VIRGINIA BEACH BAR ASSOCIATION
ETHICS PRESENTATION
WITH
HON. EDWARD HANSON, JR.
FEBRUARY 2015

ANN K. CRENSHAW
Kaufman & Canoles

HYPOTHETICAL #1

LIMITED SCOPE REPRESENTATION—REVIEWING PLEADINGS FOR PRO SE LITIGANTS—SUBSTANTIAL ASSISTANCE AND "GHOSTWRITING"

Law Firm has contracted with a pre-paid legal services plan ("Plan") to review and comment to Plan Members on certain documents submitted to Law Firm by Plan Members. "Plan Members" or "Members" are persons who contract with the Plan for access to services provided by Law Firm. Law Firm is compensated by the Plan for this document review service (and a wide range of other designated services) on a membership per capita basis. In addition to the services designated for payment on a membership per capita basis, the Plan allows a Member to request certain other legal services by the Law Firm, including representation before tribunals, on a discounted hourly fee-for-service basis in which the fee is paid by the Member to the Law Firm.

A Member requests Law Firm to review and provide legal advice on a Warrant In Debt with a Bill of Particulars that the Member has prepared for *pro se* filing in a General District Court and a petition for a change of custody that the Member has prepared for filing *pro se* in a Juvenile and Domestic Relations District Court. A review of these documents may fall under the designated document review service described above for which Law Firm is paid on a capitated basis. Law Firm agrees to review and provide advice on these documents, provided the Member agrees to transmit a letter to the court at the time of the filing of the documents that includes this language:

> At the request of [Member] Law Firm has reviewed the attached pleading or document or a version thereof that [Member] has informed Law Firm that he/she intends to file in this court *pro se*. Law Firm has provided legal advice to [Member] regarding the pleading or document. Member has neither retained Law Firm to represent [Member] before this court in the proceeding initiated by the attached pleading or a version thereof nor has Law Firm agreed to represent [Member] in such proceeding. This letter is merely notice to the court that Law Firm has reviewed and provided legal advice to [Member] with regard to the attached pleading or a version thereof to assist [Member] in accurately presenting his/her claim to the court in the proceeding.

QUESTIONS PRESENTED

1. Has Law Firm fully satisfied its ethical obligations of notice to the court as described in LEOs 1127, 1592, 1761 and 1803 by the actions described above?

2. Does Law Firm have an affirmative obligation to determine if the pleading or a version thereof was filed and the letter transmitted to the court with it?

3. If Law Firm determines that the pleading or a version thereof was filed without the letter, does Law Firm have an obligation to transmit a similar notice to the court?

4. Does Law Firm have an obligation to determine if the pleading was filed in the form reviewed by the Law Firm and to advise the tribunal if any change was made prior to its filing?

5. Does Law Firm have an obligation to determine in advance whether or not the court in which the pleading or document will be filed will consider the notice to be an appearance and Law Firm ruled counsel of record and then so notify the Member prior to filing?

6. Does Law Firm have an obligation to appear as counsel of record in the proceeding even if Member refuses to engage Law Firm or compensate Law Firm on the discounted fee-for-service basis as provided in the Plan?

7. Does Law Firm have an obligation to determine if the opposing party or parties to the proceeding are represented by counsel and, if so, to provide counsel with a similar notice?

8. Would any answer to the questions above change if Member directly compensated Law Firm for the requested review on a fee-for-service basis if the review was not covered under the capitated payment portion of the Plan?

1874

HYPOTHETICAL #2

CONTINUED USE OF FORMER FIRM NAME IN URL AFTER FIRM NAME HAS CHANGED

In this hypothetical, Smith and Jones are lawyers who previously practiced together in the firm of Smith & Jones, P.C. Smith recently withdrew from the PC and formed a new law firm with other lawyers. Jones continues to practice law with the PC. Pursuant to the requirements of Rules 7.1(a), 7.5(a), and 7.5(d), Jones filed the necessary papers to legally change the name of the PC from "Smith & Jones, P.C." to "Jones Law Office, P.C." At all relevant times before and after the withdrawal of Smith, the PC has owned the Internet domain name and URL "smithjones.com." Since Smith's withdrawal, the PC has established a new domain name and URL, "joneslawoffice.com." As the owner of the former domain name, the PC would like to make arrangements to automatically redirect anyone who attempts to access smithjones.com to joneslawoffice.com, or alternatively, to put a notice on the smithjones.com website that Smith & Jones, P.C. has now become the Jones Law Office because of Smith's withdrawal from the firm, providing the date of Smith's withdrawal and a link to joneslawoffice.com.

QUESTION PRESENTED

Is this redirection of Internet traffic permissible under Rule 7.5(d)? If it is not acceptable, is the proposed website notice permissible?

1873

HYPOTHETICAL #3

INADVERTENT RECEIPT OF CONFIDENTIAL INFORMATION DURING THE DISCOVERY PHASE

OF LITIGATION

In this hypothetical, a lawyer represents a client who is suing a law firm for legal malpractice. The underlying suit was dismissed because the defendant law firm failed to file suit within the statute of limitations. Plaintiff's lawyer served a Request for Production of documents, and defendant's lawyer subsequently invited plaintiff's lawyer to his office to inspect the defendant's files. While inspecting files, plaintiff's lawyer encountered a memorandum in which the defense lawyer summarized his interviews with various employees of the defendant. The interviews involved discussions suggesting why the defendant's law firm failed to file the underlying suit within the statute of limitations. Plaintiff's lawyer did not notify defendant's lawyer that he had found this document. When plaintiff's lawyer was taking depositions in the malpractice case, defendant's lawyer discovered that plaintiff's lawyer possessed the memorandum. Defendant's lawyer demanded its return, asserting that the document was privileged and confidential.

QUESTION PRESENTED

What are a lawyer's ethical obligations upon inadvertently receiving privileged information during the pre-trial discovery phase of litigation?

1871

HYPOTHETICAL #4

DOES THE ETHICAL RESTRICTION AGAINST COMMUNICATING WITH REPRESENTED PERSONS APPLY IN MATTERS WHERE A GUARDIAN *AD LITEM* HAS BEEN APPOINTED FOR A MINOR CHILD? ARE GOVERNMENT ATTORNEYS PROHIBITED FROM COMMUNICATING OR DIRECTING INVESTIGATORS TO COMMUNICATE WITH REPRESENTED PERSONS IN SUCH MATTERS?

This opinion answers the following questions:

1) May an attorney representing a parent or guardian in a matter communicate with a minor child for whom the court has appointed a guardian *ad litem* ("GAL") without the GAL's consent or legal authority?

2) May a GAL representing a minor child in a matter communicate with a parent or other person represented by an attorney in the matter without that person's attorney's consent or legal authority?

3) May a government attorney communicate with a represented person, including a child for whom a GAL has been appointed, or request or direct social workers and others performing investigative functions regarding the matter to do so without the GAL's or other attorney's consent or legal authority?

1870

HYPOTHETICAL #5

USE OF RELEASE-DISMISSAL AGREEMENTS BY PROSECUTORS

Is it ethical for a prosecutor to enter into an agreement with a criminal defendant to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the defendant's arrest, prosecution, and/or conviction?

1867

HYPOTHETICAL #6

"OF COUNSEL" RELATIONSHIP

In this hypothetical, a solo practitioner, the sole member of a professional limited liability company (PLC), who specializes in federal and state income taxes and complex business and real estate transactions wishes to formalize his relationship with a law firm that he works with frequently. Currently, the firm associates him as co-counsel in cases that require his expertise, and he associates with the firm or outright refers it cases that involve litigation or commercial real estate transactions.

The parties wish to modify and formalize their arrangement as follows:

1. The firm and the lawyer will jointly market themselves and refer to the lawyer as either "Of Counsel" or "Affiliated Attorney;"

2. In accordance with ABA Formal Opinion No. 330 (1972), the lawyer will be individually designated as "Of Counsel" or "Affiliated Attorney," rather than his PLC, and the lawyer will not enter into this arrangement with more than two firms at any time;

3. When the firm and the lawyer act as co-counsel on a matter, they will provide a joint bill to the client, accompanied by separate invoices of their individual fees and expenses;

4. When the involvement is an outright referral, the referring firm will receive a referral fee, which will comply with Rule 1.5(e); and

5. Other than these specific matters, neither the firm nor the lawyer will communicate or reveal confidences or secrets of any other clients or permit access to any documents or databases that would jeopardize other clients' confidences or secrets.

1866

HYPOTHETICAL #7

OBLIGATIONS OF A LAWYER IN HANDLING SETTLEMENT FUNDS WHEN A THIRD PARTY LIEN OR CLAIM IS ASSERTED

What are a lawyer's ethical responsibilities when, in the course of representing a client, the lawyer receives funds for the client that may be subject to a third party's claim to a portion of the funds held by the lawyer. The applicable rule of conduct is Rule 1.15(b), which requires a lawyer to:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

Does Rule 1.15(b) Require that the Lawyer Have Actual Knowledge of a Third Party's Lien or Claim to the Funds Held by the Lawyer?

Rules 1.15(b)(4) and (5) and Comment 4 appear to require that a lawyer have "actual knowledge" of a third party's interest in funds held by the lawyer. Comment 4 states in pertinent part:

Hypothetical One – Duty to Investigate Potential Lien

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan"). The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law. The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

Do the Rules of Professional Conduct permit the lawyer to disburse the settlement proceeds to the client without investigating whether the Plan is entitled to assert a claim against the client's settlement?

Hypothetical Two – Reasonable Effort to Determine Validity of Claim

Assume now that the Plan administrator has sent to the lawyer a letter asserting subrogation rights. The lawyer has responded in writing requesting documents to determine whether the Plan has a meritorious claim to portions of the settlement funds. Specifically, the lawyer has requested documentation that the Plan is self-funded and documentation that the Plan has a right of reimbursement. The lawyer has requested the documentation in thirty days. After waiting thirty days with no response, the lawyer sends a second request to the health Plan administrator notifying the Plan administrator that if the requested documents are not received in

fifteen days the lawyer will disburse the settlement without preserving any funds to reimburse the Plan.

If the Plan administrator does not respond to the lawyer's second request within fifteen days, do the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

Hypothetical Three – Reasonable Effort to Determine Validity and Amount of Claim

Another question is raised by a different hypothetical. Lawyer represents an 80 year client who fell at a hospital and sustained a hip fracture. She had a Medicare Advantage (MA) Plan which paid most of the medical bills. The lawyer settled with the hospital in mediation. The lawyer sent the Plan's lawyer an email indicating that the lawyer does not believe it has subrogation rights, based on the written health Plan, which is silent on subrogation, and the relevant case law. Lawyer received a written response from the Plan's lawyer asserting subrogation rights and citing to the federal regulations. The letter did not provide the lawyer with the amount of its claim. The letter invited the lawyer to provide cases and the Plan language the lawyer was relying upon to challenge the Plan's right of subrogation. The lawyer promptly emailed a letter back to the Plan, citing cases in support of the lawyer's position and referencing the absence of a subrogation provision in the health Plan. The lawyer specifically requested the amount of the claim and any legal authority the Plan relies upon to counter the cases cited by the lawyer. A month has now passed since the lawyer replied to the health Plan and the lawyer has not received a response back from the Plan's lawyer even though the lawyer has sent at least 3 follow-up emails and left a voicemail message with the Plan's lawyer.

Under these circumstances, has the lawyer exercised reasonable diligence and good faith to determine both the validity and amount of the Plan's claim such that the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

1865

HYPOTHETICAL #8

MAY A CRIMINAL DEFENSE LAWYER AGREE THAT HE WILL NOT GIVE CERTAIN DISCOVERY MATERIALS TO HIS CLIENT DURING THE COURSE OF THE REPRESENTATION, AND THAT HE WILL REMOVE CERTAIN MATERIALS FROM HIS FILE PRIOR TO THE END OF THE REPRESENTATION?

In this hypothetical, a prosecutor wishes to provide broad discovery to defense lawyers in the course of criminal prosecutions, in order to make defendants aware of the weight of the evidence against them, to ensure that the defense lawyer has access to all potentially useful evidence, and to encourage reasonable resolutions of criminal cases in light of that evidence. Because of the nature of much of this evidence, including the identities and locations of cooperating witnesses and graphic photographs of the victims, the prosecutor does not want to permit defendants to physically possess this evidence. Accordingly, the prosecutor asks all

defense lawyers who receive any discovery that is not legally required to sign an agreement that provides:

I, _____, counsel for the above referenced defendant, (or authorized agent of counsel for such defendant) hereby acknowledge receipt of [the discovery materials].

Although the Commonwealth is required to allow me to inspect exculpatory evidence, I agree that, with the exception of those materials described in Rule 3A:11(b)(1), the Commonwealth is not required to provide me with copies of any evidentiary materials or to allow me to copy any evidentiary materials.

In consideration of the Commonwealth providing me with copies of these evidentiary materials other than those described in Rule 3A:11(b)(1), I agree that, until this case is concluded, I will not allow these materials or any copy thereof to leave my possession or control. While I have the right to share and show the contents of these materials to my client, I agree to not give these materials, except the materials described in Rule 3A:11(b)(1), to my client until this case is concluded.

I understand that, although I may review my client's criminal and DMV records in the Commonwealth's Attorney's office, the Commonwealth Attorney is prohibited from giving me these records absent a specific court order.

I understand that [certain discovery materials] are particularly sensitive and that the Commonwealth is loaning me copies thereof for my convenience. In consideration of the Commonwealth providing me with such copies rather than merely allowing me to inspect them, I agree to return them to the Commonwealth's Attorney prior to the conclusion of my representation of the defendant.

QUESTION PRESENTED

Does a criminal defense lawyer violate Rule 1.4 and/or Rule 1.16(e) by agreeing that, to the extent the prosecutor provides any discovery in excess of that required by law, the defense lawyer will share the information with his client but will not give any discovery materials or copies to the client during the representation, and will return any copies of "sensitive" discovery materials to the Commonwealth's Attorney so that his client is not entitled to receive them upon termination of the representation?

1864

HYPOTHETICAL #9

"TIMELY DISCLOSURE" OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to

testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness.

QUESTION PRESENTED

1. Is the "timely disclosure" of exculpatory evidence, as required by Rule 3.8(d), broader than the disclosure mandated by Brady v. Maryland, 373 U.S. 83 (1963), and other case law interpreting the Due Process clause of the Constitution? If so, what constitutes "timely disclosure" for the purpose of Rule 3.8(d)?

2. During plea negotiations, does a prosecutor have a duty to disclose the death or unavailability of a primary witness for the prosecution?

1862

HYPOTHETICAL #10

MAY A CRIMINAL DEFENSE LAWYER DISCLOSE INFORMATION TO A GOVERNMENT LAWYER AFTER A FORMER CLIENT MAKES A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

In this hypothetical, a criminal defense lawyer has been contacted by a government lawyer who is responsible for handling a petition for habeas corpus filed by the defense lawyer's former client. The petition alleges that the defense lawyer provided ineffective assistance of counsel to the former client. Citing Virginia Code §8.01-654(B)(6)[1], the government lawyer requests that the defense lawyer provide information concerning his representation of the former client to the government in order for the government to prepare a response to the petition. The defense lawyer asks whether he can reveal this information in response to the government's request prior to any evidentiary hearing on the former client's petition and without a court order requiring disclosure of the information. The former client has not given informed consent to the disclosure of this information. The defense lawyer indicates that, in his experience, habeas petitions are overwhelmingly dismissed on legal or procedural grounds; in those cases, the court never reaches the substantive issues presented.

QUESTION PRESENTED

May a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel disclose confidential information to government lawyers prior to any hearing on the defendant's claim, without a court order requiring the disclosure or the informed consent of the former client, in order to help to establish that the defense lawyer's representation was competent?

1859

HYPOTHETICAL #11

MAY A LAWYER COMMUNICATE WITH AN INSURANCE ADJUSTER WHEN THE INSURED IS REPRESENTED BY A LAWYER PROVIDED BY THE INSURER?

In this hypothetical, a defendant/insured in a personal injury case is represented by a lawyer provided by his liability insurer. The plaintiff is also represented by a lawyer. The defendant/insured's lawyer has not indicated to the plaintiff's lawyer whether he represents the insurer or only the insured. The plaintiff's lawyer asks whether he may communicate directly with the insurance adjuster, an employee of the insurer, without consent from the defendant/insured's lawyer.

QUESTION PRESENTED

In a pending personal injury case where the defendant is represented by counsel provided by his insurance carrier, may the plaintiff's lawyer contact the insurance carrier without the consent of the defendant/insured's lawyer?

1863

HYPOTHETICAL #12

ACQUIRING AN INTEREST IN LITIGATION — PERSONAL INJURY REPRESENTATION: ASSISTING CLIENT TO OBTAIN LOAN FROM FINANCE COMPANY.

You advise that you have represented personal injury clients for many years and are confronted 90 percent of the time with an innocent victim of an automobile accident who has incurred unanticipated medical bills and injuries which have put him or her out of work. In almost half of these cases, your clients do not have the benefit of health insurance or disability insurance. You are also confronted daily with requests for a loan from your clients in order to obtain proper medical treatment and medication so they may continue to pay their mortgages as well as provide food and other necessities for their families. On numerous occasions, you have referred your clients to banks to obtain loans; however, due to the loss of their jobs as a result of their injuries, they are poor credit risks and it is virtually impossible for them to obtain loans. There being no other alternative, you attempt to obtain liens against your clients' cases to provide them credit which, in most cases, the landlords and hospitals simply reject.

