoon, Lawyer A retrieves a voicemail message from an individual seeking representation in a criminal matter. The caller also provides information about the multiple felony drug charges he incurred as one of several co-defendants in a local drug ring. The caller provides his name and requests a consultation with Lawyer A, who realizes, after running a conflicts check, that he already represents one of the other co-defendants.

The Committee believes Rule 1.6 governs its analysis throughout this opinion. Rule 1.6 deals with the issue of client confidentiality. [1] Also pertinent to the Committee's analysis is The Preamble to the Virginia Rules of Professional Conduct, which states that "...there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer *agrees to consider* whether a client-lawyer relationship shall be established" (italics added). [2]

The question presented is whether a caller who contacts a law firm via telephone using a public listing in a directory and who leaves a detailed message in the firm's voicemail reasonably expects that such information will be kept confidential? [3] Standing alone, publication of a telephone number in a yellow pages advertisement cannot reasonably be construed as an invitation by the lawyer or firm to an individual to submit confidential information. Thus, it would be unreasonable for a person leaving a voicemail to have an expectation that the information will be maintained as confidential. Therefore, the Committee believes that the lawyer who receives such information is under no ethical obligation to maintain its confidentiality and further, may use the information in representing an adverse party.

(B) Law Firm B maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail but the website does, however, provide contact information for every lawyer in the firm, including e-mail addresses in the biographies of each lawyer in the firm. One of the domestic lawyers in the firm receives an e-mail from a woman seeking a divorce from her husband detailing the circumstances surrounding the demise of the marriage, including her affair with another man. The lawyer reads the e-mail before he discovers that he is already representing the woman's husband.

The Committee believes the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website. The person is using mere contact information provided by the law firm on its website and does not, in the Committee's view, have a reasonable expectation that the information contained in the e-mail will be kept confidential.

In reaching this conclusion, the Committee looks to two factors: (1) whether the law firm, by merely publishing contact information on its website that includes an e-mail address, creates a reasonable ...w firm is specifically inviting or soliciting the communication of confidential information;

and (2) whether it is reasonable for the person providing the information to expect that it will be maintained as confidential.

Whether or not it is reasonable for a person to expect that information transmitted by e-mail or left on a voicemail will be maintained as confidential depends in part on whether the lawyer said or did anything to create the impression that he was inviting information or simply publishing his contact information.[4] The Committee is of the opinion that including an e-mail address on a law firm's website or publishing a telephone number in a yellow-page advertisement, without more, is not the solicitation of confidential information from a prospective client. In these circumstances, the publication of such information is more appropriately viewed simply as an invitation to contact the firm and not an invitation for a prospective client to submit confidential information. The mere inclusion of an e-mail address on a web-page is not an agreement to consider the formation of an attorney-client relationship; rather, the lawyer is simply advertising his or her general availability and how he/she may be reached.

Generally speaking, when communicating with a prospective client, the lawyer not only consents to the receipt of information but may be able to control the amount of information received. The lawyer can also avoid receipt of information that would create a conflict for that lawyer representing an adverse party. Conversely, a lawyer who unilaterally receives information via an e-mail communication has no opportunity to control or prevent the receipt of that information and risks the creation of a conflict to the representation of an existing client or another adverse party. The Committee believes that it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client, simply because the lawyer lacks ability under the circumstances to control the nature and extent of information being provided. Based on the foregoing analysis, Law Firm B should be permitted to continue representing the husband of the woman who contacted the lawyer by e-mail and to use the information acquired thereby for the benefit of the husband.

In addressing the circumstances presented in both Hypotheticals A and B, the Committee recognizes that, in addition to the mere publication of the lawyer's contact information, other factors or circumstances may exist which *could* give rise to a reasonable expectation of confidentiality on the part of the prospective client. Among these factors may be the specific nature and content of the invitation to contact the firm, including language in the advertisement or on the website that would imply the lawyer is agreeing to accept confidential information or an invitation in the lawyer's outgoing voicemail message asking the caller to provide as much detailed information about his/her case as possible. Therefore, an examination of the totality of the circumstances on a case-by-case basis is necessary to determine whether it is reasonable for a prospective client to believe that the information he/she provides will be maintained as confidential.

(C) Law Firm C maintains a website where prospective clients are invited to fill out an on-line form outlining the factual details of their accidents and injuries. In exchange for this information, Law Firm C's website offers to provide prospective clients a free evaluation of their claims. Mrs. X, an accident victim, fills out the form and provides information about her accident involving a two-car collision, including the fact that she consumed three glasses of wine in one hour before getting behind the wheel. One of Law Firm C's lawyers, after reviewing Mrs. X's online information, asks his legal assistant to run a conflicts check. The legal assistant does so and advises the lawyer that Law Firm C is currently representing a client who was the guest passenger in Mrs. X's vehicle at the time of the accident. The lawyer tells the legal assistant, "That's not a problem. I'll just tell Mrs. X we can't take her case."

In Hypothetical C, the lawyer's website specifically invites Mrs. X to submit the information in exchange for an evaluation, thereby inviting the formation of an attorney-client relationship for the purpose of providing a case evaluation. Even if the lawyer ultimately declines representation of Mrs. X, Rule 1.6(a) imposes upon that lawyer a duty of confidentiality with respect to the information received.

This analysis is consistent with prior legal ethics opinions imposing a duty of confidentiality on a lawyer when consulting with a prospective client. Even in the absence of an attorney-client relationship under such circumstances, it is reasonable for a prospective client to expect that the information provided to the lawyer will be maintained as confidential based on the mutual exchange of information. [See Legal Ethics Opinions 1453, 1546, 1601, and 1794.]

Although the representation of Mrs. X is limited to providing her with an evaluation, her situation more closely parallels the scenario of a lawyer interviewing a prospective client. Because the lawyer has an ethical duty to keep Mrs. X's information confidential, the lawyer's obligation to Mrs. X "materially limits" the lawyer's representation of the party adverse to her. Rule 1.6 would prohibit the lawyer from thereafter using that information to the detriment of Mrs. X or from sharing that information with a party whose interests are adverse to her. Because the lawyer is prohibited from using that information, Rule 1.7(a)(2) imposes a material limitation conflict on the lawyer, limiting his ability to represent an adverse party by the duty of confidentiality that is owed Mrs. X.[5] As a result, in Hypothetical C, the lawyer must not only decline the representation of Mrs. X but must actually go so far as to withdraw from the representation of an existing client whose interests are adverse to those of Mrs. X.

Finally, to avoid any inference that an attorney-client relationship has been established or that the information a prospective client provides will be kept confidential, a law firm may wish to consider the inclusion of a disclaimer on the website or external voicemail warning the person to not disclose confidential or sensitive information. The website disclaimer might also state, for example, that no attorney-client relationship is being formed when a prospective client submits information and that the firm has no duty to maintain as confidential any information submitted. The disclaimer should be clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential.[6] In addition, the Committee recommends the use of a "click-through"(aka "click-wrap") disclaimer, which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information.[7]

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

Committee Opinion
September 30, 2008

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[1] Rule 1.6 Confidentiality of Information

(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).

[2] Scope, Pt. 6, § II, Rules of Virginia Supreme Court.

[3] See LEOs 1453, 1546, 1601 and 1794 that established the Committee's determination of the duty of confidentiality at the time of initial consult and which are referenced later in this opinion.

[4]
Other jurisdictions have opined on what constitutes a solicited versus an unsolicited e-mail. See Association of the Bar of the City of New York, Formal Opinion 2001-1 (concluding that information submitted by e-mail to a law firm via the firm's website was unsolicited; simply including an e-mail link on a law firm's website does not amount to an invitation to transmit confidential information); Iowa State Bar Association Op. 07-02 (evaluated whether the lawyer said or did anything to prompt the potential client to provide confidential information to the lawyer, noting that a lawyer's "request to contact" is not the same as a request for information); Massachusetts Bar Association Op. 07-01 (concluding that a website is a marketing tool by which a prospective client may identify which lawyers have the expertise necessary to handle a particular case, and that the publication of such information could reasonably lead a prospective client to conclude that, when sending information to the firm via an e-mail link, the firm and its lawyers have implicitly "agreed to consider" whether to form an attorney-client relationship. However, this opinion further states that it would be unjust to allow the prospective client to unilaterally impose a duty of confidentiality on an unsuspecting lawyer when contacting the lawyer by an e-mail address that was obtained on the internet and that is equivalent to a listing in a telephone directory.)