You have asked the Committee to consider the propriety of your persuading a finance company to agree to loan funds ranging from $1,000 to $10,000 to personal injury clients who cannot get bank loans. You have proposed that the company would investigate the case to confirm the liability, damages, and insurance coverage with the client's written consent. If the investigation revealed facts or evidence pertinent to the case which the client's attorney did not already know, said facts would be conveyed to that attorney at no expense. If the loan is approved, the loan would become due upon resolution of the case either by settlement or trial and the borrower would be charged at a lawful interest, similar to that used by major credit card companies. Upon obtaining a favorable settlement or verdict the client would direct the attorney

involved to repay the loan out of the case proceeds. In no way would the attorney guarantee, cosign, or be responsible for the loan, except that he would honor a lien on the case.

1155

HYPOTHETICAL #13

GUARDIAN AD LITEM AS VISITATION SUPERVISOR AND WITNESS IN SAME MATTER

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

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

1729

HYPOTHETICAL #14

SETTLEMENT NEGOTIATIONS IN A CRIMINAL CASE

This hypothetical considers a criminal case in which the Commonwealth's Attorney (CA) and the defense counsel seek to negotiate a plea agreement. Generally, the CA has no legal or ethical obligation to a particular witness in this case; however, the CA wishes to "protect" Witness X by restricting dissemination of the witness' identity and involvement. The CA communicates a settlement offer to the defense counsel, advising the defense counsel of material witnesses in the case, including the name and involvement of Witness X whom the CA wishes to "protect." A condition of the proffered plea agreement requires that the defense counsel neither reveal to the client the identity of Witness X nor the scope of Witness X's involvement in the case. The CA makes it clear to the defense counsel that if the defendant is made aware of Witness X's identity and involvement, then the plea offer will be withdrawn.

QUESTIONS PRESENTED

1. May a CA make a settlement offer to the defense counsel in a criminal case, requiring the defense counsel to refrain from providing relevant information to his or her client as a condition of the settlement offer?

2. May the defense counsel in a criminal case withhold from the client relevant information if withholding such information results in a desirable plea agreement for the client?

1854

HYPOTHETICAL #15

ETHICAL DUTY OF A GUARDIAN AD LITEM TO INVESTIGATE AND REPORT ALLEGATIONS OF CHILD ABUSE AND NEGLECT

In this hypothetical, a husband and wife are involved in a contentious custody and visitation dispute over the couple's 7-year-old daughter. A guardian ad litem ("GAL") is appointed to the case. In meeting with the GAL, the mother asserts that the father has subjected the daughter to abuse and the daughter does not want continued visitation with the father. Further, the mother is asking for any visitation, if ordered, to be supervised because of the father's continued abuse. The GAL then meets with the daughter who asks the GAL not to repeat what she tells her because she is afraid her parents might get angry with her and also says she is afraid of her father and does not want to visit him. When the GAL meets with the father, the father denies all such allegations as being contrived by the mother in an effort to deny him custody and visitation. The mother insists that the GAL proceed with an investigation into the allegations of child abuse in spite of daughter's reluctance and father's denial.

This hypothetical involves the special role of a GAL and the question of whether a GAL may reveal information received from the child, against the child's wishes.

1844

HYPOTHETICAL #16

PROSECUTOR THREATENING TRIAL BY JURY TO DISSUADE A DEFENDANT FROM APPEALING A CRIMINAL CONVICTION TO THE CIRCUIT COURT

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

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

1768

HYPOTHETICAL #17

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 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?

1823

HYPOTHETICAL #18

CAN LAWYER INCLUDE IN A FEE AGREEMENT A PROVISION ALLOWING FOR ALTERNATIVE FEE ARRANGEMENTS SHOULD CLIENT TERMINATE REPRESENTATION MID-CASE WITHOUT CAUSE

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

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

Based on the facts presented, you have asked the committee to opine as to whether the provision in the third sentence of that language is ethically permissible and legally enforceable. First, the committee notes that the issue of legal enforceability would involve an application of contract law to this provision and, as such, is outside the purview of this committee. The committee will limit its response to the question of ethical permissibility. The Committee further

limits its response to situations where the client has terminated the attorney's services without cause. While the committee notes that this request does not specifically ask about the permissibility of the second sentence of the proposed language, the committee nonetheless will address that provision as well.

1812

LEO 1874: LIMITED SCOPE REPRESENTATION—REVIEWING PLEADINGS FOR PRO SE LITIGANTS—SUBSTANTIAL ASSISTANCE AND "GHOSTWRITING"

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A Member requests Law Firm to review and provide legal advice on a Warrant In Debt with a Bill of Particulars that the Member has prepared for *pro se* filing in a General District Court and a petition for a change of custody that the Member has prepared for filing *pro se* in a Juvenile and Domestic Relations District Court. A review of these documents may fall under the designated document review service described above for which Law Firm is paid on a capitated basis. Law Firm agrees to review and provide advice on these documents, provided the Member agrees to transmit a letter to the court at the time of the filing of the documents that includes this language:

> At the request of [Member] Law Firm has reviewed the attached pleading or document or a version thereof that [Member] has informed Law Firm that he/she intends to file in this court *pro se*. Law Firm has provided legal advice to [Member] regarding the pleading or document. Member has neither retained Law Firm to represent [Member] before this court in the proceeding initiated by the attached pleading or a version thereof nor has Law Firm agreed to represent [Member] in such proceeding. This letter is merely notice to the court that Law Firm has reviewed and provided legal advice to [Member] with regard to the attached pleading or a version thereof to assist [Member] in accurately presenting his/her claim to the court in the proceeding.

Questions Presented

You have asked the Committee to address these questions:

1. Has Law Firm fully satisfied its ethical obligations of notice to the court as described in LEOs 1127, 1592, 1761 and 1803 by the actions described above?

For the reasons set out in this opinion, absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the *pro se* litigant. To the extent that LEOs 1127, 1592, 1761 and 1803 are inconsistent with this opinion, they are overruled.

[1] Law Firm's compensation is based on the number of members residing in the Law Firm's state, not on the number of times a Member calls Law Firm for the designated service.

2. Does Law Firm have an affirmative obligation to determine if the pleading or a version thereof was filed and the letter transmitted to the court with it?

No.

3. If Law Firm determines that the pleading or a version thereof was filed without the letter, does Law Firm have an obligation to transmit a similar notice to the court?

No.

4. Does Law Firm have an obligation to determine if the pleading was filed in the form reviewed by the Law Firm and to advise the tribunal if any change was made prior to its filing?

No.

5. Does Law Firm have an obligation to determine in advance whether or not the court in which the pleading or document will be filed will consider the notice to be an appearance and Law Firm ruled counsel of record and then so notify the Member prior to filing?

The question of whether the assistance provided to a *pro se* litigant constitutes an "appearance" is a question of law beyond the purview of this Committee. A lawyer owes a duty of competence to a client, even if the representation has been limited by agreement. This would include determining a particular court's rules, decisions or policies in regard to "ghostwriting" or providing undisclosed assistance to *pro se* litigants and advising a *pro se* litigant of any applicable law.

6. Does Law Firm have an obligation to appear as counsel of record in the proceeding even if Member refuses to engage Law Firm or compensate Law Firm on the discounted fee-for-service basis as provided in the Plan?

Probably not, but this depends on whether the court has deemed the lawyer to have entered an appearance on behalf of the Member. See discussion below.

7. Does Law Firm have an obligation to determine if the opposing party or parties to the proceeding are represented by counsel and, if so, to provide counsel with a similar notice?

No. Because the representation in your hypothetical will have terminated, no further ethical obligations are owed.

8. Would any answer to the questions above change if Member directly compensated Law Firm for the requested review on a fee-for-service basis if the review was not covered under the capitated payment portion of the Plan?

No.

DISCUSSION

Question 1 assumes that Law Firm has an obligation to notify the court if it has provided assistance to a member that seeks a document review of a pleading that *the member has prepared* and intends to file *pro se*. This assumption appears to be based on the Committee's prior

guidance in Legal Ethics Opinions 1127 and 1592. The Committee will review and analyze each.

Legal Ethics Opinion 1127

In LEO 1127, the Committee was asked whether it is ethically permissible for a lawyer to advise and assist a *pro se* litigant in pending employment litigation by providing legal advice, legal research, recommendations for courses of action to follow in discovery and redrafting of documents prepared by the litigant himself. The Committee opined that there was nothing in the Code of Professional Responsibility that prohibited a lawyer from rendering such assistance to a *pro se* litigant. However, in LEO 1127, the Committee pointed to former DR 7-105(A), which requires that a lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding. Rule 3.4(d) of the current Rules of Professional Conduct adopts the identical language. Rule 3.4(d) is violated when a lawyer *knowingly* disregards "a standing rule or a ruling of a tribunal made in the course of a proceeding." (Emphasis added). LEO 1127 explains that the lawyer cannot disregard a court's rule or requirement that the identity of the drafter of a pleading be disclosed. While this may be a correct statement of an ethics rule, the rules of procedure in state and federal court generally do not require the identification of a lawyer who prepares a pleading for a *pro se* litigant.[2] The rules of procedure require that a pleading be signed by a lawyer admitted to practice before that court, or by the unrepresented party.[3] In your hypothetical, the *pro se* litigant signs and files the pleading, not the lawyer. In effect, LEO 1127 advises lawyers to avoid violating a non-existent rule of procedure. Absent a standing rule of procedure that requires disclosure of the *drafter* of a pleading, who does not sign that pleading nor enter an appearance as counsel of record, neither Rule 3.4(d) nor former DR 7-105(A) comes into play.

By way of example, United States District Court Judge Henry Morgan held:

> The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding *pro se* is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit's mandate that the pleadings of *pro se* parties be held to a less stringent standard than pleadings drafted by lawyers, *see, e.g., White v. White*, 886 F.2d 721, 725 (4th Cir. 1989) (citations omitted), (2) effectively nullifies the certification requirement of Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), and (3) circumvents the withdrawal of appearance requirements of Rule 83.1(G) of the Local Rules for the United States District Court for the Eastern District of Virginia ("Rule 83.1(G)").

Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997).

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[2] 11 U.S.C. §110 requires that non-lawyer bankruptcy petition preparers sign and make certifications on the petition prepared for a *pro se* debtor.

[3] Va. S. Ct. R. 1:4(c): "Counsel or an unrepresented party who files a pleading shall sign it and state his address."

In this case, there was no rule of procedure requiring that the identity of the drafting attorney be disclosed, as discussed and assumed in LEO 1127. Further, it is more likely that the lawyers chastised by Judge Morgan in *Laremont-Lopez* reasonably believed that they were acting in good faith and did not *knowingly* disregard any standing rules in the federal court. Without a rule of procedure prohibiting their conduct, how could they know? The attorneys in this case maintained that they were retained by the plaintiffs for the discrete limited purpose of drafting the complaints. They argued that at the time the complaints were filed their representation of the plaintiffs had terminated, and thus, it was appropriate for the plaintiffs to sign the pleadings as unrepresented litigants. In short, their position is that they did not sign the pleadings because they no longer represented the plaintiffs. *Laremont-Lopez, supra,* 968 F. Supp. at 1078. It is hard to question this argument. Indeed, Judge Morgan allowed that the attorneys' reasoning was "not at odds with the plain language of Rule 11" but nevertheless held that they had circumvented the rule by not having signed the pleadings. But this still begs the question of whether the lawyers in this case had *knowingly* disregarded any standing rule that required disclosure of their identity as the drafter of pleadings filed by the *pro se* litigants. As to the lawyers in *Laremont-Lopez*, the court found that they had not:

> The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding *pro se* is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, *there is no specific rule which deals with such ghost-writing.* Therefore, the Court FINDS that there is insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted.

Laremont-Lopez, supra, 968 F. Supp. at 1079-80. (Emphasis added). Judge Morgan found that the lawyer's conduct was *inconsistent* with the rules but did not find that they had *violated* any of those rules. However, lawyers are now on notice, because of *Laremont-Lopez* and other federal court cases, that "ghostwriting" may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court.

Legal Ethics Opinion 1592

In this opinion, the Committee addressed a situation in which an attorney was retained by an uninsured motorist insurance carrier to defend the carrier in an action in which the uninsured motorist ("Defendant Motorist") has appeared *pro se*. Although Attorney A had not entered an appearance on behalf of the Defendant Motorist, the Defendant Motorist consulted with Attorney A, and Attorney A assisted Defendant Motorist and/or gave Defendant Motorist advice in regard to responding to discovery requests propounded by the Plaintiff in the case. The Committee opined:

> Under DR 7-105(A), and indications from the courts that *attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the pro se client*, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-

> 102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4). The committee cautions that Attorney A may wish to obtain Defendant Motorist's assurance that he will disclose A's assistance to the court and adverse counsel. See LEO #1127; Association of the Bar of the City of New York Opinion 1987-2 (3/23/87), ABA/BNA Law. Man. on Prof. Conduct, 901:6404.

(Emphasis added). LEO 1592 does not cite any specific cases for the italicized language nor was this conclusion reached in any of the "ghostwriting" opinions rendered in the federal courts in the Eastern District of Virginia. Moreover, controlling authority in state court says just the opposite. *Walker v. American Ass'n of Prof. Eye Care*, 268 Va. 117, 597 S.E.2d 47, (2004) (lawyer who assisted *pro se* plaintiff with preparation of motion for judgment signed only by plaintiff as a *pro se* litigant and filed pleading with court together with filing fee did not appear on plaintiff's behalf as counsel of record). Without any supporting authority, LEO 1592 reaches the conclusion that a lawyer who assists a *pro se* litigant by preparing a pleading or providing her with legal assistance is deemed by the court to have entered an "appearance" as counsel of record on behalf of that person. That conclusion is incorrect, but at least one circuit court has deemed the litigant "represented by counsel" when a lawyer prepared for a client a motion for judgment for the client to sign and proceed *pro se*. *See Walker, supra.*

LEO 1592 concluded that the lawyer violated DR 7-105(A) following the approach taken in LEO 1127. The opinion also cites former DR 7-102(A)(3), which states: "In his representation of a client a lawyer shall not . . .conceal or knowingly fail to disclose that which he is required by law to reveal." Application of this rule under these circumstances raises some questions. First, as the attorney argued in *Laremont-Lopez*, the lawyer-client relationship was concluded when the "ghostwriting" attorney completed the drafting of the pleading. So when the *pro se* litigant filed his pleading with the court, he was not represented by counsel. DR 7-102(A)(3) on its face speaks to misconduct by a lawyer in the course of representing a client. The rule seems inapplicable to the circumstances presented in the opinion. Second, was the lawyer "required by law" to disclose that he or she assisted the *pro se* litigant? As stated in the discussion of LEO 1127, there was no rule violated when the attorney failed to disclose his identity as the drafter of the pleading. Judge Morgan was frustrated by the fact that the attorney had circumvented some other rules, but made no finding that the rules had been violated by the "ghostwriting" attorney and acknowledged that there was no rule forbidding "ghostwritten" pleadings. Finally, LEO 1592 cites DR 1-102(A)(4) as having been violated when the lawyer failed to disclose his "substantial assistance" to an unrepresented defendant motorist. This rule is nearly identical to current Rule 8.4 (b): "A lawyer shall not. . .engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law." Application of this rule assumes, of course, that the "ghostwriting" lawyer is being dishonest or deceitful for not having disclosed his assistance to the *pro se* litigant, even though no standing court rule or law required such disclosure.

Other Bar Opinions

State and local ethics committees have reached different conclusions on whether disclosure of a lawyer's assistance to a *pro se* litigant is required by the Rules of Professional Conduct. Some have opined that no disclosure is required.[4] Others, in contrast, have expressed the view that the identity of the lawyer providing assistance must be disclosed on the theory that failure to do so would both be misleading to the court and adversary counsel, and would allow the lawyer to evade responsibility for frivolous litigation under applicable court rules.[5] The ABA's Standing Committee on Ethics and Professional Responsibility took the "middle ground" approach adopted in LEOs 1127 and 1592 stating that disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified.[6] The ABA has since taken the position, as have other jurisdictions, that the fact of assistance need not be disclosed, a position this Committee has likewise chosen to adopt, overruling LEOs 1127 and 1592 to the extent they are inconsistent with this opinion. *See* ABA Formal Op. 07-446 (May 5, 2007). The Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a *pro se* litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct. This Committee does not believe that the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the

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[4] New York County Law Ass'n Ethics Op. 742 (2010)(disclosure of lawyer's assistance not required unless necessary by law, rule of court or court order); New Jersey Ethics Op. 713 (2008)(disclosure not required unless lawyer behind the scene controlling litigation); ABA Formal Op. 446-07(2007)(litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure). Some state bar opinions have struck a "middle ground" stating that the lawyer's assistance should be disclosed if not the lawyer's identity. Arizona Eth. Op. 06-03 (July 2006) (Limited Scope Representation; Confidentiality; Coaching; Ghost Writing); Illinois State Bar Ass'n Op. 849 (Dec, 9,1983) (Limiting Scope of Representation); Maine State Bar Eth. Op. 89 (Aug. 31, 1988); Los Angeles County Bar Ass'n Eth. Op. 502 (Nov. 4, 1999) (Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for In Pro Per Litigant); Los Angeles County Bar Ass'n Eth. Op.483 (Mar. 20, 1995) (Limited Representation of In Pro Per Litigants). *But see* Alaska Eth. Op. 93-1 (March 19, 1993) (Preparation of a Client's Legal Pleadings in a Civil Action Without Filing an Entry of Appearance) (lawyer's assistance must be disclosed unless lawyer merely helped client fill out forms designed for pro se litigants).