[5]
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.

[6]
California Formal Ethics Op. 2005-168 (concluding that terms of the disclaimer should defeat the sender's reasonable expectation of confidentiality. Language which merely states that "no confidential relationship is being formed" by submitting the information is "potentially confusing.")

[7]
David Hricik, *To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients*, 16 Prof. Lawyer 1 (2005) (indicating that "Click wraps are the only certain way to ensure that a court will hold that the prospective client manifested assent to the term. Without manifested assent, the term is not binding on the prospective client. Thus, a firm website should be structured so that the client must assent to the term in order to transmit e-mail.").

LEGAL ETHICS OPINION 1799 CONFLICT OF INTEREST – CAN A COMMONWEALTH'S ATTORNEY PROSECUTE CASES WHERE THE DEFENDANT IS REPRESENTED BY THE COMMONWEALTH'S ATTORNEY'S FORMER PARTNER WITH WHOM HE/SHE OWNS AN INTEREST IN REAL ESTATE?

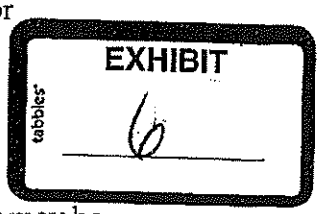
You have presented a hypothetical in which A and B were the only partners in a firm. A and B as individuals owned the office building in which the law office was located. A was appointed the Assistant Commonwealth's Attorney for the locality. B continued as a sole practitioner in the office building. B pays no rent for the law practice, but two other tenants pay rent, which goes to the mortgage payments and for upkeep of the building. A is responsible for one-half of the real estate taxes, with B responsible for the other half, only if rents are insufficient to cover the taxes. Where the rent paid is insufficient to cover the mortgage, B pays the balance. A and B benefit from the increasing equity and from tax deductions for the building. A and B also own the office equipment, computers, and furniture used by the tenants of the building, including B's law practice. The AB law firm obtained a loan for partnership business. Monthly payments on that loan are now paid solely by B, but A remains legally responsible for the balance, along with B. B represents criminal defendants in A's jurisdiction.

You have asked the Committee to opine, under the facts of the inquiry, whether A is precluded from prosecuting those defendants represented by B.

This Committee has in the past considered landlord/tenant relationships between opposing counsel. *See* LEOs ##1416, 1578. The focus of those opinions was less on the mere fact of a landlord/tenant relationship and more on the fact that the offices of opposing counsel were in the same building. For instance, in LEO 1416, this Committee found a conflict where the opposing counsel shared a law library, waiting room, and receptionist while the situation in LEO 1578 was distinguished in that no such sharing was present. Neither opinion addresses whether thelandlord/tenant relationship rose to a personal interest creating a conflict of interest for the attorneys.

It is this question of potential conflict of interest that is at issue in the present inquiry. Prior opinions considering business relationships between opposing counsel as a source of conflicts of interest applied DR 5-101(A), predecessor to the current Rule 1.7(b). DR 5-101(A) stated the following:

> 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.



In contrast, the current Rule 1.7(b) states, in pertinent part, the following:

> 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.

Thus, the prior opinions looking at business relationships between opposing counsel applied the DR 5-101 standard of "may affect," as opposed to the current, Rule 1.7's narrower standard of "may be materially limited." *See,* LEO ## 789, 1311, and 1767. Only recent LEO 1767 has applied Rule 1.7(b)

to a business relationship between opposing counsel to consider the issue of a conflict of interest.

LEO 1767 involved a Commonwealth's Attorney who retained private counsel to do collections work for the Commonwealth's Attorney. That opinion found that such a relationship did create a conflict of interest for the Commonwealth's Attorney in any case were that private attorney represented the defendant. The normal Rule 1.7(b) conflicts "cure" was not available in that instance due to the Commonwealth's Attorney having no means to obtain the necessary consent from his client, the Commonwealth of Virginia. The Committee in finding a conflict in that scenario noted the following:

> The prosecutor who is the client of the defense attorney may find his ability to represent the Commonwealth against the attorney compromised. Loyalty to a client must not be watered down by a personal business or relationship with opposing counsel. This Committee finds that ...the Commonwealth's Attorney's representation "may be materially limited" in any case where he is the client of opposing counsel.

The concern of diminished loyalty to one's client is at the heart of a "personal interest" conflict for a lawyer. Comment 4 to Rule 1.7 states that a critical question for determining a conflict of interest is "whether it will interfere with the lawyer's independent professional judgment." In LEO 1767, the Committee concluded that interference with or watering down of the lawyer's professional judgment and loyalty to the client would always be present whenever a lawyer is the client of his opposing counsel.

In contrast, not all conflict scenarios can be decided so categorically. The determination of whether the business relationship between opposing counsel constitutes a conflict will often be very fact-specific. A landlord/tenant relationship between opposing counsel is that sort of fact-specific context; the mere existence of the leasing arrangement will not always give rise to a conflict, nor will it never do so. It will be the particular details surrounding each such situation that will be critical to the determination.

In the present scenario, several facts indicate further entanglement between the prosecutor and the defense attorney beyond a mere landlord/tenant relationship. While the prosecutor is a landlord for the defense attorney's law practice, the following conditions are also present:

> 1) The two opposing counsel co-own the building;
> 2) The two opposing counsel are each responsible for the mortgage on that building;
> 3) The prosecutor is landlord not for a residence or a nonlegal business of the defense attorney, but for his law practice; and
> 4) The prosecutor is co-owner of the computers, office equipment and furniture of the defense attorney's law practice.

Because the business connection between the prosecutor and this defense attorney is directly related to the law practice of the defense attorney, the Committee opines that this business relationship qualifies as a personal interest of the prosecutor giving rise to a conflict of interest under Rule 1.7(b). As the prosecutor's client is the Commonwealth, he is not able to obtain client consent as contemplated in Rule 1.7(b)(2). Accordingly, in this hypothetical, the Assistant Commonwealth's Attorney is precluded from prosecuting clients represented by the defense attorney. Moreover, as the all conflicts arising under Rule 1.7 are imputed to each member of a firm [1] under Rule 1.10(a) [2], no other prosecutor in that office may prosecute a defendant represented by this defense attorney.

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

Committee Opinion
June 30, 2004

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[1]
The definition of "firm" from the Terminology section of the Rules of Professional Conduct is as follows, "a professional entity, public or private, organized to deliver legal services, or a legal department or a corporation or other organization." That definition is not limited to private law firms but also applies, for example, to a Commonwealth Attorney's office.
[2]
Paragraph (a) of Rule 1.10 states in pertinent part, [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 ... [Rule] 1.7.

VIRGINIA LEGAL ETHICS OPINION 1742

ACTIVITIES OF CLOSING ATTORNEY IN CONNECTION WITH REAL ESTATE TRANSACTION WHEN TITLE COMPANY IS REPRESENTING SELLER

You have presented a hypothetical situation in which Attorney has received a contract concerning a real estate transaction showing that Attorney will be the settlement agent. The contract has an addendum which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the seller's documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that Attorney's settlement statement should show no charges to the seller from Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

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

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?

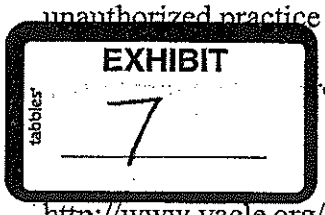
    a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?
    b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorney's name?

2. If Attorney complies with the instructions of the title company, is Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?

4. Can an attorney acting in his capacity as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a non-attorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

The appropriate and controlling rules relative to your inquiry are: Rule 1.5 (b), requiring that fees be adequately explained to the client; Rule 5.4 (a) which prohibits a lawyer from sharing fees with a nonlawyer; Rules 5.4 (b) and (d) which generally prohibit a lawyer from practicing law as an employee of a corporation owned or controlled by nonlawyers; and Rule 5.5 (a)(2), stating that a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.



eviously opined, in the context of a real estate closing, that absent an agreement

with or forewarning to the seller or seller's attorney, it is improper for a closing attorney engaged by the purchaser to impose certain fees on the seller. LEOs 425, 647, 878, 911,(1) 922, 927, 1177, 1228, and 1346.

Your inquiry raises the question of whether these opinions apply if the seller is represented by a lay title company as opposed to a licensed attorney. The conclusion reached in these opinions was not based, however, on whether the seller was separately represented. As we stated in LEO 1346, "if purchaser's attorney undertakes to perform those functions on behalf of the seller, the fees for the services first must be adequately explained to the seller who must then, after consulting with his own attorney, consent to the charge before it can be imposed on the seller." LEO 1346 (1990). The committee believes that Rule 1.5 (b)'s requirement that fees be adequately explained to a client would require advance notice and agreement by the seller, *even if the seller has not engaged independent counsel.* In that case, the closing attorney would be representing the seller as well as the purchaser. *Pickus v. Virginia State Bar,* 232 Va. 5, 348 S.E.2d 202 (1986)(When a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties and, in this limited sense, all the parties are his clients). Regardless of whether the title company is authorized to represent the seller, the seller must consent to the charges imposed by the closing attorney. This requires notice to the seller that he or she will be charged for certain fees or costs by the closing attorney sufficiently in advance of the closing. The purpose is to provide an opportunity for the seller, if he or she chooses, to avoid the imposition of charges for the performance of certain ministerial functions. LEO 1228.

In the companion opinion issued by the Standing Committee on the Unauthorized Practice of Law, that committee determined that the lay title company which is the subject of your inquiry could not lawfully undertake a legal representation of the seller. UPL Op. 197 (2000). The UPL committee opined that no employee of the title company is authorized to give legal advice to the seller nor prepare on the seller's behalf legal instruments affecting the title to real estate such as a deed transferring title to the purchaser. *Id.* Therefore, the UPL committee concluded that the closing attorney may regard the seller as unrepresented by independent counsel. This means, for example, that the closing attorney may communicate directly with the seller to obtain consent regarding the fees and costs the closing attorney intends to charge to the seller without violating Rule 4.2 of the Virginia Rules of Professional Conduct. (2)

As to your second inquiry, if the closing attorney complies with the instructions of the title company, the committee believes that the closing attorney would be assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. Rule 5.5 (a)(2). In the facts you present, the closing attorney would be disbursing to the title company payment for the preparation of the seller's deed, knowing that the title company is not authorized to practice law. Such conduct, in the committee's opinion, is violative of Rule 5.5 (a)(2).

With regard to your third and fourth inquiries, the committee agrees with the distinction drawn by the UPL committee in UPL Op. 197 between a lawyer who is an employee of the title company as opposed to a lawyer in private practice who simply owns the title company. If the seller were represented by a licensed attorney in private practice and that attorney also owns the title company, the attorney could properly advise the seller and prepare legal instruments on seller's behalf, subject to the ethical obligations discussed in LEO 1564 concerning lawyer-owned title companies. In contrast, if the attorney owns the title company but is working not as the seller's private attorney but on behalf of the title company, then that attorney should not be treated by the purchaser's attorney as representing the seller. Only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller. Similarly, if the licensed attorney is employed directly by the title company, and subject to its control, it would not be proper for the lawyer to provide legal services to customers of

the title company. Rule 5.4 (a) prohibits the lawyer from sharing legal fees with the title company. Rules 5.4 (b) and (d) generally prohibit a lawyer from providing legal services or practicing law within a corporation owned by nonlawyers. Since the title company is not authorized by law to serve as the seller's legal representative at closing, the committee believes that the seller should not be regarded as represented by their own counsel.

Committee Opinion

June 26, 2000

1. It is no longer permissible for the buyer's (or lender's) attorney to charge the seller for the preparation and filing of an IRS Form 1099-S. I.R.C. § 6045 (e)(3). This provision overruled, in part, LEOs 911, 922 and 927.

2. In representing a client, a lawyer shall not communicate about the subject matter 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.

LEGAL ETHICS OPINION 1702 INADVERTENT RECEIPT OF CONFIDENTIAL INFORMATION; ZEALOUS REPRESENTATION

You have presented a hypothetical situation in which Attorney A represents B in a suit against Y, represented by Attorney X. Attorney X sends Y confidential information which makes reference to confidences Y has revealed to Attorney X and also outlines trial strategy and evaluation constituting work product of Attorney X. This information was sent via facsimile transmission to Y. Through an error in Attorney X's office, the information was also sent via facsimile transmission to Attorney A. Attorney A's office is able to recognize from the first paragraph of the transmission that the information has been sent in error and that it contains confidential information and work product of Attorney X.

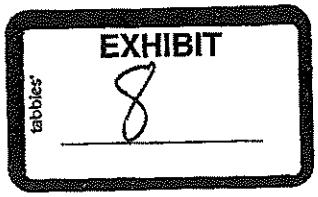
Under the facts you have presented, you have asked the committee to opine as to whether Attorney A's duty of zealous representation of his client requires that he read and use the information sent to him in error by opposing counsel's office. Also, even if Attorney A is not required to use the information, may he do so? Does it matter whether the cover sheet of the facsimile transmission contains a clause warning that the information may be confidential and is to be read only by the addressee?

The factual situation presented is not an uncommon occurrence in an age of instant high-tech electronic communication of information through facsimile machines and e-mail. The lawyer who receives inadvertently transmitted confidential information seemingly has conflicting ethical duties.

> [T]here is a theoretical conflict between ethical rules that require fairness to the opposing party and counsel and prohibit methods for obtaining evidence that violates another's legal rights, on the one hand, and the duty of competent and diligent (zealous?) representation of one's client, on the other.

What about inadvertently disclosed documents or information?, 60 Def. Counsel J. 613 (1993); seeInadvertent Disclosure in the Age of Fax Machines: Is the Cat really out of the Bag?, 46 Baylor L. Rev. 385 (1994). The ethical conflict is not answered dispositively in the Disciplinary Rules or the ABA Model Rules. Id. No Disciplinary Rule explicitly mandates a standard of conduct encompassing the ethical obligations of a lawyer who receives an inadvertent transmission of confidential/privileged documents from an opposing lawyer, or a deliberate transmission from an unauthorized third party.

DR 7-101 requires zealous representation of a client. However, DR 7-101(B)(2) tempers the character of zealous representation by permitting a lawyer to withdraw if the client insists on the lawyer participating in conduct or pursuing an objective which is "repugnant or imprudent." DR 7- 102(A)(8) also tempers the character of zealous representation by prohibiting a lawyer from knowingly engaging in illegal conduct or conduct contrary to a Disciplinary Rule. DR 1- 102(A)(3)and (4) prohibit a lawyer from committing a deliberately wrongful act or engaging in conduct involving dishonesty, fraud or deceit that reflects adversely on



fitness to practice law.

The absence of an explicit Disciplinary Rule does not create an ethical vacuum. EC 9-2 admonishes the following:

> [W]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

Similar aspirational guidance is stated in EC 9-6:

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

A deliberate interception or procurement of confidential information is not ethically permissible, of course. A lawyer may not, for example, secretly tape record his telephone conversation with the adverse party (LEO No. 1635), or counsel his client to do so (Gunter v. Virginia State Bar, 238 Va. 617 (1989)). Nor may a lawyer procure information and documents from an opposing lawyer's former employee or rifle a file that an opposing lawyer inadvertently left in the lawyer's office following depositions. LEO No. 651. Each of those examples is controlled by DR 1-102(A)(3) and (4) and DR 7-102(A)(7) and (8) notwithstanding the duty of zealous representation contained in DR 7-101(A).