[5] Colorado Bar Ass'n Eth. Op. 101 (Jan. 17, 1998) (Unbundled Legal Services) (Addendum added Dec. 16, 2006, noting that Colorado Rules of Professional Conduct amended to state that a lawyer providing limited representation to *pro se* party involved in court proceeding must provide lawyer's name, address, telephone number and registration number in pleadings); Connecticut Inf. Eth. Op 98-5 (Jan. 30, 1998) (Duties to the Court Owed by a Lawyer Assisting a *Pro Se* Litigant); Delaware State Bar Ass'n Committee on Prof'l Eth. Op. 1994-2 (May 6, 1994); Kentucky Bar Ass'n Eth. Op. E-343 (Jan. 1991); New York State Bar Ass'n Committee on Prof'l Eth. Op. 613 (Sept. 24, 1990).

[6] ABA Inf. Op. 1414 (June 6, 1978) (Conduct of Lawyer Who Assists Litigant Appearing *Pro Se*), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495, at 1414 (ABA 1986). *See also* Florida Bar Ass'n Eth. Op.79-7 (Reconsideration) (Feb. 15, 2000); Iowa Supreme Court Bd. Of Prof'l Eth. & Conduct Op. 96-31 (June 5, 1997) (Ghost Writing Pleadings); Massachusetts Bar Ass'n Eth. Op. 98-1 (May 29, 1998); New Hampshire Bar Association (May 12, 1999) (Unbundled Services: Assisting the *Pro Se* Litigant); Utah 74 (1981); Association of the Bar of the City of New York, Committee on Prof'l & Jud. Eth. Formal Op. 1987-2 (Mar. 23, 1987).

part of the lawyer or client, and therefore there would be no violation of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).

Analysis

LEOs 1127 and 1592 did not address the right of the client and the lawyer to agree to limit the scope of the engagement as explicitly authorized by Rule 1.2(b): "[a] lawyer may limit the objectives of the representation if the client consents after consultation." Perhaps that is because there was no counterpart in the Code of Professional Responsibility for current Rule 1.2(b).[7] With Virginia's adoption of most of the ABA Model Rules in 2000, a discussion of Rule 1.2(b) and "unbundling" legal services became a hot topic not only in Virginia but across the country as well.

We agree with the reasoning in ABA Formal Op. 07-446 that:

> The fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.

Some case decisions and ethics opinions have required disclosure of the lawyer's assistance on the basis that *pro se* litigants are treated more leniently and held to less stringent standards than litigants that are represented by counsel. This Committee does not share this concern and believes that a *pro se* litigant that receives undisclosed assistance by a lawyer will not receive any unwarranted special treatment. In many instances, if the lawyer has been competent and effective with his undisclosed assistance it will be obvious to the court and other parties that a lawyer has been involved. If the undisclosed lawyer has not been competent or effective, the *pro se* litigant will have no advantage. We see no reason to conclude, as some decisions and opinions have, that undisclosed assistance will give the *pro se* litigant an "unfair advantage." As noted by one commentator:

> Practically speaking ... ghostwriting is obvious from the face of the legal papers, a fact that prompts objections to ghostwriting in the first place.... Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motion. A court that refuses to dismiss or enter

[7] DR 7-101(B)(1) stated that a lawyer may, "with the express or implied authority of his client, exercise his professional judgment to limit or vary his client objectives and waive or fail to assert and waive or fail to assert a right or position of his client." This provision seems quite different from current Rule 1.2(c) as the former rule only authorizes the lawyer to waive or fail to assert positions of the client in mid-stream after the representation has begun. In contrast, and more appropriate to the subject of "ghostwriting" a pleading for a *pro se* litigant, Rule 1.2(c) and Comment [6] focus on an agreement reached between lawyer and client at the outset of the representation. Most of the newer ethics opinions on "ghostwriting" rely heavily on Rule 1.2 and the right to limit the scope of the representation.

> summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error in the same manner as if it refuses to deny such dispositive motions against an attorney-drafted complaint.

Jona Goldschmidt, *In Defense of Ghostwriting,* 29 FORDHAM URB. L.J. 1145, 1157-58 (2002). Critics are concerned that a litigant appearing *pro se* will receive an unfair benefit from a tribunal as a result of undisclosed legal assistance. That concern, in the Committee's view, is outweighed by the court having a properly pleaded motion, complaint, answer, or other document to consider and the broader access to justice that limited assistance may promote. The Committee believes, therefore, that the nature or extent of such assistance is immaterial and need not be disclosed.

Nor does the Committee believe that providing undisclosed assistance to a *pro se* litigant violates Rule 3.3. Similarly, this Committee believes that non-disclosure of the lawyer's assistance is not an act of dishonesty, fraud, deceit or misrepresentation that is prohibited by Rule 8.4(c) nor is the lawyer assisting the *pro se* litigant in conduct that is illegal or fraudulent in contravention of Rule 1.2(c). Finally, we believe that assistance to a *pro se* litigant is not a material fact that must be disclosed to another party under Rule 4.1. The Committee believes that a lawyer who has been asked by a *pro se* litigant for limited assistance on some discrete tasks and who undertakes them in a manner that comports with Rule 1.2(b) and all other applicable rules of conduct should not be subject to discipline for having done so.

This opinion assumes that the lawyer is practicing in a jurisdiction where no law or tribunal rule requires disclosure of such participation, prohibits litigants from employing lawyers (e.g., small claims courts), or otherwise regulates such undisclosed advice or drafting. If there is such a regulation, the boundaries of the lawyer's obligation are beyond the scope of this opinion.

Your inquiries in Questions 1-4 have been answered on the basis that the Rules of Professional Conduct do not obligate the lawyer to ensure that the court is informed that a *pro se* litigant has received assistance from the lawyer. The Committee adds that it is not practical to require that lawyers *ensure* that a court is informed of his assistance to a *pro se* litigant after the lawyer-client relationship has ended and the lawyer has no control over what pleadings are actually filed with the court.

In regard to your Question Number 5, whether the court in which the pleading is filed will regard Law Firm as having entered an appearance on behalf of Member is a question of law beyond the Committee's purview.[8] However, as part of the lawyer's duty of competence under Rule 1.1, the lawyer should exercise diligence and research the particular court's view of "ghostwriting" pleadings for a *pro se* litigant. As one court stated:

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[8] *See Walker v. American Ass'n of Prof. Eye Care,* 268 Va. 117, 597 S.E.2d 47 (2004)(lawyer who assisted *pro se* litigant with motion for judgment signed only by plaintiff as *pro se* party and filed pleading with clerk's office with filing fee did not enter an appearance on behalf of plaintiff).

> Nevertheless, the Court considers it improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as *pro se.*[9]

Thus, regardless of whether the preparation of a pleading for a *pro se* litigant constitutes an "appearance," the lawyer must make a reasonable effort to determine if the particular court will permit the preparation of a lawsuit on behalf of a *pro se* litigant that is not signed by the lawyer preparing the document, as some courts do not allow such a practice on procedural, ethical and substantive grounds.[10] As some courts have complained that "ghostwriting" evades the lawyer's obligations under Rule 11 of the Federal Rules of Civil Procedure, Law Firm must also be mindful of its obligation to not assist a Member in the preparation of a pleading that is frivolous. See Rule 3.1.[11]

This Committee observes that, in contrast to the federal court precedents, a majority of state courts and state bar ethics opinions point to a positive trend toward acceptance of undisclosed assistance to *pro se* litigants. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 286-88 (2010)(reporting that of 24 states that have addressed this issue, 13 permit ghostwriting, and of those 13 states, 10 permit undisclosed ghostwriting while 3 require a statement on the pleading to

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[9] *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F.Supp. 1075, 1077 (E.D. Va. 1997). *See also Sejas v. MortgageIT, Inc.*, 1:11cv469 (JCC) (E.D. Va. 2011):

> [T]his Court admonishes Plaintiff that 'the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding *pro se* is inconsistent with the procedural, ethical and substantive rules of this Court.' *Laremont-Lopez v. Southeast Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1080-81 (E.D. Va. 1997). The Court further warns any attorney providing ghostwriting assistance that he or she is behaving unethically. *Davis v. Back*, No. 3:09cv557, 2010 WL 1779982, at *13 (E.D. Va. April 29, 2010) (Ellis, J.).

[10] *Barnett v. LeMaster*, 12 F. App'x 774, 778–79 (10th Cir. 2001) (stating that where the party entered a *pro se* appearance as well as filed and signed his appeal *pro se*, the attorney who drafted the brief knowingly committed a gross misrepresentation to this court); *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001) (determining that attorney ghostwriting of *pro se* litigant's appellate brief constitute[d] a misrepresentation to this court by litigant and attorney); *Laremont-Lopez v. SoutheasternTidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (finding that attorney ghostwriting of *pro se* litigants' complaints constitute[d] a misrepresentation to the Court); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("Clearly, the party's representation to the Court that he is pro se is not true when the pleadings are being prepared by the lawyer. A lawyer should not silently acquiesce to such representation."); *In re Mungo*, 305 B.R. 762, 769 (Bankr. D.S.C. 2003) ("[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."); *see also Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) ("Having a litigant appear to be *pro se* when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand . . . is far below the level of candor which must be met by members of the bar."), *aff'd*, 85 F.3d 489 (10th Cir. 1995); *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (finding that attorney ghostwriting of *pro se* litigant's court documents violates the attorney's duty of honesty and candor to the court).

[11] "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

indicate it was prepared with the assistance of counsel; 10 states expressly forbid ghostwriting). Even some federal courts have "softened" their position toward ghostwriting. The Second Circuit, in an attorney disciplinary case styled *In re Fengling Liu*, Doc. No. 09-90006-am, 2011 U.S. App. LEXIS 23326 (Nov. 22, 2011), while publicly reprimanding an immigration lawyer for other misconduct, found that her ghostwritten pleadings were not improper:

> We also conclude that there is no evidence suggesting that Liu knew, or should have known, that she was withholding material information from Court or that she otherwise acted in bad faith. The petitions for review not at issue were fairly simple and unlikely to cause any confusion or prejudice. Additionally, there is no indication that Liu sought, or was aware that she might obtain, any unfair advantage through her ghostwriting. Finally, Liu's motive in preparing the petitions—to preserve the petitioner's right of review by satisfying the thirty-day jurisdictional deadline—demonstrated concern for clients rather than a desire to mislead this Court or opposing parties. Under these circumstances, we conclude that Liu's ghostwriting did not constitute misconduct and therefore does not warrant the imposition of discipline.

In response to Question Number 6, this is a question of law beyond the Committee's purview. Assuming the court deems Law Firm to have appeared as counsel for Member, Law Firm would have a duty to perform the tasks required of counsel of record to protect Member's interests in the pending case unless and until Law Firm is granted leave to withdraw, even if Member refuses to pay for Law Firm's services.

As to your Question Number 7, to perform only the limited and discrete task of preparing a pleading for a person to file *pro se*, the Committee does not believe the Rules of Professional Conduct require that notice of that limited representation be given to an opposing party or their counsel.

As to your Question Number 8, the Committee believes that the manner in which Law Firm is compensated does not affect how the questions in this opinion are addressed.

Conclusion

To sum up, the Committee does not believe that nondisclosure of the fact of legal assistance is dishonest so as to violate Rules 3.3 or 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a *pro se* litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no representation to the tribunal regarding the nature or scope of the representation, and indeed, may be obliged under Rule 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client that can be attributed to the lawyer that the documents were prepared without legal assistance, the lawyer has not made any false statements of fact to the court prohibited by Rule 3.3, nor has been dishonest within the meaning of Rule 8.4(c). The non-disclosure of the lawyer's behind-the-scenes assistance is not material to the court's determination of the merits of the *pro se* litigant's position or case and therefore the court is not misled by the non-disclosure.

While this Committee opines that undisclosed assistance to a *pro se* litigant is permissible under the Rules of Professional Conduct, if a lawyer agrees to prepare a lawsuit for a *pro se*

litigant, he or she must do so competently and may not prepare one that is frivolous. *See* Rules 1.1 and 3.1. Preparing a lawsuit for a person to file *pro se* requires that the lawyer make a sufficient inquiry of the facts and research of applicable law to ensure that the pleading contains claims that are not frivolous. Further, depending on the complexity of the case and the sophistication of the limited scope client, the preparation of a lawsuit for the limited scope client may not be an appropriate means by which to accomplish the client's objectives. *See* Rule 1.2. When limited scope representation is considered for a *pro se* litigant, the lawyer must meet the "consultation" requirement of Rule 1.2 by explaining to the client the advantages and disadvantages of limited scope versus full representation.

This Committee concludes that the Rules of Professional Conduct do not prohibit undisclosed assistance to a *pro se* litigant. However, lawyers who undertake to prepare or assist in the preparation of a pleading for a *pro se* litigant may advise the *pro se* litigant to insert a statement to the effect that "this document was prepared with the assistance of a licensed and active member of the Virginia State Bar." Because the fact of the lawyer's assistance may be confidential under Rule 1.6(a), the lawyer should not include such a statement if the client objects to revealing that fact.

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

Committee Opinion
July 28, 2014

LEGAL ETHICS OPINION 1873

CONTINUED USE OF FORMER FIRM NAME IN URL AFTER FIRM NAME HAS CHANGED

In this hypothetical, Smith and Jones are lawyers who previously practiced together in the firm of Smith & Jones, P.C. Smith recently withdrew from the PC and formed a new law firm with other lawyers. Jones continues to practice law with the PC. Pursuant to the requirements of Rules 7.1(a), 7.5(a), and 7.5(d), Jones filed the necessary papers to legally change the name of the PC from "Smith & Jones, P.C." to "Jones Law Office, P.C." At all relevant times before and after the withdrawal of Smith, the PC has owned the Internet domain name and URL "smithjones.com." Since Smith's withdrawal, the PC has established a new domain name and URL, "joneslawoffice.com." As the owner of the former domain name, the PC would like to make arrangements to automatically redirect anyone who attempts to access smithjones.com to joneslawoffice.com, or alternatively, to put a notice on the smithjones.com website that Smith & Jones, P.C. has now become the Jones Law Office because of Smith's withdrawal from the firm, providing the date of Smith's withdrawal and a link to joneslawoffice.com.

QUESTION PRESENTED

Is this redirection of Internet traffic permissible under Rule 7.5(d)? If it is not acceptable, is the proposed website notice permissible?

APPLICABLE RULES AND OPINIONS

The relevant Rules of Professional Conduct are Rule 7.1(a)[1] and Rule 7.5(a) & (d)[2].

ANALYSIS

There is no doubt that the firm name cannot include the departed partner's name once that partner has joined another firm[3]. However, that does not necessarily imply that the domain name and URL must be immediately abandoned once the partner departs the firm. Even after the firm name changes, the domain name/URL will have value to former clients who are searching for the firm using the name they are familiar with, or others who for whatever reason are not aware of the firm name change. Because search results may be in part based on an individual's search history and other historical factors, a search for "Smith" or "Jones" may lead to

[1] Rule 7.1 Communications Concerning A Lawyer's Services
(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact when omission of such fact makes the statement materially false or misleading as a whole.

[2] Rule 7.5 Firm Names And Letterheads
(a) A lawyer shall not use a name, firm name, letterhead, or other professional designation that violates Rule 7.1. 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.
***
(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

[3] Rule 7.5(d); LEO 1704.

"smithjones.com" even after Smith's departure and the resulting name change[4]. For these reasons, it would not serve the interests of the public, including former/potential clients, or the partners in the former firm who collectively built goodwill and created value associated with that firm name, to require that all use of the domain name and URL be discontinued immediately once the partners separate. On the other hand, a domain name/URL containing the firm name is a "professional designation" for purposes of Rule 7.5(a) and accordingly may not contain a false or misleading statement.

While placing a notice on the smithjones.com website is an appropriate way of explaining why smithjones.com is no longer the Smith & Jones website, the content of the notice may not be misleading. The notice proposed in this hypothetical, which would say that Smith & Jones, P.C., "has now become" the Jones Law Office, is misleading without the additional information that Smith also continues to practice law, because it implies that Smith may no longer be available to represent clients and that clients of Smith & Jones will be represented by Jones.

The other proposed solution, redirecting smithandjones.com to joneslawoffice.com, also requires some additional information in order to avoid being misleading. Automatically redirecting traffic to joneslawoffice.com without providing some explanation, either as part of the redirecting process or on the joneslawoffice.com website, is misleading for the same reason that the proposed notice above is misleading: it implies that Smith may not be available for continued representation and that Jones may be the only remaining option for representation. Even if Jones has the legal right to control the smithjones.com domain name/URL, redirecting traffic to joneslawoffice.com is appropriate only if joneslawoffice.com, or a page visible during the process of redirecting, explains the change from Smith & Jones to Jones Law Office and that Smith continues to practice law in a different firm. Clients are entitled to their choice of lawyer, and Jones may not impede that choice by refusing to provide information about the change in the name and composition of the firm. See LEO 1506.

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

Committee Opinion
March 20, 2014

[4] *See, e.g.*, "Google Accounts & Web History," available at http://www.google.com/goodtoknow/data-on-google/web-history/ (discussing Google's use of personal information to customize search results).

LEGAL ETHICS OPINION 1871 INADVERTENT RECEIPT OF CONFIDENTIAL INFORMATION DURING THE DISCOVERY PHASE OF LITIGATION

In this hypothetical, a lawyer represents a client who is suing a law firm for legal malpractice. The underlying suit was dismissed because the defendant law firm failed to file suit within the statute of limitations. Plaintiff's lawyer served a Request for Production of documents, and defendant's lawyer subsequently invited plaintiff's lawyer to his office to inspect the defendant's files. While inspecting files, plaintiff's lawyer encountered a memorandum in which the defense lawyer summarized his interviews with various employees of the defendant. The interviews involved discussions suggesting why the defendant's law firm failed to file the underlying suit within the statute of limitations. Plaintiff's lawyer did not notify defendant's lawyer that he had found this document.

When plaintiff's lawyer was taking depositions in the malpractice case, defendant's lawyer discovered that plaintiff's lawyer possessed the memorandum. Defendant's lawyer demanded its return, asserting that the document was privileged and confidential.

QUESTION PRESENTED

What are a lawyer's ethical obligations upon inadvertently receiving privileged information during the pre-trial discovery phase of litigation?

APPLICABLE RULES AND OPINIONS

The applicable Rule of Professional Conduct is Rule 3.4(d)[1], along with Supreme Court of Virginia Rule 4:1(b)(6)(ii). The relevant Legal Ethics Opinion is 1702.

ANALYSIS

LEO 1702 concludes that when a lawyer inadvertently receives confidential information, he is ethically obliged to return that information to the lawyer from whom the information was received, or to otherwise follow the sending lawyer's instructions, even if those instructions are to destroy the document. A lawyer's duty to represent his client diligently, according to LEO 1702, does not allow the lawyer who inadvertently received the privileged information to use the information to his client's benefit.

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[1] Rule 3.4 Fairness to Opposing Party and Counsel
A lawyer shall not:
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(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

Since LEO 1702 was adopted in 1997, the Supreme Court of Virginia adopted Rule 4:1(b)(6)(ii)[2], which states that the recipient of inadvertently disclosed privileged information must either destroy or sequester the inadvertently disclosed material until the court resolves the privilege claim. Rule 3.4(d) requires a lawyer to obey standing rules of a tribunal. Thus, to the extent that the confidential information is received in the discovery phase of litigation, a lawyer: (1) may review the information if necessary to determine his obligations under the discovery rule; (2) must notify the party producing the documents that the lawyer is in possession of them; (3) is not ethically obligated to return the information to opposing counsel; and (4) may sequester the material pending a judicial determination of whether and to what extent the receiving lawyer may use the information.[3] Outside of the discovery process, the requirements of LEO 1702 fully apply.

In this hypothetical, plaintiff's lawyer should have promptly notified defendant's lawyer of his possession of the memo, in accord with LEO 1702, and then either sequestered or destroyed his copy of the memo pending a judicial determination of whether he could use the document.

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

Committee Opinion
July 24, 2013

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[2] Rule 4:1(b)(6)(ii): If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected the producing party may notify any other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing party must preserve the information until the claim of privilege or other protection is resolved. *See also* Fed. R. Civ. P. 26(b)(5)(B).

[3] In *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113 (2010), the Supreme Court of Virginia established a five-factor test for courts to apply in order to determine whether the attorney-client privilege was waived by an inadvertent disclosure of privileged information.

LEO 1870

DOES THE ETHICAL RESTRICTION AGAINST COMMUNICATING WITH REPRESENTED PERSONS APPLY IN MATTERS WHERE A GUARDIAN *AD LITEM* HAS BEEN APPOINTED FOR A MINOR CHILD? ARE GOVERNMENT ATTORNEYS PROHIBITED FROM COMMUNICATING OR DIRECTING INVESTIGATORS TO COMMUNICATE WITH REPRESENTED PERSONS IN SUCH MATTERS?

This opinion answers the following questions:

1) May an attorney representing a parent or guardian in a matter communicate with a minor child for whom the court has appointed a guardian *ad litem* ("GAL") without the GAL's consent or legal authority?

2) May a GAL representing a minor child in a matter communicate with a parent or other person represented by an attorney in the matter without that person's attorney's consent or legal authority?

3) May a government attorney communicate with a represented person, including a child for whom a GAL has been appointed, or request or direct social workers and others performing investigative functions regarding the matter to do so without the GAL's or other attorney's consent or legal authority?

1. Communications by a Parent's/Guardian's Lawyer with Child Represented by GAL

Virginia Rule of Professional Conduct 4.2 provides:

> **RULE 4.2 Communication With Persons Represented By Counsel**
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Thus, a parent's or guardian's attorney would be restricted from communicating with the child if the guardian *ad litem* were deemed the child's lawyer. In Virginia, as elsewhere[1], guardians *ad litem* represent the child *as an attorney*.

> The GAL acts **as an attorney** and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify. The GAL should rely primarily on opening statements, presentation of evidence and closing arguments to present the salient information the GAL feels the court needs to make its decisions. ***

[1] In some jurisdictions, guardians *ad litem* are called "law guardians."

> The role and responsibility of the GAL is to represent, **as an attorney**, the child's best interests before the court. The GAL is a full and active participant in the proceedings who independently investigates, assesses and advocates for the child's best interests. Decision-making power resides with the court.[2]

(Emphasis added).

Courts and ethics authorities in other jurisdictions have held that Rule 4.2 prohibits a parent's lawyer from communicating with the client's child once a GAL has been appointed, unless the guardian consents or a court authorizes such contact.

In *Disciplinary Proceedings Against Kinast*, 530 N.W.2d 387, 192 Wis.2d 36 (1995), an attorney representing a wife in a custody dispute had his client bring the two minor children to his office, where he had a five-minute conversation with them in the presence of their mother, during which he purportedly asked them about school and commented that they would probably like to live with both of their parents. The attorney, Kinast, accomplished this without the consent or knowledge of the children's court-appointed guardian *ad litem*, despite Kinast's knowledge that an attorney had been appointed to serve as such for the children.

In determining that Rule 4.2[3] had been violated by Kinast, the Supreme Court of Wisconsin cleared up the bar's "confusion" surrounding this subject, opining that

> [T]he rule prohibiting a party's lawyer from communicating with another party without the consent of that party's attorney is intended to protect litigants from being intimidated, confused or otherwise imposed upon by counsel for an adverse party. **Children involved in divorce litigation are no less entitled to the protection that rule affords than are adult parties to the litigation.** Any confusion that may exist among lawyers in Rock County or elsewhere in the state regarding the application of SCR 20:4.2 to children represented by a guardian ad litem is hereby resolved.[4]

(Emphasis added).

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[2] "Standards to Govern the Performance of Guardians *Ad Litem* for Children" (2003) Judicial Counsel of Virginia. *See*, also, Rule 8:6 of the Rules of the Supreme Court of Virginia, wherein it is stated: "When appointed for a child, the guardian ad litem shall vigorously **represent the child**, fully protecting the child's interest and welfare. " [Emphasis added.]

[3] Wisconsin's version of the Rule, SCR 20:4.2, then applied to contact with a "party" versus a "person," but the Court overrode a referee's finding of no ethical violation, finding that children were indeed parties in custody litigation.

[4] 530 N.W.2d at 390, 391.

In *Auclair v. Auclair*, 127 Md.App. 1, 730 A.2d. 1260 (1999), the Court of Special Appeals of Maryland cited *Kinast* with approval but left open the opportunity for mature minor children represented by a guardian *ad litem* to seek out advice from a private attorney.[5] The *Auclair* case involved minor children who sought to intervene as parties in their parents' divorce case. The appellate court would have allowed the minor children "access to legal counsel with respect to matters not within the purview of the guardian's realm of responsibility." 730 A.2d. 1275.

State bar ethics committees have reached the same conclusion as courts that Rule 4.2 prohibits a parent's attorney from communicating with a minor child regarding the custody dispute, absent the consent of the child's guardian *ad litem* or a court order authorizing such contact.

The State Bar Association of North Dakota Ethics Committee was confronted with the question of whether it was ethically permissible for a client to bring a child to the attorney's office so that the child's affidavit might be obtained in connection with a proceeding for modification of custody. In Opinion No. 09-06, the Committee opined:

> Rule 4.2 of the Rules of Professional Conduct addresses communication with persons who are represented by counsel. The Rule provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." When a guardian ad litem has been appointed to represent a child's best interests, it is the opinion of the Ethics Committee that Rule 4.2 would prohibit communication with the child without the consent of the guardian ad litem or court order. A guardian ad litem appointed under N.D.C.C. § 14-09-06.4 must be a licensed attorney and functions independently in the same manner as an attorney for a party to the action. N.D.R.Ct. 8.7

New York State Bar Association Committee on Professional Ethics Opinion #656 (38-93) answered in the negative the question, "May the attorney for a parent in a child custody proceeding question a child for whom the court has appointed a law guardian without the law guardian's consent?" Quoting from an earlier opinion, the ethics committee opined:

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[5] "Consequently, although we hold that Rule 4.2 of the Maryland Rules of Professional Conduct applies to communications with minors for whom guardians have been appointed, under the unique facts of this case, we are not persuaded that private counsel should be prohibited from consulting with the children because of the ages, intelligence, and maturity of appellants and the real or perceived inability of the guardian ad litem to be the investigative arm of the court and reporter of the children's preferences to the court, while simultaneously acting as advocate for appellants." 730 A.2d. 1276.

> Where a person is represented by counsel, there is an absolute proscription which serves to bar any and all communications relating to the matter for which that person has retained counsel .... If a person is represented by counsel, absent such counsel's consent, the ethics of our profession require that no lawyer other than his own communicate with him on the subject of the representation and all forms of communications are proscribed.

The New York opinion also addresses the question of whether parental consent to have the parent's attorney speak to a child plays a role in whether the attorney may speak to the represented child: "In light of the purposes of the rule, **the presence or absence of consent by the child's parent for the parent's attorney to speak with the child is not pertinent**; the rule requires that the consent of the child's law guardian be obtained before counsel for either parent may communicate with the child." (Emphasis added). In other words, the parent's consent does not override the need for consent of the GAL representing the child.

The Utah State Bar Ethics Advisory Opinion Committee, in Opinion No. 07-02 (2007), stated that "except in the narrow circumstance described below involving a 'mature' minor, we conclude that another attorney may not communicate with the represented minor about the subject of the representation without either obtaining (a) prior consent of the GAL or (b) permission from the court. In the context of custody, dependency, abuse or neglect cases, the 'best interest' of the represented person, as well as the wishes of the represented person, would both be within the 'subject of the representation' by the GAL."

As was recognized by the *Auclair* court, *supra.,* the Utah opinion acknowledges that there will be times when "mature" minors may wish to obtain a second opinion or their own independent representation from an otherwise uninvolved attorney. Thus,

> [w]hen a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent. Minors also have statutory and constitutional rights that are independent of the rights of their parents and guardians.

Utah State Bar Ethics Adv. Op 07-02, *supra* at para. 24. Consistent with a minor child's right to consult counsel found in *Auclair* and the Utah ethics opinion, this Committee opines that Rule 4.2 does not restrict another lawyer from communicating with a minor child who is seeking a

"second opinion" or "replacement counsel" without the guardian's knowledge or consent. Those exceptions are contained in Comment [3][6] to Rule 4.2. Obviously, no such lawyer should *also* be a parent's lawyer, due to the inherent conflict of interest and the inability of such lawyer to be disinterested.

2. Communication by a GAL with a Parent or Guardian Represented by an Attorney

Just as the attorney representing a parent or guardian may not communicate with a child represented by a GAL without the GAL's consent or legal authority, neither may the GAL communicate regarding the matter with a represented parent or guardian of the child without that parent's or guardian's attorney's consent or authorization conferred by a court order or other legal authority. As is clear in the foregoing analysis, such a restriction upon the GAL is necessary under Rule 4.2 because the duties and functions of the GAL are those of an attorney representing a client except when it would be inconsistent with the "Standards to Govern the Performance of Guardians *Ad Litem* for Children," referred to above. Further, this Committee has previously opined that a lawyer serving as a GAL for a child is also subject to the applicable Rules of Professional Conduct governing lawyers unless those ethical obligations are inconsistent with the lawyer's obligations or duties as a GAL. *See, e.g.* Virginia Legal Ethics Op. 1725 (1999) (lawyer serving as GAL for child subject to conflict of interest rules). Virginia Legal Ethics Op. 1729 (1999) (When the duties do not conflict, the lawyer serving as GAL should follow the course of action required by the Code of Professional Responsibility).

This Committee acknowledges that a GAL appointed to represent a child is authorized and charged to communicate with or interview all parties to the dispute including the child's parents and any other persons having relevant information.[7] The court's order appointing the lawyer as GAL states, in pertinent part:

> The guardian *ad litem* appointed to represent the child shall have access to the following persons and documents without further order of the Court:
>
> A. The child.
>
> B. Parties to the proceeding.
>
> C. Court Appointed Special Advocate (CASA), local department of social services and court services unit worker in the case, and school personnel involved with the child.

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[6] Comment [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

[7] Form DC 5-14, *Order for Appointment of Guardian ad Litem; GAL Standards, supra* at S-4.

Form DC 514, *Order for Appointment of Guardian Ad Litem*, District Court Manual, Forms Volume (December 2007). This does not mean, however, that a lawyer appointed as GAL pursuant to this order may disregard the lawyer's ethical obligations under the Rules of Professional Conduct in the discharge of his or her duties as GAL. To the contrary, the *Standards to Govern the Performance of Guardians ad Litem for Children* make clear that "[a]ttorneys who serve as GALs are subject to the Rules of Professional Conduct promulgated by the Virginia State Bar as they would be in any other case, except when the special duties of a GAL conflict with such rules."[8] This Committee's review of applicable law reveals no authority that a lawyer serving as GAL is "authorized by law" to have *ex parte* contacts or interviews with represented parents in the context of the GAL's investigation, solely by virtue of his or her appointment as GAL. Rule 4.2 recognizes that in particular and exceptional circumstances a court order may *specifically authorize* the GAL to communicate directly with a parent that is represented by counsel.[9] However, this Committee believes that a lawyer serving as GAL is not, solely by virtue of his or her appointment, "authorized by law" to have direct *ex parte* interviews or communications with parents or other persons the GAL knows to be represented by counsel in that matter.

3. Attorney-Directed Communications by Social Workers and Others Performing Investigative Functions with Represented Persons in Matters Where a GAL Has Been Appointed

In Virginia Legal Ethics Opinion 1755, the Committee noted that Rule 8.4(a)[10] prohibits an attorney from violating Rule 4.2 through the acts of others. Consistent with this precept, ABA Formal Legal Ethics Op. 95-396 (1995), in its analysis of an attorney's use of investigators, states as follows:

> Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do. [Footnote omitted.] Whether in a civil or a criminal matter, if the investigator

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[8] *Standards to Govern the Performance of Guardians ad Litem for Children* at S-2.

[9] Comment [4] to Rule 4.2 states, in relevant part, " a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so."

[10] **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

> acts as the lawyer's "alter-ego," the lawyer is ethically responsible for the investigator's conduct.

Pursuant to law, social workers, police officers, and other government employees routinely investigate allegations of crimes against and mistreatment of minor children.[11] The matters are often investigated before a parent or guardian has counsel, and before a prosecutor on behalf of the Commonwealth or a local government attorney representing a social services department knows of the matter. Under those circumstances, it is clear that Rule 4.2 is not applicable because no lawyer is yet involved and as such cannot be directing the communications. Additionally, these public employees are both authorized by law and specifically trained to conduct these investigations.

Subject to the exceptions discussed in this opinion, once a prosecutor or local government attorney assumes responsibility to represent the Commonwealth or other governmental entity in a matter, he or she may not:

a) communicate regarding the civil matter with a represented person, including a child for whom a GAL has been appointed in that matter; and/or

b) use a social worker, police officer, or other investigator as an intermediary to circumvent Rule 4.2 in order to communicate with a represented person, including a child in regard to the civil matter in which a GAL has been appointed. However, investigative contacts regarding possible violations of criminal law made at the request of a prosecutor or lawyer representing a social services agency *are* "authorized by law," and therefore ethically permissible when judicial precedent has approved such contacts prior to the attachment of one's right to counsel. *See*, Comment [5] to Rule 4.2.[12] Under this "law enforcement" exception to Rule 4.2, a government lawyer may not only instruct or direct a non-lawyer investigator or agent to communicate, but may also give advice regarding the content of the communication with a represented person. Unless a GAL has been appointed to represent a child in a criminal proceeding, criminal prosecutors may communicate directly and indirectly with the child/victim, even if such communication involves subject matter related to a pending or contemplated civil proceeding involving the child.

Attorneys who represent government agencies in pending or contemplated civil proceedings may communicate directly or indirectly with a minor child prior to the time that a court has appointed a GAL to represent a child in the matter. Once the government attorney

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[11] *See, e.g.,* Va. Code §63.2-1518.

[12] Comment [5] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

becomes aware that a GAL has been appointed to represent the child in the particular civil proceeding, the government attorney who, in representing the agency, is representing another party in that proceeding must obtain the consent of the GAL before communicating with the child, either directly or indirectly through the agency of a social worker or investigator.[13] If the government attorney cannot obtain the appointed GAL's consent to have such contacts with the child, and no court order authorizes such contact, that attorney should move the court to authorize such contact with the child.

CONCLUSION

When a lawyer has been appointed to serve as a GAL for a child in a civil proceeding, Rule 4.2 applies and prohibits counsel for another party in that proceeding from communicating *ex parte* with the child about the subject matter of that proceeding, unless the GAL consents to such communication or unless the law or court order authorizes that lawyer to communicate *ex parte* with the represented child. Similarly, the lawyer serving as GAL for the child is bound by Rule 4.2 and may not have *ex parte* communications with another represented party in that proceeding, unless counsel for that party consents, or unless the GAL is authorized by law or court order to have such communication.

Rule 4.2 also applies to lawyer-directed communications with a represented person by non-lawyers. However, a government lawyer does not violate Rule 4.2 merely by requesting a social worker or investigator to communicate with a represented person, including a child for whom a GAL has been appointed, if the law entitles or charges the investigator or social worker to have such communication. While the government lawyer may request that the social worker or investigator contact and interview a represented person, and advise generally what information the lawyer seeks, the lawyer may not "mastermind" or "script" the interview or dictate the content of the communication. Such conduct would be viewed as circumventing Rule 4.2 through the actions of another. Rule 8.4(a).