In LEO No. 1583 a lawyer wrote to a judge about whether the judge's markings on the reverse side of an arrest warrant for a third DUI constituted a conviction absent the judge's signature and a recorded finding of guilt. The judge replied to the lawyer and inadvertently enclosed the original of the arrest warrant.

The lawyer inquired whether he was permitted to use the arrest warrant or give it to his client, or was obligated to return it to the court. The committee relied on DR 7-102(A)(3), (7), and (8) and DR 1- 102(A)(3) and (4), and referred to Code of Virginia §§ 18.2-111 and 17-44 and -45, in concluding that the lawyer had an ethical duty to return the arrest warrant and not to use it.

Ethics panels in other jurisdictions have expressed divergent opinions regarding the use or return of inadvertently transmitted confidential documents. District of Columbia Legal Ethics Opinion 256 (1995) advised that a lawyer who receives inadvertently sent confidential documents from opposing counsel may use them if he read them before discovering they were inadvertently sent to him. However, if the receiving lawyer knew the documents were inadvertently sent before reading them, then he was obligated to return them and not use them.

Maine Ethics Opinion 146 (1984) advised that a lawyer who received confidential documents inadvertently included in a discovery response was permitted to use them as permitted by the

rules of procedure and evidence. Kentucky Ethics Opinion E-374 (1995) advised that a lawyer who uses inadvertently sent privileged documents will not be disciplined for using them.

Most ethics panels agree on one point: a lawyer who receives inadvertently transmitted confidential documents from the opposing lawyer has a duty to notify the opposing lawyer promptly. Florida Ethics Opinion 93-3 (1994); Maine Ethics Opinion 146 (1994); Ohio Ethics Opinion 93-11 (1993).

The ABA Committee on Ethics and Professional Responsibility addressed the matter in Formal Opinion 92-368 (1992). It aptly observed the following:

> A satisfactory answer to the question posed [i.e., the ethical duties of the lawyer receiving inadvertently sent confidential or privileged documents from the opposing lawyer] cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules. . .

Thus, the ABA Committee looked at the precepts underlying the Model Rules for guidance. The ABA Committee also examined the ethical mandate of confidentiality, cases rejecting a waiver of attorney-client privilege from mere inadvertence in delivery of documents, and finally, the law of bailments. The ABA Committee summarized its opinion, as follows:

> A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

A number of cases have addressed inadvertent waiver of attorney-client privilege and work product privilege based on evidentiary rules. See generally Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437 (S.D.N.Y. 1995); ABA/BNA Lawyers' Manual on Professional Conduct 55:417 (1996). Resolution Trust Corp. v. First of America Bank, 868 F. Supp. 217, 220 (W.D. Mich. 1994), is one of few inadvertent disclosure cases that includes ethics in its analysis.

> [C]ommon sense and a high sensitivity toward ethics and the importance of attorney-client confidentiality and privilege should have immediately caused the plaintiff's attorneys to notify defendant's counsel of his office's mistake. The lawyers who received the document must have known by the markings and the contents of the document that a clerk or secretary in the defendant's lawyer's office mistakenly included the privileged letter within the documents intended for the plaintiff's lawyers. . . . While lawyers have an obligation to vigorously advocate the positions of their clients, this does not include the obligation to take advantage of a clerical mistake in opposing counsel's office where something so important as the attorney-client privilege is involved.

(footnote omitted)(emphasis supplied).

The italicized language is a variation of the theme sounded by the ABA in 1908 in its adoption of canon 15:

> [T]he office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. . . .

G. Warvelle, Essays in Legal Ethics at 222 (2nd ed. 1920).

The theme of professionalism in the practice of law, notwithstanding the absence of an applicable black letter Disciplinary Rule, is articulated in EC 9-2 and EC 9-6. Legal ethics, like ethics generally, is fraught with gray areas that do not fit under an explicitly applicable Disciplinary Rule. In that circumstance, the ethical polestar is conduct that reflects credit on and inspires public confidence in and respect for the integrity of the legal profession.

It is the committee's opinion that the conclusion reached in ABA Formal Opinion 92-368 correctly states the ethical duties of a lawyer who receives inadvertently transmitted confidential documents from opposing counsel or opposing counsel's client. Those ethical duties foster the bedrock ethical principle of safeguarding client confidences and secrets. See LEO No. 1643. Just as a lawyer may not take and use documents from opposing counsel's briefcase inadvertently left behind (LEO No. 651), it is not ethically permissible for a lawyer to keep and use documents inadvertently transmitted to him by opposing counsel. The situations are factually different, yet the sense of the Committee is that no difference exists in principle. Safeguarding client confidences and secrets is a categorical imperative that should not hinge on someone pushing the wrong number on a facsimile machine, or putting documents in the wrong envelope.

The committee is mindful of cases adopting a doctrinaire rule that even an inadvertent transmission of confidential documents causes a loss of attorney-client privilege and permits the receiving lawyer to use the documents. The rules of evidence do not, however, displace ethical standards governing lawyers. See Gunter v. Virginia State Bar, 238 Va. 617, 621 (1989), rejecting the argument "if it's legal, it's ethical," as far too restrictive under the Code of Professional Responsibility:

> The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, ... [W]e emphasize that more is required of lawyers than mere compliance with the minimum requirements of that standard. The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility.

In some cases it may not be apparent without reading the document received that it is confidential or was transmitted

inadvertently. Boilerplate notices on fax cover pages do not necessarily put the receiving lawyer on notice of an inadvertent transmission to him. Hence, a rule prohibiting the receiving lawyer from reading an inadvertently transmitted document would violate reality. Even so, once the receiving lawyer discovers that he has a confidential document inadvertently transmitted by opposing counsel or opposing counsel's client, he has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions.

In the facts you present, the committee believes that Lawyer A's obligation to zealously represent B does not require Lawyer A to read the misdirected confidential communication, since the mistake was immediately recognized by a member of Lawyer A's staff. Further, having immediately recognized that the fax was both confidential and misdirected, the committee opines that Lawyer A may not read the misdirected communication and must immediately notify the opposing counsel, Attorney X, of the mistaken receipt of the facsimile transmission, and abide by whatever instructions Attorney X may give in regard to the disposition of the document. The committee is of the opinion that Attorney A may not use the information contained in the misdirected fax to the benefit of B.

Although not presented by your request for an advisory opinion, the committee believes that the opinion expressed relative to inadvertent transmission of privileged/confidential documents warrants reconsideration of an earlier opinion relative to deliberate but unauthorized transmission by an unknown third party. LEO #1076 concluded that, where an unknown third party sends a lawyer selected items from the opposing lawyer's file, the Code of Professional Responsibility does not obligate the lawyer to return the items or prohibit their use for the client's benefit. The committee suggested, however, that out of professional courtesy the receiving lawyer should inform the opposing lawyer of the receipt of the items, which one writer has labeled "The Southern Gentlemen" rule. 60 Defense Counsel J. at 614.

The Maryland Bar Association opined that a lawyer who receives copies of an opposing party's documents from an unidentified source is not obligated to make disclosure to the court or the opposing lawyer. However, if the lawyer receives original documents, not just copies, he is duty- bound to return them. Maryland Bar Assoc. Op. 89-53 (1989). In Michigan a lawyer may keep and use unknown third party-provided documents from the opposing lawyer's file if neither the receiving lawyer nor his client in any way procured the documents. Michigan Bar Assoc. Op. CI-970 (1983).

ABA Formal Opinion 94-382 (1994) addressed the ethical obligation of the lawyer who receives an opposing lawyer's confidential/privileged documents from an unidentified source. Unlike ABA Formal Opinion 92-368, where the opposing lawyer or opposing party did not intend to transmit the confidential/privileged documents to the receiving lawyer, the unknown third party sender intended for the receiving lawyer to have and make use of the transmitted confidential/privileged documents.

Even so, the ABA Committee declined to adopt a rule that made it ethically permissible for a lawyer to have unlimited use of the opposing lawyer's confidential/privileged documents that were received from an unknown third party. Adopting an unlimited use rule, the ABA Committee observed, would subject the protection of client confidences and secrets to the whim or mischief of unauthorized efforts of others.