Committee Opinion
October 4, 2013

[13] As stated previously, Rule 4.2 does not prohibit a non-lawyer social worker or investigator from independently contacting the represented child; however the Rule does come into play when the government lawyer directs or controls the content of the communication through an intermediary such as a social worker or investigator.

LEGAL ETHICS OPINION 1867 USE OF RELEASE-DISMISSAL AGREEMENTS BY PROSECUTORS

QUESTION PRESENTED

Is it ethical for a prosecutor to enter into an agreement with a criminal defendant to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the defendant's arrest, prosecution, and/or conviction?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 3.4(i)[1] and 3.8(a)[2].

ANALYSIS

A release-dismissal agreement is an agreement between a prosecutor and a criminal defendant to dismiss criminal charges in return for a release of some entity from civil liability. The United States Supreme Court considered the permissibility of such agreements in *Town of Newton v. Rumery*, 480 U.S. 286 (1987). The case involved a prosecutor entering into an agreement with a criminal defendant to dismiss criminal charges if the defendant signed a release for any claim he might have for false arrest. In a 5-4 plurality opinion, the Supreme Court found the agreement in *Town of Newton* valid without directly addressing the application of the Rules of Professional Conduct to the prosecutor's actions in offering or entering into such an agreement.

Rumery involved a defendant (Rumery) who was charged with tampering with a witness based on a phone call that he made to a sexual assault victim whose assailant was a friend of Rumery's. Rumery's defense lawyer threatened to sue the town and its officials, so the prosecutor entered into a release-dismissal agreement with Rumery whereby the criminal charge would be dismissed in exchange for his release of any civil claims against the town. Several months later, Rumery sued the town, and the town asserted the release-dismissal agreement as an affirmative defense. The United States Supreme Court upheld the dismissal of the civil suit, holding that a per se ban on release-dismissal agreements is not necessary, although such agreements may be abused in particular cases.

First, the Court rejected Rumery's argument that release-dismissal agreements are inherently coercive because the choice between facing criminal charges and waiving civil claims is an unfair choice. The Court held that this scenario is not more coercive than many other choices that are routinely presented to criminal defendants, including the choice to waive a number of constitutional rights in exchange for a guilty plea.

The Court also rejected Rumery's arguments that release-dismissal agreements violate public policy by encouraging prosecutors to trump up charges in response to a civil rights claim and by creating incentives for individuals injured by police misconduct not to pursue claims for that misconduct. The Court dismissed the latter argument on the basis that no individual ever has

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[1] Rule 3.4 Fairness to Opposing Party And Counsel
A lawyer shall not:
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(i) present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

[2] Rule 3.8 Additional Responsibilities Of A Prosecutor
A lawyer engaged in a prosecutorial function shall:
(a) not file or maintain a charge that the prosecutor knows is not supported by probable cause.

a duty to pursue a claim for police misconduct, so the diffuse public interest in having police misconduct investigated and remedied should not be elevated above an individual's choice not to pursue a civil remedy. The Court also held that to invalidate all release-dismissal agreements based on the possible behavior of prosecutors neglects other public interests that may justify such an agreement and improperly assumes prosecutorial misconduct. Prosecutors have enormous discretion in charging decisions and courts are not competent to analyze the exercise of that discretion in the absence of other evidence of misconduct. The release-dismissal agreement in this case was particularly justified by the fact that the prosecution of Rumery would have required a traumatized sexual assault victim, who was already reluctant to testify in the sexual assault prosecution, to testify in a second, derivative prosecution.

Likewise, the potential for ethical misconduct by a prosecutor does not require a per se ban on any behavior that might lead to that misconduct. Any time a lawyer is engaged in a prosecutorial function, she may not file or maintain a charge that she knows is not supported by probable cause. Accordingly, if a prosecutor knows that a charge is not (or is no longer) supported by probable cause, she is obligated to dismiss the charge and may not condition that dismissal on a release of civil liability. To maintain the charge pending agreement to or negotiation of a release-dismissal agreement would itself violate Rule 3.8(a). Within the parameters of Rule 3.8(a), however, a prosecutor has enormous discretion to make charging decisions, including the type and timing of charges, as well as the discretion to make plea bargains or to dismiss pending charges. In the absence of other factors indicating misconduct, the prosecutor's exercise of discretion to dismiss pending charges pursuant to a release-dismissal agreement does not indicate that Rule 3.8(a) was violated.

A prosecutor, like any other lawyer, is subject to Rule 3.4(i), which forbids presenting criminal charges *solely* to obtain an advantage in a civil matter. If charges were initiated or trumped up in order to coerce a defendant into accepting a release-dismissal agreement, then the prosecutor's conduct would violate this Rule. However, as in the case of accord and satisfaction agreements or agreements to pay restitution, if there is probable cause to maintain the charges and there is no other evidence that the charges were brought/maintained solely to coerce settlement of the civil matter, this Rule would not be violated by the negotiation of a release-dismissal agreement.

Although the Committee concludes that there is no need for a per se ban on release-dismissal agreements, any such agreement will be subject to intense legal and ethical scrutiny, as the *Rumery* court made clear. Thus, a prosecutor should not require release-dismissal agreements as a matter of course in dismissing criminal charges. To comply with Rule 3.4(i), a prosecutor should not seek a release of civil claims that are unrelated to the criminal charges at issue.

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

Committee Opinion
November 15, 2012

LEGAL ETHICS OPINION 1866 "OF COUNSEL" RELATIONSHIP

In this hypothetical, a solo practitioner, the sole member of a professional limited liability company (PLC), who specializes in federal and state income taxes and complex business and real estate transactions wishes to formalize his relationship with a law firm that he works with frequently. Currently, the firm associates him as co-counsel in cases that require his expertise, and he associates with the firm or outright refers it cases that involve litigation or commercial real estate transactions.

The parties wish to modify and formalize their arrangement as follows:

1. The firm and the lawyer will jointly market themselves and refer to the lawyer as either "Of Counsel" or "Affiliated Attorney;"
2. In accordance with ABA Formal Opinion No. 330 (1972), the lawyer will be individually designated as "Of Counsel" or "Affiliated Attorney," rather than his PLC, and the lawyer will not enter into this arrangement with more than two firms at any time;
3. When the firm and the lawyer act as co-counsel on a matter, they will provide a joint bill to the client, accompanied by separate invoices of their individual fees and expenses;
4. When the involvement is an outright referral, the referring firm will receive a referral fee, which will comply with Rule 1.5(e); and
5. Other than these specific matters, neither the firm nor the lawyer will communicate or reveal confidences or secrets of any other clients or permit access to any documents or databases that would jeopardize other clients' confidences or secrets.

QUESTIONS PRESENTED

1. Other than matters on which the firms are co-counsel, are any other clients of the firm deemed to be clients of the solo practitioner for conflicts of interest and other purposes?

2. Other than matters on which the firms are co-counsel, is the referring firm responsible for ethical breaches that may arise in the receiving firm's representation, and are clients that are referred from the solo practitioner to the firm considered to be clients of the solo practitioner for conflicts of interest and other purposes?

3. If the fee arrangement complies with Rule 1.5(e) (including client disclosure), is joint marketing referring to the solo practitioner as either "Of Counsel" or "Affiliated Attorney" permissible?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.5(e)[1], Rule 1.10(a)[2], Rule 5.1(c)[3] and Rule 7.5(d).[4] Relevant legal ethics opinions are 1293, 1554, 1712, 1735 and 1850, along with ABA Formal Opinions 330 (1972) (withdrawn 1990) and 90-357 (1990).

[1] Rule 1.5 Fees

ANALYSIS

In order to answer your specific inquiry, the Committee must first review and refine the principles applicable to the "of counsel" relationship. The Committee has consistently defined the "of counsel" relationship as a close, continuing, and personal relationship between a lawyer and a firm that is not the relationship of a partner, associate, or outside consultant. The relationship must involve some element of the practice of law, and cannot be limited to a pure business affiliation; the "of counsel" may not simply be a forwarder or receiver of legal business to or from the firm.

The "of counsel" designation is commonly used to describe several different types of relationships, including a retired partner of the firm who continues to be associated with the firm and available for consultations either with members of the firm or with clients directly, a part-time practitioner who has a different status than other members of the firm, such as a retired judge or former government official, or regular employees of the firm who occupy a status between partner and associate (typically lawyers who are too experienced to be considered associates, but who are not going to become partners for lifestyle or practice reasons). All of these uses of the term are permissible, since each arrangement involves a close, continuing relationship with the firm.

The term is also commonly used in a way that is not permissible: to describe the relationship between a lawyer or firm and a national law firm that solicits cases throughout the country and then makes geographically-based referrals to its designated lawyer or firm in each

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(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the client is advised of and consents to the participation of all the lawyers involved;
(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
(3) the total fee is reasonable; and
(4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

[2] Rule 1.10 Imputed Disqualification: General Rule
(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).
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Comment [1] explains, "Whether two or more lawyers constitute a firm as defined in the Terminology section can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other."

[3] Rule 5.1 Responsibilities of Partners and Supervisory Lawyers
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(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[4] Rule 7.5 Firm Names and Letterheads
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(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

state. In this case, it is not appropriate for the lawyer to be designated as "of counsel" to the national law firm, because the relationship consists only of forwarding/receiving business and there is otherwise no relationship between the lawyer and the national firm.

Accordingly, a lawyer who is "of counsel" to a firm is associated with that firm for the purposes of the Rules of Professional Conduct, including the fee-sharing and conflict of interest rules. Rule 1.5(e) addressing fee-sharing between lawyers not in the same firm does not apply to the firm's relationship with a lawyer serving as "of counsel." When a lawyer becomes of counsel to a firm, all conflicts are imputed from the lawyer to the firm and vice versa. This imputation cannot be avoided by screening the lawyer from other cases in the firm or otherwise limiting the information available to him; Rule 1.10(a) provides for an absolute imputation of conflicts between lawyers who are currently associated in a firm.

Applying these general principles to the hypothetical situation presented, it is clear that the lawyer and firm may *either* have an occasional relationship in which conflicts are not imputed beyond specific cases and fee-sharing must be done in accordance with Rule 1.5(e), or the lawyer may become "of counsel" to the firm, which would impute all conflicts of the firm to the lawyer. Once the lawyer and the firm begin to hold the lawyer out as "of counsel" to the firm, conflicts will be imputed between the two regardless of whether the lawyer actually has any information about the clients of the firm or vice versa. However, the lawyer also cannot avoid the imputation of conflicts merely by refusing the title "of counsel;" if the lawyer holds himself out to potential clients as being closely associated with the firm, or if he in fact is closely and regularly associated with the firm, then conflicts will be imputed to him regardless of the title he uses. Likewise, Rule 7.5(d) permits the lawyer and firm to describe their relationship as an "of counsel" relationship if that is the case.

In order to avoid association with the firm for conflicts purposes, the firm may limit the lawyer's relationship to that of an independent contractor, sharing fees with the firm pursuant to Rule 1.5(e), and working on specific matters in which the firm's clients require his specialized skills with each client's consent to the lawyer's participation at the outset of the representation. This relationship must remain limited though, in order to avoid imputation of conflicts. If the relationship between the lawyer and the firm is limited in this way, then the lawyer and firm would apply the analysis of LEOs 1712, 1735, and 1850, governing lawyer temps and other forms of "outsourcing" of legal services, in determining whether and to what extent the lawyer would be considered to be associated with the firm for conflicts purposes. For example, if the lawyer's access to information is restricted solely to those matters on which he or she is working on a temporary or occasional basis, the lawyer would not be considered associated with the firm for conflicts purposes.

Although conflicts would be imputed between the firm and any lawyer who is "of counsel" to that firm, the lawyer and firm would not generally be liable for one another's ethical misconduct on cases that they were not handling together. Rule 5.1(c) limits a lawyer's responsibility for another lawyer's ethical misconduct to circumstances where the lawyer knew about the other lawyer's conduct and either ordered or ratified it, or was in a supervisory position over the other lawyer and failed to take remedial actions. When the "of counsel" lawyer and the firm are not working together on cases, neither the lawyer nor the firm is supervising or directing the other's behavior, and generally will not be aware of one another's actions. There would therefore be no basis for holding the lawyer or the firm responsible for one another's actions when they are not associated on a particular case.

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

LEGAL ETHICS OPINION 1865

OBLIGATIONS OF A LAWYER IN HANDLING SETTLEMENT FUNDS WHEN A THIRD PARTY LIEN OR CLAIM IS ASSERTED

In this opinion the Committee revisits a lawyer's ethical responsibilities when, in the course of representing a client, the lawyer receives funds for the client that may be subject to a third party's claim to a portion of the funds held by the lawyer. The applicable rule of conduct is Rule 1.15(b), which requires a lawyer to:

> (4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and
>
> (5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

Comment 4 to Rule 1.15 provides helpful guidance on the lawyer's ethical duty when faced with third party claims asserted against the funds that the lawyer is handling:

> Paragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession. However, a lawyer may be in possession of property or funds claimed both by the lawyer's client and a third person; for example, a previous lawyer of the client claiming a lien on the client's recovery or a person claiming that the property deposited with the lawyer was taken or withheld unlawfully from that person. Additionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorneys' lien, a valid assignment executed by the client, or a lien on the subject property created by a recorded deed of trust) the lawyer has a duty to secure the funds claimed by the third party. Under the above described circumstances, paragraphs (b)(4) and (b)(5) require the lawyer either to deliver the funds or property to the third party or, if a dispute to the third party's claim exists, to safeguard the contested property or funds until the dispute is resolved. If the client has a non-frivolous dispute with the third party's claim, then the lawyer cannot release those funds without the agreement of all parties involved or a court determination of who is entitled to receive them, such as an interpleader action. A lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien.

When Is a Third Party "Entitled" to Funds Held By the Lawyer?

Rule 1.15 (b) requires that a third party be "entitled" to funds in the lawyer's possession. Although Rule 1.15 (b) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a

client.[1] As Comment 4 states, a third party must have a valid claim to an interest in the specific funds held by the lawyer. In the absence of a valid third party interest in the funds, the lawyer owes no duty to a creditor of the client and must act in the best interests of the client.[2] The mere assertion of an unsecured claim by a creditor does not create an "interest" in the funds held by the lawyer.[3] Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien.

All ethics opinions and legal authorities agree that an "interest" in the funds held by the lawyer include a statutory lien, a judgment lien and a court order or judgment affecting the funds.[4] Likewise, agreements, assignments, lien protection letters or other similar documents in which the client has given a third party an interest in specific funds trigger a duty under Rules 1.15 (b)(4) and (5) *even though the lawyer is not a party to such agreement or has not signed any document*, if the lawyer is aware that the client has signed such a document.[5] In other words, a third party's interest in specific funds held by the lawyer is created by some source of obligation other than Rule 1.15 itself.[6] Whether they create binding contractual obligations, assurance of payment from the lawyer may also create ethical duties to third parties under Rule 1.15.[7] The basis for such duties is the fundamental duty of lawyers to deal honestly with third parties. Rules 4.1 and 8.4(c). Before the lawyer may give a third party an assurance of payment, the lawyer should discuss the matter with the client, because it is ultimately a matter for the client to decide.[8] If the lawyer is asked to sign a document assuring payment, the lawyer should explain to the client the ramifications, including the lawyer's potential ethical and civil liability, ensure that the client is competent to understand the explanation, and obtain the client's informed consent.[9]

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[1] *Oklahoma Bar Assn. v. Taylor*, 4 P.3d 1242 (Okla. 2000); Utah Bar Advisory Op. No. 00-04; *Advance Finance Co. v. Trustees of Client's Security Trust Fund of Bar of Maryland*, 652 A.2d 660 (Md. App. 1995) (holding that since Rule 1.15 imposed fiduciary obligations to maintain funds for benefit of clients or creditors, the state fund that pays for lawyers' violations of fiduciary obligations was liable to a creditor).

[2] *Klancke v. Smith*, 829 P.2d 464 (Colo. App. 1991); Alaska Bar Assn. Ethics Comm. Op. 92-3.

[3] *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. 1996), *cert. dismissed*, 699 A.2d 151 (Conn. 1997).

[4] For example, a judgment lien creditor of a client may garnish funds held in a lawyer's trust account. *Marcus, Santoro & Kozak v. Wu*, 274 Va. 743, 652 S.E.2d 777 (2007) (lien of a writ of fieri facias validly executed against lawyers' trust accounts by client's judgment lien creditor to whom lawyers directed to pay funds).

[5] *See, e.g., Virginia State Bar v. Timothy O'Connor Johnson*, CL 09-2034-4 (August 11, 2009) (while Respondent did not sign the agreement, his client did, and Respondent was aware that his client had directed that his chiropractor be paid directly out of settlement proceeds administered by his lawyer). *See also* LEO 1747 and Comment 4.

[6] Alaska Bar Ass'n Ethics Comm., Op. 92–3 (1992); Colo. Bar Ass'n Ethics Comm., Op. 94–94 (1993); Conn. Comm. on Prof 'l Ethics, Informal Op. 02–04 (2002) and Informal Op. 95–20 (1995); Utah Ethics Advisory Op. Comm., Op. 00–04 (2000).

[7] R.I. Ethics Advisory Panel, Op. 94–46 (1994) (lawyer's response to hospital's inquiry about status of the personal injury case that the payment of bills was "contingent upon a 'successful' outcome" was sufficient to raise Rule 1.15 duties).

[8] Colo. Bar Ass'n Ethics Comm., Op. 94–94 (1993). Va. Rule 1.2, Comment 1 (lawyer should defer to client regarding expenses to incurred).

[9] ABA Standing Comm. on Ethics and Prof 'l Responsibility, Informal Op. 1295 (1974).

The Committee understands that there will be occasions when a lawyer may not be able to determine whether a third party is entitled to funds held by the lawyer, for example, when there exists a dispute between the client and the third party over the third party's entitlement. Legal and factual issues may make the third party's claim to entitlement or the amount claimed uncertain. *Rule 1.15 (b)(4) and (5) does not require the lawyer to make that determination.* When faced with competing demands from the client and third party the lawyer must be careful not to unilaterally arbitrate the dispute by releasing the disputed funds to the client.[10] Conversely, a lawyer should not disburse the client's funds to a third party if the client has a non-frivolous dispute with the third party.[11] When the client and a third party have a dispute over entitlement to the funds, the lawyer should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court.[12] To avoid or reduce the occurrence of such conflicts, the Committee recommends that at the outset of the representation, preferably in the engagement letter or contract, the lawyer clearly explain that medical liens will be protected and paid out of the settlement proceeds or recovery.

Does Rule 1.15(b) Require that the Lawyer Have Actual Knowledge of a Third Party's Lien or Claim to the Funds Held by the Lawyer?

Rules 1.15(b)(4) and (5) and Comment 4 appear to require that a lawyer have "actual knowledge" of a third party's interest in funds held by the lawyer. Comment 4 states in pertinent part:

> [a]dditionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has *actual knowledge* of a third party's *lawful* claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorney's lien, a valid assignment executed by the client, or a lien on the subject property created by a deed of trust), the lawyer has a duty to secure the funds claimed by the third party. (emphasis added)

Other authorities have likewise adopted the view that Rule 1.15(b)(4) and (5) requires that the lawyer have actual knowledge of a third party's lawful claim to an interest in the specific funds held by the lawyer. Arizona Ethics Op. 98-06; Conn. Bar. Op. 95-20. However, in some situations under federal and state law, the lawyer need only be aware that the client received medical treatment from a particular provider or pursuant to a health care Plan. In those instances, notice of lien or a lien letter may not be required in order for that third party to claim

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[10] *Virginia State Bar v. Timothy O'Connor Johnson, supra* (lawyer acted unethically by making unilateral decision to disburse to client's chiropractor funds less than the full amount of the lien); LEO 1747.

[11] See *In re Smith*, 625 So. 2d 476 (La. 1993) (lawyer disciplined for improperly withholding client's money to pay outstanding medical bills); see also Connecticut Informal Ethics Op. 95-20 (1995) (lawyer cannot pay money to third person over client's objection); Pennsylvania Ethics Op. 92-89 (1992) (lawyer, whose client was ordered to pay arrearage in child support, cannot release escrow proceeds from real estate sale without client consent).

[12] Ariz. Comm. On Rules of Prof 'l Conduct, Formal Op. 98–06 (1998); Ga. State Disciplinary Bd., Advisory Op. 94–2 (1994); Va. Standing Comm. on Legal Ethics, Op. 1747 (2000)

entitlement to funds held by lawyer.[13] The effect of such state and federal laws on a lawyer's obligation to a third party is a question of law beyond the purview of this Committee. The lawyer will need to know and understand the law in order to determine whether it creates a valid interest in the funds held by the lawyer.[14]

Prior Opinions

In Legal Ethics Opinion 1747 (rev. 2000), the Committee opined that if a third party has a legal interest in settlement funds by virtue of a statutory lien, consensual lien, contract or court order, the lawyer may not ignore that third party's interest in the funds held by the lawyer and disburse those funds to the client, even if the client so directs.[15] As this Committee observed in Legal Ethics Opinion 1747:

> Well before LEO 1413 was issued, the Virginia Supreme Court concluded, in the context of a settlement attorney handling a real estate closing, that the lawyer's fiduciary duties under Canon 9 extended to protecting funds owed to or claimed by third parties, and not simply the client. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986) (decided under former DR 9-102). Pickus, a new attorney, allowed a coercive client, the seller, to receive directly the settlement proceeds without having determined whether a prior deed of trust lien on the subject real estate had been released. As things turned out, the prior lien had not been satisfied. The Court upheld the disciplinary board's finding that DR 9-102 had been violated, holding that DR 9-102 was promulgated to protect third parties as well as clients. 232 Va. at 14.

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[13] A written notice of lien is not required if the lawyer is on notice that the client's medical care was provided or paid for by the Commonwealth of Virginia. Va. Code §8.01-66.5(A). Medicare liens do not require notice and there is no statute of limitations. See 42 U.S.C. §§ 1395y(b)(1) & (2), 2651-2653. Beginning January 1, 2011, personal injury claims from Medicare-eligible claimants are required to be reported to Medicare. Further, Medicare is entitled to 100% recovery of the benefits it paid during treatment for the injury minus its pro rata share of the client's legal fees and expenses and will seek reimbursement from any settlement or payment for the claim. Failure to comply with the reporting or reimbursement requirements can result in a $1,000 daily fine per claimant, interest, and double damages. For more information *see* 42 U.S.C. 1395y, 42 CFR § 411.37 (2009), and the webpage for the Centers for Medicare and Medicaid Services (CMS), the federal agency that oversees Medicare, at http://www.cms.hhs.gov/MandatoryInsRep/.

[14] Phila. Bar Ass'n Prof 'l Guidance Comm., Op. 2000–3 (2000).

[15] See *Aetna Cas. & Sur. Co. v. Gilreath*, 625 S.W.2d 269 (Tenn. 1981) (lawyer has duty to honor employer's statutory workers' compensation lien); Alaska Bar Ass'n Ethics Op. 92-3 (1992) (lawyer may not follow client's instruction to disregard facially valid assignment or statutory lien in favor of third party; lawyer should advise client that he will hold disputed funds in trust until dispute is resolved).California Formal Ethics Op. 1988-101 (lawyer whose client agreed to pay recovery proceeds to health care provider may not ignore agreement and disburse all money to client upon client's request); Connecticut Informal Ethics Op. 06-09 (2006) (firm that drafted promissory note in which client promised to pay third party out of settlement may not give all proceeds to client despite unsuccessful effort to locate third party; firm must continue to hold money in interest-bearing account until third party is found or until firm receives copy of judgment, stipulation, or binding decision stating that it shall release funds); Maryland Ethics Op. 94-19 (1993) (lawyer must disregard client instruction not to pay creditor where client had valid agreement with creditor); Ohio Supreme Court Ethics Op. 95-12 (1995) (lawyer must disregard client's instructions not to pay physician from proceeds when client entered earlier agreement to pay medical expenses from such proceeds); South Carolina Ethics Op. 94-20 (1994) (if lawyer knows client has executed valid doctor's lien he may not comply with client's instruction that lawyer disregard it; no principle of client loyalty or confidentiality permits lawyer to violate ethical obligations to third persons of notification and delivery).

On the other hand, if the third party has not taken the steps necessary in order to perfect its lien or claim to the funds in the lawyer's possession, or has no contract, order or statute establishing entitlement to the funds, the lawyer's primary duty is to the client. Under those circumstances, the lawyer may ethically follow the client's direction to disregard the third party claim and deliver the funds to the client.[16] Of course, if the lawyer releases the funds to the client, the lawyer should inform the client of the risks involved in disregarding a third person's claim.[17] For example, the lawyer should explain that while the lawyer may not have an *ethical* duty under the rules to deliver funds to the third party, the third party may nonetheless have a civil claim or other remedies against the client that may be pursued after the funds have been released to the client. With these basic principles in hand, the Committee turns to three hypothetical situations in which the ethical obligations of the lawyer in handling funds claimed by a third party are discussed.

Hypothetical One – Duty to Investigate Potential Lien

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan").[18] The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law.[19] The lawyer does

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[16] *Janson v. Cozen & O'Connor*, 676 A.2d 242 (Pa. Super. Ct. 1996) (lawyer who holds client's funds in escrow owes no special fiduciary duty to third person who makes claim against funds where there is no agreement between client and third person regarding those funds); *Farmers Ins. Exch. v. Zerin*, 61 Cal. Rptr.2d 707 (Cal. Ct. App. 1997) (lawyer who recovered tort settlement on clients' behalf is not legally obligated to clients' medical insurer to withhold portion of funds from distribution to ensure insurer's reimbursement); Maryland Ethics Op. 97-20 (1997) (lawyer may disburse entire settlement to client where hospital failed to timely submit bills to insurer and thus had no legally valid claim). See also Arizona Ethics Op. 88-6 (1988) (third-party claim that is not perfected lien or assignment does not affect client's right, and lawyer should advise claimant to take issue up with client); Colorado Ethics Op. 94 (1993) (lawyer must distribute promptly to client if third person's claim against client property does not arise out of statutory lien, contract, or court order); Connecticut Informal Ethics Op. 95-20 (1995) (lawyer has no duty to act on mere assertions of third-party interests or to investigate whether third persons have interests in client property); Maine Ethics Op. 116 (1991) (lawyer who represents client in both real estate transaction and divorce must turn real estate proceeds over to client even if lawyer reasonably believes that client does not intend to comply with divorce order); Maryland Ethics Op. 97-9 (1997) (settlement money may be disbursed to client even though two lawyers assert claim to proceeds for services in other, unrelated matters); Philadelphia Bar Ass,n Ethics Op. 86-134 (1986) (lawyer must disburse to client without retaining anything for physicians who are owed payment, provided that there is no agreement between doctors and client regarding proceeds from settlement); South Carolina Ethics Op. 89-13 (1989) (lawyer not required to pay half of injury settlement to client's ex-wife under divorce decree where lawyer was not served with process as required by decree). See generally 1 G. Hazard & W. Hodes, *The Law of Lawyering* §19.6 (3d ed. 2001 & Supp. 2005-2) (lawyer not a "neutral observer" and "must favor the client when the other party's claims are not solid").

[17] Cleveland Ethics Op. 87-3 (1988); South Carolina Ethics Op. 93-31 (1993).

[18] Most employer-sponsored health care Plans are governed by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U. S. C. §1001 *et seq*.

[19] The pivotal issue is whether the client has received medical care paid under an insured Plan—in which case the Plan may be subject to the anti-subrogation statute, or a self-funded Plan—in which case the ERISA laws may preempt state law and the anti-subrogation statute may not apply. Thus, ascertaining the nature of the employer-sponsored Plan is a critical step in determining whether the Plan is entitled to funds held in settlement of the client's case. If the Plan is self-funded, the terms of the Plan documents control the extent of its claimed right of subrogation or reimbursement. If the Plan is not self-funded, but fully insured, the Virginia anti-subrogation statute bars subrogation in contracts of health insurance.

not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

Do the Rules of Professional Conduct permit the lawyer to disburse the settlement proceeds to the client without investigating whether the Plan is entitled to assert a claim against the client's settlement?

Under the circumstances presented in Hypothetical 1, the Committee believes that the answer is a qualified "yes." The facts presented in the instant hypothetical are quite different from those in the cited authorities requiring the lawyer to protect a third party's claim to the funds being administered by the lawyer. A lien or claim has not been asserted and the lawyer has insufficient information to know whether a valid lien or claim even exists. Here, the lawyer would have to affirmatively investigate both the facts and the law to determine whether the Plan has a lien on or entitlement to a portion of the funds held by the lawyer. In so doing, it is likely that the lawyer would have to communicate with the Plan to determine if the Plan is exempt from Virginia's anti-subrogation statute. The lawyer would also have to find out if the Plan has a right of reimbursement and, if so, the amount to which the Plan claims to be entitled.[20] By having these communications with the Plan the lawyer would be disclosing to the Plan's agents that a Plan beneficiary is seeking a recovery or settlement against a third party. Communication with the Plan could remind or encourage the Plan to perfect a lien or claim to the client's settlement of which the Plan was not aware. Depending on the circumstances, such a disclosure could be detrimental to the client and contrary to the client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed "or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . ."

A lawyer faced with the circumstances presented in Hypothetical 1 must first consult with the client about whether to have communications with the Plan, explaining to the client both the risks and benefits of having such communication and obtain the client's informed consent to affirmatively investigate the Plan's possible claim to an interest in the client's settlement. If after warning the client of the possible consequences of not reimbursing the Plan, the client directs the lawyer to not communicate or further investigate the Plan's right of reimbursement, the lawyer should confirm in writing the client's direction and the possible consequences of that course of action.[21] Although the lawyer will not violate Rules 1.15(b)(4) or (b)(5) and is therefore not subject to professional discipline by the bar, the lawyer and/or the client may suffer civil liability under federal law if the Plan seeks reimbursement of medical expenses that have not been paid out of the settlement. Therefore, the lawyer has an ethical duty to advise the client of the potential liability of disbursing the funds without preserving any funds to reimburse the Plan. *See* Rules 1.2 and 1.4.

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[20] In Hypotheticals 1 and 2 the Committee assumes that the client has not executed any writing creating a contractual obligation to reimburse the Plan.

[21] Possible consequences that the lawyer should consider discussing with the client include the fact that the Plan documents might contain a requirement that the client notify the Plan of third party recovery actions and that the Plan might have the right to refuse payment of future medical expenses if the Plan is not reimbursed, as well as to hold the client civilly liable for non-payment.

While a lawyer may not knowingly disregard a lien or third party claim that has been properly asserted against the settlement funds, the question raised in this hypothetical is whether the lawyer has an ethical duty, without authorization from the client, to actively investigate a third party's potential claim against the settlement funds. The Committee believes that, under the circumstances presented in the first hypothetical involving ERISA Plan claims, the Rules of Professional Conduct do not impose such a duty on the lawyer unless the client has authorized further communication with the Plan and further investigation of the Plan's unasserted right of reimbursement.

Hypothetical Two – Reasonable Effort to Determine Validity of Claim

Assume now that the Plan administrator has sent to the lawyer a letter asserting subrogation rights. The lawyer has responded in writing requesting documents to determine whether the Plan has a meritorious claim to portions of the settlement funds. Specifically, the lawyer has requested documentation that the Plan is self-funded and documentation that the Plan has a right of reimbursement. The lawyer has requested the documentation in thirty days. After waiting thirty days with no response, the lawyer sends a second request to the health Plan administrator notifying the Plan administrator that if the requested documents are not received in fifteen days the lawyer will disburse the settlement without preserving any funds to reimburse the Plan.

If the Plan administrator does not respond to the lawyer's second request within fifteen days, do the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

A lawyer owes an ethical duty to act with reasonable diligence and competence in handling a client's legal matter. Rules 1.1 and 1.3. The Rules of Professional Conduct are rules of reason.[22] A lawyer cannot be reasonably expected to hold or preserve funds indefinitely on the possibility that the Plan might at some point in the future demonstrate its entitlement to the funds it claims. Most opinions hold that the lawyer may not sit on the funds for a prolonged period of time because of the lawyer's obligation to act diligently under Rule 1.3 and Rule 1.15(b)(4)'s requirement that the lawyer "promptly pay or deliver" funds to the client or third party.[23] As stated in Comment [4] to Rule 1.15, "[p]aragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession."

In this hypothetical, the lawyer has exercised reasonable diligence to determine whether the Plan has a valid subrogation claim or lien but the Plan has not responded to the lawyer's inquiries. The lawyer still does not know whether the Plan has a valid claim or lien. Comment [4] to Rule 1.15 provides further: "[a] lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien." As discussed in the Committee's analysis of Hypothetical 1, the lawyer must first consult with the client regarding the course of action to take, informing the client to the fullest extent possible

[22] Preamble to Virginia Rules of Professional Conduct (Scope).

[23] *The Dishonored Medical Lien: A New Trend in Bar Complaints,* 25 Ariz. Att'y 17 (1989) at 17; *Attorneys' Ethical Obligations to the Clients' Creditors*, 67 N.Y. St. B.J. 40 (1995); Phila. Bar Ass'n Prof 'l Guidance Comm. Op. 91–6 (1991).

of the risks and benefits of further communication with the Plan to determine the existence and extent of the Plan's claim; or, alternatively, disregarding the Plan's claim and releasing the funds to the client. Under the circumstances presented in hypothetical 2, the Committee believes that the lawyer has acted reasonably and in good faith to determine if the Plan has a claim to or interest in the funds in the lawyer's custody or control and may, after consultation with the client, disburse the settlement funds to the client without holding back funds to reimburse the Plan.

Hypothetical Three – Reasonable Effort to Determine Validity and Amount of Claim

Another question is raised by a different hypothetical. Lawyer represents an 80 year client who fell at a hospital and sustained a hip fracture. She had a Medicare Advantage (MA) Plan which paid most of the medical bills. The lawyer settled with the hospital in mediation. The lawyer sent the Plan's lawyer an email indicating that the lawyer does not believe it has subrogation rights, based on the written health Plan, which is silent on subrogation, and the relevant case law. Lawyer received a written response from the Plan's lawyer asserting subrogation rights and citing to the federal regulations.[24] The letter did not provide the lawyer with the amount of its claim. The letter invited the lawyer to provide cases and the Plan language the lawyer was relying upon to challenge the Plan's right of subrogation. The lawyer promptly emailed a letter back to the Plan, citing cases in support of the lawyer's position and referencing the absence of a subrogation provision in the health Plan. The lawyer specifically requested the amount of the claim and any legal authority the Plan relies upon to counter the cases cited by the lawyer. A month has now passed since the lawyer replied to the health Plan and the lawyer has not received a response back from the Plan's lawyer even though the lawyer has sent at least 3 follow-up emails and left a voicemail message with the Plan's lawyer.

Under these circumstances, has the lawyer exercised reasonable diligence and good faith to determine both the validity and amount of the Plan's claim such that the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

As in hypothetical 2, the Committee believes that the lawyer has exercised reasonable diligence and good faith to determine both the validity and the amount of the Plan's claim, such that the lawyer may, after consultation with the client, disburse the settlement funds to the client without preserving any funds to reimburse the health Plan.