The ABA Committee also declined to adopt an absolute rule prohibiting a receiving lawyer from reviewing or using such confidential/privileged documents under all circumstances. It was noted, for example, that the receiving lawyer may have a legitimate claim that the documents had been wrongfully withheld from discovery responses. Or the receiving lawyer may seek to establish that the documents were received from someone acting under the authority of a whistle blower statute. See e.g., Whistleblower Protection Act, 5 U.S.C. □ 1201, et seq. (1988).

ABA Formal Opinion 94-382 sought to strike a balance of the competing interests, as follows:

> [T]he Standing Committee is of the opinion that a lawyer receiving such privileged or confidential materials satisfies her professional responsibilities by (a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed, (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents, (c) following the instructions of the adverse party's lawyer, or (d) in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

(footnote omitted).

It is fair to say that deception and conversion, and possibly even larceny, play a role in an unidentified third party's unauthorized raiding of the file of the opposing lawyer or of his client in order to obtain and then send privileged/confidential documents to the other lawyer. DR 1-102(3) and (4) would not permit the other lawyer to commission someone to procure such documents. They are tainted. Yet as the ABA Committee observed, there may be circumstances where the character of the documents and the justification for their use transcend the tainted acquisition.

The committee is of the opinion that ABA Formal Opinion 94-382 fairly balances the competing interests and correctly states the ethical responsibility of a lawyer who receives from an unidentified source confidential/privileged documents taken without authorization from the file of the opposing lawyer or of the opposing party. LEO #1076 is therefore overruled.

The duty of competent, zealous representation of a client notwithstanding, the Committee believes that the guidelines articulated in EC 9-2 and EC 9-6, and applied in Gunter, circumscribe a lawyer's representation of a client. A "use

whatever you have, no matter how you got it" rule may reflect the rules of the marketplace, yet Gunter admonishes that "Higher standards should prevail in the practice of law." Id. at 621. The practice of law is a profession and is the only one not regulated by the Virginia Department of Professional and Occupational Regulation. (See Code of Va. □□ 54.1-100, et seq.) The profession's unique status entails a heightened adherence to ethical standards that engender respect for and confidence in the integrity of the profession.

[DRs 1-102(A)(3) and (4), 7-101 (A) and (B)(2), 7-102(A) (3), (7) and (8); ECs 9-2, 9-6; LEOs 651,1076, 1583, 1635, 1643; DC Ethics Op. 256; Maine Ethics Op. 146; Kentucky Ethics Op. E-374; Florida Ethics Op. 93-3; Ohio Ethics Op. 93-11; ABA Formal Ops. 92-368, 92-382; Maryland Ethics Op. 89-53; Michigan Op. CI-970]

Committee Opinion
November 24, 1997

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.

LEGAL ETHIC OPINION 1795 IS IT ETHICAL FOR A CRIMINAL DEFENSE ATTORNEY TO DISCOURAGE A WITNESS FROM SPEAKING WITH THE COMMONWEALTH'S ATTORNEY?

I am writing in response to your request for an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("Committee").

You have presented a hypothetical situation involving a lawyer's representation of a criminal defendant. The defense attorney represented a client charged with felony unauthorized use of a vehicle. The defendant's mother reported the incident as victim of the crime. On the day of trial, the Commonwealth Attorney attempted to interview her in the hall of the courthouse, within earshot of the defense attorney. The defense attorney joined them and asked the victim/mother, in a terse fashion, if the defense attorney could speak with her. The defense attorney then told the mother that she did not have to speak to the Commonwealth Attorney.

The Commonwealth Attorney learned from this interview that the mother, while the primary driver of the vehicle, was not the owner. The titleholder of the vehicle was the defendant's father. The victim/father came to the courthouse to discuss the matter with the Commonwealth Attorney prior to the trial. The Commonwealth Attorney observed the defense attorney speaking with the two victims/parents. The defense attorney then announced that he planned to go to trial. The Commonwealth Attorney realized that while the mother was waiting in the courtroom, the victim/father was not. The mother told the Commonwealth Attorney that the father was in the hallway. This turned out not to be the case. The defense attorney admitted that he had instructed the father that he could leave as he was not under subpoena. The defense attorney had also told the father that as he was a necessary witness to prove ownership of the vehicle, if he left the courthouse, the Commonwealth would lose the case. The defense attorney later explained he had checked the court's file for the subpoena as the father had told him he did not know why he had to be there.

Under the facts you have presented, you have asked the Committee to opine as to whether it was a violation of the Rules of Professional Conduct when:

1) The defense lawyer asked the victim/mother if he could speak with her before she spoke with the Commonwealth Attorney;

2) The defense lawyer told the victim/mother that she did not have to speak with the Commonwealth Attorney;

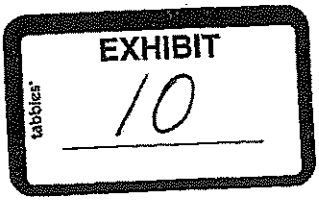
3) The defense lawyer told the victim/father that he had checked the court's file and that as there was no subpoena, the father was free to leave; and

4) The defense lawyer told the victim/parents that if the father left the courthouse, the Commonwealth attorney would lose the case due to the absence of the father's necessary testimony.

These comments by the defense attorney should be analyzed in light of two provisions of the Rules of Professional Conduct. Rule 3.4(h) greatly restricts when an attorney may request that someone decline to provide relevant information to another party. Rule 4.3(b) restricts an attorney's communications with an unrepresented person, such as a witness. Those provisions state as follows:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:



(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 4.3 Dealing With Unrepresented Persons

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Rule 3.4(h) prohibits requesting a person other than a client to withhold information from another party, outside a narrow exception. The Committee notes that the exception only applies to *civil* proceedings and is, therefore, inapplicable in the present scenario. Thus, the communications between this defense attorney and the victim/parents must be reviewed in light of this particular prohibition.

Previous opinions of this Committee on this topic addressed other related provisions less on point than Rule 3.4(h); paragraph (h) was not in effect until January 1, 2000, subsequent to the issuance of those opinions. *See*, LEOs 1426, 1678, 1736. In considering the permissibility of an attorney requesting or encouraging a witness from providing information to the opposing side, Rule 3.4(h) is now the proper authority. The Committee therefore does not base its conclusions regarding this issue on its prior opinions issued before the adoption of Rule 3.4(h). Outside the parameter of the above-mentioned exception, Rule 3.4(h) presents a straightforward directive:

> A lawyer shall not...request a person other than a client to refrain from voluntarily giving relevant information to another party.

In the present scenario, the attorney's first comment to the victim/mother was to speak to him before speaking to the Commonwealth Attorney. That statement alone merely requested preferential treatment; it did not request that she not speak to the Commonwealth Attorney *at all*. Thus, that statement did not constitute an impermissible request under this rule.

The attorney's next statement was to inform the mother that she did not have to speak to the Commonwealth Attorney. That statement may involve the giving of advice, but it does not include a clear request that the mother withhold the information from the Commonwealth Attorney. While it is a possible motivation for that attorney's comments, his actual statement is not in the nature of a request. Therefore, this statement did not constitute an impermissible request under this rule.

The attorney subsequently told the father that as he had not been subpoenaed, he need not appear in court. This statement similarly does not on its face constitute a request to refrain from testifying. Thus, it did not constitute an impermissible request under Rule 3.4(h).

The final statement at issue of this attorney was his assessment that the father's testimony was essential to the Commonwealth's case. Again, this statement, while containing advice, did not contain an

impermissible request under Rule 3.4 (h). While the Committee can speculate as to the motives of the defense attorney in providing the advice he did to these individuals, the Committee sees no statement in those communications that went as far as an actual request to withhold information from the Commonwealth Attorney or at trial. Accordingly, the Committee opines that none of the defense attorney's statements violated Rule 3.4(h).