Conclusion

The mere assertion of a claim by a third party to funds held by the lawyer does not necessarily entitle the third party to such funds. A lawyer must exercise competence and reasonable diligence to determine whether a substantial basis exists for a claim asserted by a third party.[25] If no such basis exists, or if the third party has failed to take the steps required by

[24] 42 C.F.R. 422.108 (Medicare secondary payer (MSP) procedures).

[25] The Committee acknowledges with great concern the increasing complexity of the task a lawyer faces in resolving liens. This is caused in part by more recent state and federal laws and regulations in this area. The time and expense necessary to handle such matters properly has increased dramatically over the years. As one expert has noted:

law to perfect its entitlement to the funds, a lawyer may release those funds to the client, after appropriate consultation with the client regarding the consequences of disregarding the third party's claim.

If the lawyer reasonably believes that the third party has an interest in the funds held by the lawyer, the lawyer may not disburse to the client funds claimed by the third party, even if the client so directs. In prior opinions this Committee has held that a lawyer may not disregard the valid claims of a third party,[26] and lawyers have been subject to discipline for disbursing to the client funds to which a third party claimed entitlement.[27] When the client has a non-frivolous dispute over the third party's entitlement to funds, or the lawyer cannot determine, as between the client and the third party, who is entitled to the funds, the lawyer should hold the disputed funds in trust until the dispute is resolved or interplead them into court. A lawyer who chooses to hold or interplead the disputed funds instead of releasing the funds to the client does not violate Rule 1.15(b). A lawyer who acts in good faith and exercises reasonable diligence to determine the validity of a third party's claim or lien is not subject to discipline under Rule 1.15(b). Whether the lawyer faces civil liability for failing to protect a third party lien or claim is a legal issue beyond the purview of this Committee.[28]

> The phenomenon has spawned a whole new industry with many companies taking on the task of "lien resolution" and providing an alternative to the personal injury bar. Personal injury attorneys may now hire experts in these complex areas. It may be cost effective and result in a better outcome for the client if these issues are contracted out to firms or companies with knowledge and expertise in these issues. Additionally, the increased recovery actions by governmental agencies has had another impact on this area. It has and will continue to delay the ability to settle the claims that exist as the government agencies become flooded with more and more of these claims. It can tie up the resources of plaintiffs' attorneys and result in funds languishing in non-interest bearing or IOLTA accounts for extended periods of time.

Pi-Yi Mayo, *Medicare and Medicaid Claims:* State Bar of Texas Advanced Personal Injury Law Course (2011) at 3.

[26] Va. Legal Ethics Op. 1747 (2000) (unethical for lawyer to disburse funds to client when client had agreed to pay third party medical group out of the settlement proceeds held by lawyer; lawyer owed duty to hold funds if third party claim was in dispute or interplead the disputed funds into court if client would not authorize disbursement to medical group).

[27] *Virginia State Bar v. Timothy O'Connor Johnson*, Case No. CL09-2034 (Richmond Cir. Ct. August 11, 2009). Lawyer violates former Rule 1.15 (c)(4) when refusing to honor chiropractor's consensual lien with client, directing client's lawyer to pay total amount owed to chiropractor out of settlement of client's personal injury case. Although lawyer was not a party to the assignment of benefits, lawyer knew that client had contracted with chiropractor to pay the medical bill out of settlement. When the chiropractor refused to reduce his bill, lawyer unilaterally arbitrated the dispute by disbursing to chiropractor an amount less than what was owed. Lawyer owed a duty to either pay the full amount owed to chiropractor or hold the amount in dispute in trust until client and chiropractor could resolve their dispute, or interplead the disputed funds into court. The court cited with approval Legal Ethics Opinion 1747 and comment [4] to Rule 1.15 and affirmed the District Committee's finding of misconduct.

[28] For a lawyer's civil liability under such circumstances, *see, e.g.*, *Kaiser Found. Health Plan, Inc. v. Aguiluz*, 54 Cal. Rptr. 2d 665 (Ct. App. 1996) (attorney who knew client had agreed to repay medical provider from settlement proceeds was liable for amount client owed provider); *Shelby Mut. Ins. Co. v. Della Ghelfa*, 513 A.2d 52 (Conn. 1986) (insurer could enforce lien against lawyer who disbursed proceeds to insured); *Unigard Ins. Co. v. Fremont*, 430 A.2d 30 (Conn. Super. Ct. 1981) (lawyer liable for conversion because of failure to honor a statutory insurer's lien); *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Idaho Ct. App. 1983) (law firm liable for failing to honor assignment that client, but not firm, had signed); *W. States Ins. Co. v. Louise E. Olivero & Assocs.*, 670 N.E.2d 333 (Ill. App. Ct. 1996) (firm's failure to honor subrogation lien constituted conversion); *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998) (liability based on lawyer's knowledge of statutory lien or valid assignment); *Leon v.*

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

Committee Opinion
November 16, 2012

Martinez, 638 N.E.2d 511 (N.Y. 1994) (if enforceable assignment is proven, lawyer is liable to pay the creditor the assigned amount); *Prewitt v. City of Dallas*, 713 S.W. 2d 720 (Tex. App. 1986) (a lawyer's constructive notice of the city's right to the first money paid to the firm's client rendered the law firm liable after it paid those monies out to its client).

LEGAL ETHICS OPINION 1864 MAY A CRIMINAL DEFENSE LAWYER AGREE THAT HE WILL NOT GIVE CERTAIN DISCOVERY MATERIALS TO HIS CLIENT DURING THE COURSE OF THE REPRESENTATION, AND THAT HE WILL REMOVE CERTAIN MATERIALS FROM HIS FILE PRIOR TO THE END OF THE REPRESENTATION?

In this hypothetical, a prosecutor wishes to provide broad discovery to defense lawyers in the course of criminal prosecutions, in order to make defendants aware of the weight of the evidence against them, to ensure that the defense lawyer has access to all potentially useful evidence, and to encourage reasonable resolutions of criminal cases in light of that evidence. Because of the nature of much of this evidence, including the identities and locations of cooperating witnesses and graphic photographs of the victims, the prosecutor does not want to permit defendants to physically possess this evidence. Accordingly, the prosecutor asks all defense lawyers who receive any discovery that is not legally required to sign an agreement that provides:

> I, _____, counsel for the above referenced defendant, (or authorized agent of counsel for such defendant) hereby acknowledge receipt of [the discovery materials]. Although the Commonwealth is required to allow me to inspect exculpatory evidence, I agree that, with the exception of those materials described in Rule 3A:11(b)(1), the Commonwealth is not required to provide me with copies of any evidentiary materials or to allow me to copy any evidentiary materials.
>
> In consideration of the Commonwealth providing me with copies of these evidentiary materials other than those described in Rule 3A:11(b)(1), I agree that, until this case is concluded, I will not allow these materials or any copy thereof to leave my possession or control. While I have the right to share and show the contents of these materials to my client, I agree to not give these materials, except the materials described in Rule 3A:11(b)(1), to my client until this case is concluded.
>
> I understand that, although I may review my client's criminal and DMV records in the Commonwealth's Attorney's office, the Commonwealth Attorney is prohibited from giving me these records absent a specific court order.
>
> *I understand that [certain discovery materials] are particularly sensitive and that the Commonwealth is loaning me copies thereof for my convenience. In consideration of the Commonwealth providing me with such copies rather than merely allowing me to inspect them, I agree to return them to the Commonwealth's Attorney prior to the conclusion of my representation of the defendant.*

QUESTION PRESENTED

Does a criminal defense lawyer violate Rule 1.4 and/or Rule 1.16(e) by agreeing that, to the extent the prosecutor provides any discovery in excess of that required by law, the defense lawyer will share the information with his client but will not give any discovery materials or copies to the client during the representation, and will return any copies of "sensitive" discovery materials to the Commonwealth's Attorney so that his client is not entitled to receive them upon termination of the representation?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.4[1] and Rule 1.16(e)[2], and relevant legal ethics opinions are 1789 and 1854.

ANALYSIS

A lawyer's obligation to share information with his client during the course of the representation is governed by Rule 1.4, which requires the lawyer to inform the client of "facts pertinent to the matter" and to comply with "reasonable requests for information." Unlike Rule 1.16(e), which applies upon termination of the representation, Rule 1.4 does not specify the means by which these obligations must be carried out. LEO 1789, addressing the issue of a client who has asked for a copy of his medical records that the lawyer obtained in the course of the representation, explains that any request for a copy of a particular document in the file "must be considered" in light of the duty to promptly comply with reasonable requests for information, but does not conclude that a lawyer must provide a document because the client has requested it.

In this case, the discovery agreement specifically authorizes the defense lawyer to show his client the contents of the discovery materials and to discuss those contents with the client; the defense lawyer is only barred from providing the document or a copy to the client. Under the

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[1] Rule 1.4 Communication
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

[2] Rule 1.16 Declining or Terminating Representation
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(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

circumstances, the lawyer does not violate Rule 1.4 by entering into and complying with this discovery agreement. The lawyer can explain all pertinent facts to his client and comply with a reasonable request for information by meeting with the client to view and discuss the discovery materials; accordingly, Rule 1.4 does not require that the lawyer provide copies of any of these materials, even upon request of the client.

This proposed discovery agreement differs from the arrangement prohibited by LEO 1854 because in this case, the lawyer is allowed and encouraged to share the information from the discovery materials with his client. Absent state or federal law, a rule of court, or court order to the contrary, an agreement that in any way limited the lawyer's ability to give information to his client would be prohibited according to the analysis in LEO 1854.

At the termination of the representation, Rule 1.16(e) requires that the lawyer provide the contents of his file to the client upon the client's request. Accordingly, unless the disclosure of certain materials is prohibited by law, any materials that are in the lawyer's file at the conclusion of the representation must be provided at that time. Except for the last paragraph of the discovery agreement, referring to "certain sensitive materials," the agreement does not raise any concern as to the defense lawyer's compliance with Rule 1.16(e), as it explicitly provides that the lawyer will make the discovery materials a part of his file and furnish those materials to his client upon termination of the representation.

However, the provision that requires the lawyer to return "certain sensitive materials" to the Commonwealth so that those materials are not in the lawyer's possession at the termination of the representation may lead to problems if the lawyer's representation is terminated unexpectedly and the lawyer does not have time to return the materials before the client is entitled to receive a copy of his file. In order to avoid a potential violation of Rule 1.16(e) after the lawyer's termination or for another reason, the defense lawyer should seek informed consent, preferably in writing, from his client before agreeing to this restriction on the client's access to information upon termination of the representation.[3] Without client consent, the lawyer should not accept "sensitive materials" that would be subject to the last paragraph of the discovery agreement.

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

Revised
March 12, 2014

Committee Opinion
October 24, 2012

[3] The lawyer may wish to memorialize the client's consent to the agreement by having the client sign the agreement, along with the defense lawyer and the Commonwealth's Attorney.

LEGAL ETHICS OPINION 1862 "TIMELY DISCLOSURE" OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness.

QUESTION PRESENTED

1. Is the "timely disclosure" of exculpatory evidence, as required by Rule 3.8(d), broader than the disclosure mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and other case law interpreting the Due Process clause of the Constitution? If so, what constitutes "timely disclosure" for the purpose of Rule 3.8(d)?

2. During plea negotiations, does a prosecutor have a duty to disclose the death or unavailability of a primary witness for the prosecution?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 3.8(d)[1], Rule 3.3(a)(1)[2], Rule 4.1[3], and Rule 8.4(c)[4].

ANALYSIS

Pursuant to *Brady v. Maryland* and subsequent cases, a prosecutor has the *legal* obligation to disclose material exculpatory evidence to a defendant in time for the defendant to make use of it at trial. A number of cases interpreting this legal obligation have noted that the

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[1] Rule 3.8 Additional Responsibilities Of A Prosecutor
A lawyer engaged in a prosecutorial function shall:
***
(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court;

[2] Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal;

[3] Rule 4.1 Truthfulness In Statements To Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

[4] Rule 8.4 Misconduct
It is professional misconduct for a lawyer to:
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(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

prosecutor's *ethical* duty to disclose exculpatory evidence is broader than the legal duty arising from the Due Process clause, although they have not explored the contours of that ethical duty.[5]

Rule 3.8(d) does not refer to or incorporate, in the language of the Rule or its comments, the *Brady* standard for disclosure. The standard established by the Rule is also significantly different from the *Brady* standard in at least two ways: first, the Rule is not limited to "material" evidence, but rather applies to all evidence which has some exculpatory effect on the defendant's guilt or sentence; second, the Rule only requires disclosure when the prosecutor has actual knowledge of the evidence and its exculpatory nature[6], while *Brady* imputes knowledge of other state actors, such as the police, to the prosecutor. These differences from the *Brady* standard raise the further question of whether Rule 3.8(d) requires earlier disclosure than the *Brady* standard, which requires only that the evidence be disclosed in time for the defendant to make effective use of it. Thus, the prosecutor has complied with the legal disclosure requirement if the evidence is disclosed in the midst of trial so long as the defendant has an opportunity to put on the relevant evidence.[7]

Although the Committee has never definitively addressed the question, it opines today that the duty of timely disclosure of exculpatory evidence requires earlier disclosure than the *Brady* standard, which is necessarily retrospective, requires. This conclusion is largely based on the response to *Read v. Virginia State Bar*, in which the Supreme Court of Virginia reversed the Virginia State Bar Disciplinary Board's order revoking a prosecutor's license, finding that the prosecutor had complied with his legal obligations under *Brady* and therefore had complied with the correlative ethics rule in force at that time. The disciplinary rule in effect at that time was DR 8-102 of the Virginia Code of Professional Responsibility which read, "The prosecutor in a criminal case or a government lawyer shall . . . [d]isclose to a defendant all information required by law."

At the time of the conduct at issue, Beverly Read was a Commonwealth's Attorney. Read was conducting the prosecution of an arson case. During the investigation, the Commonwealth discovered two witnesses, Sils and Dunbar, who both identified the defendant at the scene of the crime. Sils had second thoughts after he identified the defendant in a line-up and later became convinced that the defendant was not the person Sils had observed at the scene of the crime. Sils disclosed to Read that the defendant was definitely not the man observed at the scene of the crime. Read told Sils that he would not be called as a witness and that his presence was no longer necessary. Read concluded his case and rested without disclosing that the two witnesses had changed their statements. When Sils went home and had further discussions with the other witness, Dunbar, both became convinced that the defendant was not the man they saw. They returned to the courthouse during the trial the following day and agreed to testify for the defense. Read then attempted to pass a message to defense counsel that would have disclosed the exculpatory information but defense counsel refused to accept the writing. Unsuccessful in passing this information to defense counsel, Read then read into the record that the two witnesses had recanted and would testify that the defendant was not the man they saw at the scene of the crime. After this exchange, defense counsel moved to dismiss for prosecutorial misconduct.

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[5] *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing* Rule 3.8(d); Kyles v. Whitley, 514 U.S. 419, 436 (1995) (noting that *Brady* "requires less of the prosecution than" Rule 3.8(d)).

[6] As Comment [4] to Rule 3.8 explains, "[p]aragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence..."

[7] *See e.g., Read v. Virginia State Bar*, 233 Va. 560, 357 S.E.2d 544 (1987).

The motion to dismiss was denied. A complaint against Read was made with the Virginia State Bar and a disciplinary proceeding ensued.

Read's counsel argued that his client had complied with *Brady* because the information was available to use during trial, and therefore had disclosed "all information required by law." In spite of the Board's finding that Read had willfully intended to see the defendant tried without the disclosure that the two witnesses had recanted, the Supreme Court of Virginia agreed that Read had complied with the disciplinary rule, reversed the Disciplinary Board's decision, and entered final judgment that Read had not engaged in any misconduct. Following this decision, the Bar rewrote the relevant rule, replacing the *Brady* standard with the standard now found in Rule 3.8(d), clarifying that the prosecutor's ethical duty under that rule is not coextensive with the prosecutor's legal duty under *Brady*.

In light of the conclusion that Rule 3.8(d) requires earlier disclosure than the *Brady* standard, the Committee next turns to the meaning of "timely disclosure." In general, "timely" is defined as "occurring at a suitable or opportune time" or "coming early or at the right time." Thus, a timely disclosure is one that is made as soon as practicable considering all the facts and circumstances of the case. On the other hand, the duty to make a timely disclosure is violated when a prosecutor intentionally delays making the disclosure without lawful justification or good cause.

The text of the Rule makes clear that a court order is sufficient to delay or excuse disclosure of information that would otherwise have to be turned over to the defendant. Thus, where the disclosure of particular facts at a particular time may jeopardize the investigation or a witness, the prosecutor should immediately seek a protective order or other guidance from the court in order to avoid those potential risks. As specified by the Rule, however, disclosure must be "precluded or modified *by order of a court*" (emphasis added) in order for the prosecutor to be excused from disclosure.

Because this is not a bright-line rule, the Committee cannot give a definitive answer to the question of whether the prosecutor must immediately turn over the exculpatory evidence at issue in the hypothetical; however, the prosecutor may not withhold the evidence merely because his legal obligations pursuant to *Brady* have not yet been triggered.

As to the second question, assuming that the witness's unavailability does not come within the scope of Rule 3.8(d), other rules might obligate the prosecutor to disclose this information during plea negotiations or when the plea bargain is being presented to the court.

Specifically, Rules 3.3, 4.1, and 8.4(c) all forbid making false statements or misrepresentations in various circumstances. Rule 4.1(a) generally prohibits making a false statement of fact or law, and Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law." Both of these provisions would apply to any misrepresentation or false statement made in the course of plea negotiations with the defendant/his lawyer. Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Accordingly, the prosecutor may not make a false statement about the availability of the witness, regardless of whether the unavailability of the witness is evidence that must be timely disclosed pursuant to Rule 3.8(d), either to the opposing lawyer during negotiations or to the court when the plea is entered.[8]

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

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[8] See also Rule 3.8(a), which bars a prosecutor from filing or maintaining a charge that the prosecutor knows is not supported by probable cause.