Whenever an attorney, on behalf of a client, is communicating with an unrepresented person, he must be mindful of the broad prohibition against providing advice found in Rule 4.3(b). Thus, in prior LEOs 1426 and 1589, this Committee applied Rule 4.3(b)'s predecessor, DR 7-103(A)(2), to prohibit a lawyer from advising a witness that he need not speak with opposing counsel. While not presenting a complete bar, Rule 4.3(b) does restrict communications with an unrepresented person in many instances. Communications with an unrepresented person are prohibited in a particular instance when each of the following characteristics is present:

1) The communication must be on behalf of a client;

2) The communication must include advice, other than the advice to secure counsel; and

3) The interests of the person must be or have a reasonable possibility of being in conflict with the interest of the client.

In applying Rule 4.3's prohibition to the communications in the present hypothetical, each prong must be considered. In each conversation with these victim/parents, the attorney's comments were on behalf of the attorney's client, a first prong of the prohibition.

In applying the second prong of this prohibition, the statements must each be reviewed to determine whether the attorney provided advice. The Committee notes that the rule is not triggered solely by *legal* advice. The attorney first spoke to the victim/mother by requesting that she speak with him prior to speaking with the Commonwealth Attorney. Even if such a request was made in a terse fashion, it remains a request, not advice of any sort. Rule 4.3(b) does not prohibit that request. However, the defense attorney did not stop at that point in his communication; rather, he went on to tell the mother that she was not required to speak with the Commonwealth Attorney. The Committee opines that this particular comment meets the second prong; the defense attorney was providing advice to the mother with that statement. The defense attorney then proceeded to inform the victim/father that the attorney had checked the file, there was no subpoena, and thus the father was not required to appear in court. The defense attorney's statement to the father that he was free to leave is a statement of advice and thus meets the second prong. Finally, the defense attorney told both parents that the father's testimony was necessary for the Commonwealth's case so that if he failed to appear, the Commonwealth would lose. Again, the Committee finds advice in that communication as the defense attorney is advising the parents as to the consequences of whether or not the father testified. Three of the four statements of this defense attorney were made on behalf of his client and provided advice.

The third prong of a Rule 4.3(b) violation is that the interests of the unrepresented persons "are or have a reasonable possibility of being in conflict with the interest of the client." Thus, the prohibition is broader than just actual adverse *parties*. Here, all of the defense attorney's statements at issue were made to the victims of the client's crime. Ordinarily, while crime victims are not the clients of the prosecutor, they do nonetheless have interests adverse to those of the defendant. However, in this particular hypothetical the true interest of the two crime victims is less clear cut as they are the parents of the defendant. The mother was the person who originally reported the incident and was the primary user of the vehicle, and the father, as titleholder of the car, may potentially have had civil remedies

against the defendant. In communicating with these individuals, this defense attorney was speaking with people whose interests were or possibly could have been in conflict with those of the defendant. The attorney therefore may not without further clarification provide advice to these individuals. However, given the family relationship between the "victims" and the defendant, it would not have been unreasonable for this attorney to ask these parents about their interest in the matter: did they want to pursue criminal charges regarding their vehicle or did they instead want to protect their son from prosecution? If the lawyer had obtained clear indication of the latter from the parents, he would no longer have had to treat them as persons whose interests "are or have a reasonable possibility of being in conflict with the interest of the client," and could have provided them the advice in question. The defense attorney needs to clarify the interests of these unrepresented persons before giving any advice.

The request to speak with the defense attorney before the Commonwealth Attorney was not in violation of Rule 4.3(b) as it did not provide any advice. However, under the limited facts provided, each of the other statements made by this defense attorney to the victim/parents were impermissible under that rule as the statements were made on behalf of a client and included advice to unrepresented people with interests that have a reasonable possibility of being in conflict with those of the client.

The Committee notes that the materials you provided with your request suggested authorities that do not form the foundation of this Committee's conclusions. Specifically, your materials suggest that the conversations between the defense attorney and these victim/parents qualify as an attorney/client relationship and therefore are the source of a conflict of interest for this defense attorney. The Committee did not find facts in the hypothetical to support the formation of an attorney/client relationship; accordingly, the Committee did not view these conversations from a conflicts perspective but rather from the perspective of conversations with unrepresented persons.

Your materials also raise the issue of whether these conversations constitute the crime of obstruction of justice under Va. Code §18.2-460 on the part of this attorney. Applying the Virginia Code is outside the purview of this Committee; therefore, this Committee declines to opine on that issue.

In resting its conclusions on application of Rules 3.4 and 4.3, this Committee notes that all such conclusions are limited to this hypothetical with an *individual* client. Were a similar scenario to involve an *entity* client, the analysis would need to extend to include the impact of Rule 1.13, which governs representation of organizations.

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

Committee Opinion
June 30, 2004

LEGAL ETHICS OPINION 1846 IS IT ETHICAL FOR A LAWYER TO BECOME A MEMBER OF A LEAD-SHARING ORGANIZATION?

In this hypothetical, an attorney wishes to become a member of a lead-sharing organization, which can be either a for-profit or not-for-profit association, in which members pay a $500 membership fee, and meet once a week. The membership fee is not distributed, in whole or in part, back to any member, but rather pays administrative costs of the organization and goes towards the profit of the association. Part of the oath associated with membership is that each member will maintain a high degree of professionalism in dealing with their leads, including, inter alia, timeliness and quality of services. Membership is often dependent on the number of leads a member passes. During the meetings, members take turns giving a 30-second promotional, stating any of the following: their name, professional title, industry, place of employment, and who would represent a "good lead" for them. On an alternating basis, one member per meeting gets to present a fifteen minute presentation in which they can discuss any aspect of their industry they deem appropriate. The presentation may be educational, a plea for business, etc. The meeting then involves members passing leads to other members. These leads represent potential clients and may have been actively solicited by the lead-passing member whether they know of a particular professional in the lead-receiving member's industry. The lead-receiving member has no control over how the lead was generated, but the lead-receiving member retains full control over their representation of the client, and need not disclose any details of that relationship to any other person or entity. At the end of the meeting, the 30-second promotional process is usually repeated.

QUESTIONS PRESENTED:

1) Is it ethical for a lawyer to become a member of a lead-sharing organization and use that organization to receive leads for legal services from other members of the organization?

2) Can a lawyer have an ownership interest in a lead-sharing organization that is either for-profit or not-for-profit?

3) Under the same set of hypothetical facts, can a lawyer be a member of a lead-sharing organization when the lawyer is also a licensed title insurance agent, or any other business professional, that provides services through an ancillary business, and solicits business only with respect to real estate closings and title insurance sales or referrals directed to his non-legal business?

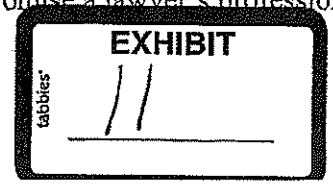
4) Assuming that the lawyer may participate in this lead-sharing organization, are there any restrictions on what may be included in their 15-minute presentation?

APPLICABLE RULES & OPINIONS

The rules applicable to these questions are Rule 7.3(d) and 7.2(c), which qualify that a lawyer may not give anything of value to another for securing employment by a client; Rule 5.4(c), regarding the professional independence of the lawyer; Rule 1.7(a), regarding general conflict's analysis; and Rule 1.6(a), that qualifies client confidentiality. Also pertinent to the Committee's analysis is LEO 1348.

ANALYSIS

The Committee believes that the arrangement as described in this hypothetical does not fall within the parameters of a lawyer referral service as described in LEO 1348. Further, the Committee would like to preface its analysis by stating that this opinion is not intended to discourage the development and use of lawyer referral services. [1] Nevertheless, the Committee believes that the arrangement as described in this hypothetical may create undisclosed conflicts of interest, compromise a lawyer's professional independence, and risk violation of the solicitation rules.



The Committee's analysis starts with Rule 7.3(d) and Rule 7.2(c) and the basic prohibition against a lawyer giving anything of value to a person or organization for securing employment by a client or as a reward for having made a recommendation resulting in employment by a client.[2] This prohibition is designed to prohibit lawyers from compensating another for recommendations or as a reward for influencing a prospective client to employ the lawyer. The Committee considers the "leads" or referrals exchanged among members of this group to be things of value. The Committee finds that this practice of reciprocal referrals amounts to *quid pro quo* payment for services, in violation of Rules 7.3(d) and 7.2(c). The lawyer, in this hypothetical, would be giving something of value to another organizational member in the form of return referrals as a term of membership. When membership in a lead-sharing organization is dependent on the number of leads a member passes, the Committee finds that this type of membership requires the lawyer to exchange something of value for referrals.

The rationale against permitting a lawyer to make such exclusive or *quid pro quo* referrals is that this activity may compromise the professional judgment of the lawyer. Rule 5.4 precludes the lawyer from allowing another person who recommends the lawyer from directing or regulating the lawyer's judgment.[3] A lawyer who is beholden to an organization may feel obligated to accept a case he is not competent to handle, or conversely, a lawyer may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client's needs. Either of these situations may put the client's interests at risk.

The prior analysis deals with a lawyer's acceptance of leads, however, there are additional concerns raised by a lawyer's passing leads. The passing of leads creates potential conflicts of interest for the lawyer pursuant to Rule 1.7(a)(2).[4] This rule specifically cautions the lawyer regarding potential conflicts stemming from the lawyer's personal interests. Participation in a lead-sharing organization potentially creates such a conflict when the lawyer's membership is dependent on the number of leads the member lawyer passes, thereby impacting the lawyer's freedom to choose the most appropriate specialty provider for a client.

Other issues triggered by your hypothetical are the confidentiality provisions that protect the client, even to the level of client identity in some representations. A lawyer may not participate in a plan that requires the lawyer to disclose information relating to the representation of a client except in compliance with Rule 1.6.[5] The mere disclosure of a client's name and specific need in certain circumstances may be enough to violate the Rule without consent of the client.

CONCLUSION:

In conclusion, the answers to your specific questions are as follows:

1) This Committee finds that it is unethical for a lawyer to participate in a lead-sharing organization such as the one described in this hypothetical, for all the afore-mentioned reasons.

2) This Committee finds that there would be nothing unethical in a lawyer owning an interest in a company that is a lead-sharing organization as long as the lawyer is not a member.

3) This Committee finds there to be no ethical violation when a lawyer participates in a lead-sharing organization as a title insurance agent or in some other professional capacity, operating through an ancillary business as long as the lawyer does not violate any of the Rules of Professional Conduct.

4) Since the Committee has found the lawyer's participation in this lead-sharing organization to be unethical, this question is rendered moot.

These same questions have been addressed by the states of Maryland, Massachusetts, Arizona, New Hampshire, Oregon, New York, and Montana, all of which have come to the same conclusion that membership in such an organization compromises the lawyer's independence, potentially creates [6] undisclosed conflicts of interest, and violates solicitation rules.

This opinion is not intended to diminish the importance of the ethical practice of lawyer to lawyer referrals in the professional world and the benefits of *bona fide* lawyer referral programs. Referring clients to other lawyers with expertise in certain areas, or receiving such referrals, goes a long way toward sustaining the legal profession and the provision of legal services in many communities. The prohibitions and cautions of this opinion are predicated and indeed limited to a hypothetical organization which bases membership on a commitment to provide referrals. Nothing in this opinion is intended to preclude a lawyer's involvement or membership in organizations that promote the interplay of lawyers and other professionals for education, community action, or social goals, out of which networking and referrals may develop.

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

Committee Opinion
February 2, 2009

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[1]
Rule 7.3 Direct Contact With Prospective Clients and Recommendations Of Professional Employment
Comment [7] The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

[2]
Rule 7.3 Direct Contact With Prospective Clients and Recommendations Of Professional Employment
(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.

Rule 7.2 Advertising
(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a not-for-profit lawyer referral service or legal services organization; and
(3) pay for a lawyer practice in accordance with Rule 1.17.

[3]
Rule 5.4 Professional Independence Of A Lawyer
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[4]
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:

(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.

[5]

Rule 1.6 Confidentiality of Information

(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 by 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).

[6]

See, Maryland State Bar Association Committee on Ethics Docket 2007-16 and 2005-11; Massachusetts Bar Association Ethics Opinion 08-01; New Hampshire Bar Association Ethics Committee Opinion #2005-06/6; Oregon State Bar Legal Ethics Committee Formal Opinion No. 2005-175; New York State Bar Association Committee on Professional Ethics Opinion 791-2/1/06; and State Bar of Montana Ethics Committee Opinion 960227.

LEGAL ETHICS OPINION 1813 LAWYER ADVERTISING – USE OF THE TERMS "AFFILIATED" OR "ASSOCIATED"

Inquiry:
Can two law firms use the term "affiliated" or "associated" to describe the relationship between the firms on their letterhead?

Opinion:
The communication that one firm is "affiliated" or "associated" with another is not prohibited by the Rules of Professional Conduct, as long as the relationship between the firms is such that the communication is not false or misleading. The opinion also states that if "associated" or "affiliated," the law firms must adhere to the applicable rules regulating disclosure of confidential information and conflicts of interest as if they were a single firm. *See* ABA Formal Op. 84-351. The questions in this opinion relating to lawyer advertising will be addressed by the Standing Committee on Lawyer Advertising and Solicitation ("SCOLAS"). The questions in this opinion relating to confidentiality and conflict will be addressed by the Standing Committee on Legal Ethics ("Ethics Committee"). This is a joint committee opinion.

Advertising

The appropriate and controlling disciplinary rules are Rule 7.1 and 7.5. Rule 7.1 governs communications concerning a lawyer's services. It prohibits the communication if it contains false, fraudulent, misleading or deceptive statements or claims. Rule 7.5 deals with firm names and designations that must be truthful and accurate and not otherwise in violation of Rule 7.1 and 7.2.

RULE 7.1 Communications Concerning A Lawyer's Services

(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; or

(2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

(b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3.

RULE 7.5 Firm Names And Letterheads

(a) A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, website, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1 and 7.2.

(b) A law firm shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations of those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

SCOLAS has observed a trend for more lawyers and firms to practice in multiple states. When lawyers or firms practice together regularly, particularly in the multi-state practice, but not as a single firm, communications describing these firms as "affiliated" or "associated" can, in appropriate circumstances, provide useful information to clients and potential clients in selecting a law firm. An absolute prohibition of such a description is not justified. SCOLAS agrees with the analysis employed by the American Bar Association in ABA Formal Op. 84-351 and finds many of the examples from that opinion instructive. The following serves as guidelines to explain where the use of these terms is permissible.

First and foremost, the use of the terms like "affiliated" or "associated" are permitted under Rule 7.1 because they accurately describe the relationship that exists. This opinion then discusses the application of the provisions on conflict of interest and confidentiality under the Rules of Professional Conduct.

The basic requirement regarding lawyer advertising under Rule 7.1(a) is that communications by a lawyer concerning legal services must not be false or misleading. Thus, designation by a lawyer or law firm of another law firm on a letterhead or in any other communication, including private communication with a client or other person, as "affiliated" or "associated" with the lawyer or law firm must be consistent with the actual relationship. Communication that another law firm is "affiliated" or "associated" is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or if used only with other information necessary to adequately describe the relationship and avoid confusion. An "affiliated" or "associated" law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship.

Webster's Collegiate Dictionary (1997) defines "affiliate", a noun, as "an affiliated person or organization; specifically: a company effectively controlled by another or associated with others under common ownership or control." "Affiliated," an adjective, is defined as "closely associated with another typically in a dependent or subordinate position; closely connected (as in function or office) with another." The word "associate," a noun, is defined as "partner, colleague, friend."

The use of these terms currently in relation to the field of law seems quite clear. The term "associate" is frequently used to refer to an individual lawyer employee of a law firm. In another context, a lawyer or law firm is sometimes said to be "associated" with another lawyer or firm in a specific lawsuit or on a specific legal matter. In those instances, the meaning is clear.
A different type of relationship is implied by the use of the term "affiliate" as a noun; therefore SCOLAS believes that a lawyer or law firm must be mindful of this distinction. The proper use of the noun "affiliate" would only be in circumstances where organizations exist under common ownership and control but maintain separate identities, which is not common in the legal field.

The type of relationship that is implied in designating another firm as "affiliated" or "associated" is analogous to the ongoing relationship that is required by the designation of "Of Counsel" as clarified in LEO 1293. The relationship must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business. The "affiliated" or "associated" firm must be available to the other firm and its clients for consultation and advice.

Availability may be on a limited basis if, for instance, the "affiliated" or "associated" firm performs all of the tax, labor, patent or other specialized work for the firm. Availability may also be limited to performing legal services that have a relationship to or must be performed in another state. More descriptive language may be required to explain the precise relationship between the firms and to avoid misleading clients and others. For example, a firm might be described as "available for association on all tax matters," if that is true and tax work is the only work that its members will perform for clients of the other firm. An out-of-state firm might be described as "associated" or "affiliated" on all matters in the particular state or pertaining to its law. Whether this further description is, itself, false or misleading depends on the actual relationship. Care must be used to describe the relationship precisely and with sufficient information that no material facts are omitted that are necessary to keep the description of the relationship from being misleading.

Conflicts of Interest and Confidentiality

When a law firm lists another as "affiliated" or "associated" with it, potential clients of the listing firm are led to believe that lawyers with the "affiliated" or "associated" firm are available to assist in the representation, at least in matters that the designation may describe. The client ordinarily also expects the lawyers of the "affiliated" or "associated" firm will not simultaneously represent persons whose interests conflict with the client's interests, just as would be true of lawyers who occupy an "Of Counsel" relationship with the firm. See LEO 1467 affirming "Of Counsel" relationship designations between two law firms, provided the requisite close, regular, personal relationship exists between the two firms. Also, Rule 1.10(a) provides:

> (a) 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, or 2.10(e).

Comment [1] to Rule 1.10 points out that what constitutes a firm can depend on the specific facts. Two practitioners that share office space and occasionally consult each other may not ordinarily be recognized as constituting a firm, however, if they present themselves to the public in such a way that they suggest they are a firm, then they should be regarded as a firm under the Rules. Important factors to consider are the terms of any formal agreement between the lawyers and the fact that they may have mutual access to client information.

Generally, lawyers in the same law firm may not simultaneously represent two clients whose interests are adverse even when the representation is in unrelated matters. Rule 1.7 provides that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client,

unless ... the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and ... each client consents after consultation" or if the lawyer's "representation of that client may be materially limited by the lawyer's responsibilities to another client ... unless ... the lawyer reasonably believes the representation will not be adversely affected, and the client consents after consultation." Comment [1] to Rule 1.7 states further that a lawyer's duty of loyalty to the client generally prohibits the lawyer from accepting employment directly adverse to the client without the client's consent.

Rule 1.9 follows the vast majority of cases in creating an irrebuttable presumption that present affiliates will share a former client's confidences where the adverse representations are in substantially related matters. The use of the "Chinese wall" approach to screen confidential information is not accepted, as the basis of the Rules of Professional Conduct is centered principally on the need to protect client confidences even after the lawyer-client relationship ceases.

The Ethics Committee believes that the same rationale applies where law firms hold themselves out as "affiliated" or "associated" with one another, as applies under the Rules of Professional Conduct and the foregoing examples, where conflicts arise within law firms. When a firm elects to affiliate or associate another with it and to communicate that fact to the public and clients, there is no practical distinction between the relationship of affiliates under that arrangement and the relationship of separate offices in a law firm. The Ethics Committee is of the opinion that ordinarily the same analysis would apply to both arrangements to determine when the firms have a disqualifying conflict of interest treating the "affiliated" or "associated" firms for this purpose as a single firm.[1]

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

Committee Opinion
Standing Committee on Lawyer Advertising
and Solicitation
Standing Committee on Legal Ethics
March 16, 2005

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[1] This opinion does not address the issues of liability exposure and insurance associated with firms who hold themselves out as "affiliated" or "associated."

LEGAL ETHICS OPINION 1835 TRUST ACCOUNT – CAN A LAWYER REMIT IRREVOCABLY CREDITED FUNDS WHEN ACCOUNT HOLDS FUNDS FOR ONLY ONE CLIENT?

You have presented a hypothetical situation in which a law firm represents a number of creditors in the collection of delinquent consumer/retail accounts. The firm maintains a separate trust account for each major client, into which they deposit only those funds collected on behalf of that client from account debtors. All of these funds held in each individual account belong only to one client, but are collected from a multitude of different debtors.

Under the facts you have presented you have asked the following questions:

1. When an attorney trust account holds funds for only one client, is it necessary to remit only on irrevocably credited funds in a trust account, or may remittances be made on a more prompt basis without violating the Rules of Professional Conduct?

2. If the answer to the first question is that disbursements on uncollected funds are permissible under those circumstances, is the same conclusion reached if the retail accounts that are being collected by the client have been "securitized", leaving the client with only servicing and perhaps some residual rights under the securitization process?

Rule 1.15 governs the lawyer's duty to safeguard other's property and 1.15 (c) states that " [A] lawyer shall: ... (4) promptly pay or deliver to the client ....the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive."

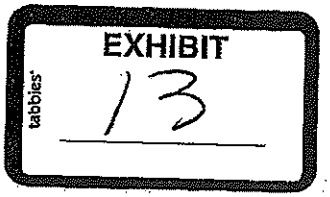
This committee has previously made reference in various LEOs to the term "irrevocably credited" when referring to the appropriate designation of funds available to be ethically disbursed to clients.[1] LEO 1255 clearly states this committee's continuing opinion on the correct timing of disbursement of funds.[2] As the requester correctly states, the term "irrevocably credited" has no legal definition, however, the committee continues to opine that, in spite of past terminology, the funds must be deposited into the lawyer's trust account, credited to the account, and be "cleared" funds that are available for withdrawal and disbursement with no chance of revocation or recall by the financial institution. As the requester has advised, the determination of when funds actually meet that standard is determined by federal banking regulations and is a legal issue outside the purview of this committee.[3]

Additionally, the question distinguishes those funds held in a commingled trust account from those funds held in a trust account exclusively for one client. The answer remains the same.

The answer to the second question is not required since the answer to the first question deemed such disbursements to be improper and the second question seems to involve legal concepts outside the purview of this committee.

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

Committee Opinion
September 7, 2006



[1]
LEOs 183, 1021, 1255, 1256, 1797.

[2]
While the disciplinary rule establishes an affirmative duty to pass funds to a party or the parties entitled to the funds, it implicitly prohibits payment of funds from an escrow account to the party who is *not or not yet* entitled to the funds. (emphasis added) Thus, a strict interpretation would require an attorney not to disburse upon items deposited in his trust account until the depository bank had irrevocably credited them to that account. (See LE Op. 183, LE Op. 753 and LE Op. 813) It is well established that an attorney assumes a strict fiduciary responsibility when he holds money belonging to the client. (See *Pickus v. Virginia State Bar*, 232 Va. 5 (1986)). LEO 1255

[3]
The requester accurately states that the amount of time a bank is permitted to hold funds before making the funds available for withdrawal is governed by a federal statute called the Expedited Funds Availability Act, 12 U.S.C. § 4001, *et seq.* (the "EFA"). The EFA places "upper limits" on the amount of time banks are permitted to hold different categories of payment instruments before making the funds available for withdrawal.

LEGAL ETHICS OPINION 1821

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

You have presented a hypothetical situation in which 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 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:

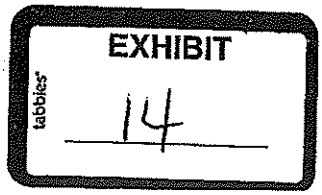
1) Is it a conflict of interest for Attorney C to sue Trust Company if his partner, Attorney B, serves on the board of directors of Trust Company?

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?

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 a 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 of 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 736 (Ark. 1995) (court disqualifies firm of former hospital board member from representing patient against the 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 H.*