LEGAL ETHICS OPINION 1859 MAY A CRIMINAL DEFENSE LAWYER DISCLOSE INFORMATION TO A GOVERNMENT LAWYER AFTER A FORMER CLIENT MAKES A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

In this hypothetical, a criminal defense lawyer has been contacted by a government lawyer who is responsible for handling a petition for habeas corpus filed by the defense lawyer's former client. The petition alleges that the defense lawyer provided ineffective assistance of counsel to the former client. Citing Virginia Code §8.01-654(B)(6)[1], the government lawyer requests that the defense lawyer provide information concerning his representation of the former client to the government in order for the government to prepare a response to the petition. The defense lawyer asks whether he can reveal this information in response to the government's request prior to any evidentiary hearing on the former client's petition and without a court order requiring disclosure of the information. The former client has not given informed consent to the disclosure of this information. The defense lawyer indicates that, in his experience, habeas petitions are overwhelmingly dismissed on legal or procedural grounds; in those cases, the court never reaches the substantive issues presented.

QUESTION PRESENTED

May a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel disclose confidential information to government lawyers prior to any hearing on the defendant's claim, without a court order requiring the disclosure or the informed consent of the former client, in order to help to establish that the defense lawyer's representation was competent?

APPLICABLE RULES AND OPINIONS

The applicable *Rule of Professional Conduct* is Rule 1.6 (a) and (b)(2)[2].

ANALYSIS

Pursuant to Rule 1.6(a), a lawyer has a general duty to maintain the confidentiality of information learned during the representation of a client, even after the representation has concluded.[3] That duty is subject to the limited exceptions specified in Rule 1.6(b) and (c),

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[1] Virginia Code §8.01-654(B)(6) provides that a petitioner who alleges ineffective assistance of counsel as a ground for habeas relief is deemed to waive the attorney-client privilege with respect to communications between counsel and himself "to the extent necessary to permit a full and fair hearing" of the allegation. This statute alone is not dispositive of the lawyer's ethical duties, however, because the duty of confidentiality is broader than the attorney-client privilege. *See* Rule 1.6 Comments [3] and [12].

[2] 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 likely be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

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(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

[3] Comment [18], Rule 1.6: "The duty of confidentiality continues after the client-lawyer relationship has terminated."

including the exception that is relevant to this question, found in Rule 1.6(b)(2). Thus, a lawyer may not reveal confidential information without either obtaining client consent or determining that one of the exceptions to the rule applies.

In this hypothetical, the former client has not given consent to the lawyer's release of this confidential information. Thus, the lawyer can disclose the requested information to the government only if Rule 1.6(b)(2) applies to authorize the disclosure.

The Committee opines that Rule 1.6(b)(2) generally does not authorize the disclosure of client confidences under these circumstances. The rule allows the disclosure of confidential information in order to "respond to allegations in any proceeding concerning the lawyer's representation of the client." A habeas petition that alleges ineffective assistance of counsel undoubtedly "concerns" the lawyer's representation of the former client, since it is a claim that the former client's conviction should be set aside because of the lawyer's performance during the representation. However, the lawyer may reveal information only to the extent reasonably necessary to defend against these claims. It is unlikely that it is reasonably necessary for the lawyer to disclose confidential information at the time the petition is filed, when the court has not made a determination of whether the petition is legally and procedurally sufficient. Many habeas petitions fail on legal grounds, and in those cases there is no need for the lawyer to ever reveal information about his representation.

Although a pre-litigation disclosure of all relevant information may make it more likely that the claim of ineffective assistance will be disposed of quickly, that fact alone does not make it necessary that the lawyer reveal the information. In the absence of additional facts and circumstances justifying an earlier release of the information, the lawyer can reach the same outcome by disclosing the information under judicial supervision in a formal proceeding, after a full determination of what information should be revealed, and without the danger of revealing more information than would be permitted by Rule 1.6(b)(2).[4] Finally, Rule 1.6(b) provides that a lawyer *may* reveal information as permitted by the Rule; but a lawyer does not violate the Rule under these circumstances by refusing to reveal information upon request.

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

June 6, 2012

[4] See LEO 1433. Even when disclosure is necessary to rebut a former client's accusation that the lawyer committed criminal conduct for which the former client has now been indicted, the lawyer is advised to seek a judicial ruling on the propriety and extent of the disclosure. See also Comment [10] to Rule 1.6, which cautions that, "in any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

LEGAL ETHICS OPINION 1863 MAY A LAWYER COMMUNICATE WITH AN INSURANCE ADJUSTER WHEN THE INSURED IS REPRESENTED BY A LAWYER PROVIDED BY THE INSURER?

In this hypothetical, a defendant/insured in a personal injury case is represented by a lawyer provided by his liability insurer. The plaintiff is also represented by a lawyer. The defendant/insured's lawyer has not indicated to the plaintiff's lawyer whether he represents the insurer or only the insured. The plaintiff's lawyer asks whether he may communicate directly with the insurance adjuster, an employee of the insurer, without consent from the defendant/insured's lawyer.

QUESTION PRESENTED

In a pending personal injury case where the defendant is represented by counsel provided by his insurance carrier, may the plaintiff's lawyer contact the insurance carrier without the consent of the defendant/insured's lawyer?

APPLICABLE RULES AND OPINIONS

The applicable Rule of Professional Conduct is Rule 4.2[1], and the applicable legal ethics opinions are 550, 687, 1169, 1524, and 1723.

ANALYSIS

The Supreme Court of Virginia has never directly answered the question of whether the insurer is also a client of the defendant/insured's lawyer when that lawyer is provided to the defendant/insured pursuant to his contract of insurance with the insurer. The leading authority on the duties of the lawyer for the insured, *Norman v. Insurance Company*, 218 Va. 718, 239 S.E.2d 902 (1978), emphasizes that the lawyer for the defendant/insured owes the same duty to his client as if he were privately retained by the insured – thereby strongly suggesting that the defendant/insured is the only client of the lawyer. Unauthorized Practice of Law Opinion 60 (Approved by the Supreme Court of Virginia, March 8, 1985) and Legal Ethics Opinion 1723 (Approved by the Supreme Court of Virginia, September 29, 1999) also suggest the same conclusion.

Although the question of whether an attorney-client relationship exists in a specific case is a question of law and fact, the Committee believes that, based on these authorities, it is not accurate to say that the defendant/insured's lawyer should be presumed to represent the insurer as well. On the other hand, in the absence of a particular conflict, it would be permissible for a single lawyer to represent both the insured and the insurer. If the lawyer is jointly representing both the insured and the insurer, then Rule 4.2 would apply to require the lawyer's consent to any communications between the plaintiff's lawyer and the insurer. Conversely, if the lawyer is not representing the insurer, then Rule 4.2 does not apply and the plaintiff's lawyer is free to communicate with the insurer without the defendant/insured's lawyer's consent/involvement.[2]

Accordingly, unless the plaintiff's lawyer is aware that the defendant/insured's lawyer also represents the insurer, the plaintiff's lawyer may communicate with the insurance adjuster or

[1] Rule 4.2 Communication With Persons Represented By Counsel
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

[2] The duties that arise out of the contractual relationships that exist between the insurer, the insured, and the defendant/insured's lawyer are not addressed in this opinion.

other employees of the insurer without consent from the defendant/insured's lawyer. LEOs 550, 687, 1169, and 1524 are overruled to the extent that they state or imply that the lawyer for the defendant/insured always represents the insurer as well, thereby requiring plaintiff's lawyer to seek the insured's lawyer's consent before communicating with the insurance adjuster.

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

Committee Opinion
September 26, 2012

LEGAL ETHICS OPINION 1155

ACQUIRING AN INTEREST IN LITIGATION – PERSONAL INJURY REPRESENTATION: ASSISTING CLIENT TO OBTAIN LOAN FROM FINANCE COMPANY.

You advise that you have represented personal injury clients for many years and are confronted 90 percent of the time with an innocent victim of an automobile accident who has incurred unanticipated medical bills and injuries which have put him or her out of work. In almost half of these cases, your clients do not have the benefit of health insurance or disability insurance. You are also confronted daily with requests for a loan from your clients in order to obtain proper medical treatment and medication so they may continue to pay their mortgages as well as provide food and other necessities for their families. On numerous occasions, you have referred your clients to banks to obtain loans; however, due to the loss of their jobs as a result of their injuries, they are poor credit risks and it is virtually impossible for them to obtain loans. There being no other alternative, you attempt to obtain liens against your clients' cases to provide them credit which, in most cases, the landlords and hospitals simply reject.

You have asked the Committee to consider the propriety of your persuading a finance company to agree to loan funds ranging from $1,000 to $10,000 to personal injury clients who cannot get bank loans. You have proposed that the company would investigate the case to confirm the liability, damages, and insurance coverage with the client's written consent. If the investigation revealed facts or evidence pertinent to the case which the client's attorney did not already know, said facts would be conveyed to that attorney at no expense. If the loan is approved, the loan would become due upon resolution of the case either by settlement or trial and the borrower would be charged at a lawful interest, similar to that used by major credit card companies. Upon obtaining a favorable settlement or verdict the client would direct the attorney involved to repay the loan out of the case proceeds. In no way would the attorney guarantee, cosign, or be responsible for the loan, except that he would honor a lien on the case.

The Committee believes DR:5-103(B) is the appropriate and controlling rule relative to your inquiry, and it provides as follows:

> While representing a client in connection with contemplated or pending litigation a lawyer shall not advance or guarantee financial assistance to his client, except that the lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, *provided the client remains ultimately liable for such expenses* (emphasis is added). (See also LE Op. 773)

The Committee would also direct your attention to Professional Guidance Opinion No. 86-36 from the Philadelphia Bar Association, which states that a lawyer may not act as guarantor for a bank loan for his client; however, he may attempt to convince the bank to grant the loan and to take a security interest in the client's personal injury case.

Under the facts as you have presented them in your inquiry, the Committee opines that there would not be a violation of Disciplinary Rule 5-103(B) as long as the attorney does not guarantee or cosign for the loan.

HYPOTHETICAL 12

LEGAL ETHICS OPINION 1729

GUARDIAN AD LITEM AS VISITATION SUPERVISOR AND WITNESS IN SAME MATTER.

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

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

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

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

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

The Code of Virginia requires that the court appoint a "discreet and competent attorney-at-law" to serve as guardian ad litem . . . or if no such attorney be found willing to act, the court will appoint some other discreet and proper person. Va. Code § 8.01-9. However, Va. Code § 16.1-266(A) expressly limits any such appointment in the juvenile and domestic relations district court to "a discreet and competent attorney-at-law. . . ." The GAL "shall represent the child . . . at any such hearing and at all stages of the proceedings unless relieved or replaced in the manner provided by law." Va. Code § 16.1-288. Va. Code § 8.01-9 states that "every guardian ad litem shall faithfully represent

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

the estate of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such defendant is so represented and protected." The court may enforce this duty by removing the guardian ad litem and appointing another one. In regard to the obligations of the guardian ad litem, the Court of Appeals of Virginia has observed:

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

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

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

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

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

The attorney serving as GAL is charged with the duty of "fully protecting the child's interest and welfare." Va. S. Ct. Rule 8:6. The Order for Appointment of Guardian Ad Litem (DC-514) provides that the guardian ad litem is appointed "to protect and represent the interests of [child] in connection with all proceedings involved in this matter." The Order of Appointment provides further that the guardian ad litem "perform the duties . . . specified on the reverse and incorporated by reference into this order." The duties incorporated by reference include:

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

1. Represent the child in accordance with Rule 8:6 of the Rules of the Supreme Court of Virginia.

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

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

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

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

Committee Opinion
March 26, 1999

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

LEGAL ETHICS OPINION 1854 SETTLEMENT NEGOTIATIONS IN A CRIMINAL CASE.

This hypothetical considers a criminal case in which the Commonwealth's Attorney (CA) and the defense counsel seek to negotiate a plea agreement. Generally, the CA has no legal or ethical obligation to a particular witness in this case; however, the CA wishes to "protect" Witness X by restricting dissemination of the witness' identity and involvement. The CA communicates a settlement offer to the defense counsel, advising the defense counsel of material witnesses in the case, including the name and involvement of Witness X whom the CA wishes to "protect." A condition of the proffered plea agreement requires that the defense counsel neither reveal to the client the identity of Witness X nor the scope of Witness X's involvement in the case. The CA makes it clear to the defense counsel that if the defendant is made aware of Witness X's identity and involvement, then the plea offer will be withdrawn.

QUESTIONS PRESENTED

1) May a CA make a settlement offer to the defense counsel in a criminal case, requiring the defense counsel to refrain from providing relevant information to his or her client as a condition of the settlement offer?

2) May the defense counsel in a criminal case withhold from the client relevant information if withholding such information results in a desirable plea agreement for the client?

APPLICABLE RULES AND ANALYSIS

The appropriate and controlling rules relative to this hypothetical are Rules 1.4(c) and 3.4(h), which deal with communication and fairness to the opposing party and counsel. These issues and questions have not been addressed by this Committee in past legal ethics opinions.

The first question is whether it is ethical, as part of the proffered plea agreement, to require the defense counsel to keep Witness X's identity and involvement secret from his or her client, the defendant. The CA is attempting to protect Witness X from possible retribution, but Rule 3.4(h)[1] directly prohibits the CA from requesting a person (the defense counsel) to refrain from voluntarily giving relevant information to another party (the defendant). The exceptions noted in Rule 3.4(h) are specifically limited to civil cases[2]; therefore, the primary rule prohibits a lawyer from requesting that a person refrain from giving relevant information to another party. In this hypothetical, the CA cannot offer a plea agreement detailing the identity and involvement of

[1] 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.

[2] Rule 3.4, Comment [4], "Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2."

Witness X and then ask the defense counsel to refrain from sharing Witness X's identity with the client, because the identity and involvement of Witness X is considered to be relevant information.

Alternatively, because the CA is neither obligated to offer a plea agreement nor to provide all inculpatory evidence or witness testimony to the defense, the CA would be permitted to offer a plea based upon a *nameless* confidential informant for the defense counsel to present to his client. The defense counsel and his or her client would then have to assess the plea offer based upon the limited information available to them.

The second question concerns the defense counsel's communication duties when presented with the CA's plea agreement that requires the defense counsel not to reveal Witness X's identity. In response to the first question, the Committee opines that Rule 3.4(h) prohibits the CA from imposing such a requirement after having disclosed material facts to the defense counsel. The Committee also finds it unethical for the defense counsel to sequester certain facts from his or her client, as Rule 1.4(c)[3] requires the defense counsel to inform the client of all of the matter's pertinent facts that will affect the determination of the defendant's plea.[4] Rule 1.4(c) would permit the defense counsel to withhold such information from the defendant if the defense counsel believes that the defendant has enough relevant information about the pertinent facts to make an informed decision; however, whether Witness X's identity and involvement is additional information that must be disclosed to the client in order for the client to make an informed decision about accepting or rejecting the plea offer is fact specific and must be determined on a case-by-case basis. Fundamentally, the defense counsel cannot withhold from the defendant salient facts or information that would be pertinent to the defendant's decision to accept a settlement or plea agreement in his or her matter.

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

Committee Opinion
October 5, 2010

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[3] Rule 1.4 Communication
(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

[4] Rule 1.4, Comment [5] explains: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. *See* Rule 1.2(a)...."

LEGAL ETHICS OPINION 1844

ETHICAL DUTY OF A GUARDIAN AD LITEM TO INVESTIGATE AND REPORT ALLEGATIONS OF CHILD ABUSE AND NEGLECT.

In this hypothetical, a husband and wife are involved in a contentious custody and visitation dispute over the couple's 7-year-old daughter. A guardian ad litem ("GAL") is appointed to the case. In meeting with the GAL, the mother asserts that the father has subjected the daughter to abuse and the daughter does not want continued visitation with the father. Further, the mother is asking for any visitation, if ordered, to be supervised because of the father's continued abuse. The GAL then meets with the daughter who asks the GAL not to repeat what she tells her because she is afraid her parents might get angry with her and also says she is afraid of her father and does not want to visit him. When the GAL meets with the father, the father denies all such allegations as being contrived by the mother in an effort to deny him custody and visitation. The mother insists that the GAL proceed with an investigation into the allegations of child abuse in spite of daughter's reluctance and father's denial.

This hypothetical involves the special role of a GAL and the question of whether a GAL may reveal information received from the child, against the child's wishes.

The fundamental ethics rule involved in this analysis is Rule 1.6[1], which deals with the lawyer's duty of confidentiality of information. While Rule 1.6 safeguards information that the lawyer gains in a professional relationship, Rule 1.6(b)(1) specifically allows a lawyer to reveal information to the extent reasonably necessary to comply with law.[2]

The Committee's analysis also considers the role of a GAL as outlined in Rule 8:6 of the Rules of the Supreme Court of Virginia:

> RULE 8:6. The Roles of Counsel and of Guardians Ad Litem When Representing Children.
>
> The role of counsel for a child is the representation of the child's legitimate interests.
>
> When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.

This Committee has also previously addressed the unique role of a GAL. In LEO 1729 this Committee opined as follows:

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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] RULE 1.6 Confidentiality of Information
(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
(1) such information to comply with law or a court order;

> In determining the ethical duties of an attorney serving as GAL, this committee has recognized that the relationship of the GAL and child is different from the relationship of attorney and client.[3] In reconciling the differences between the traditional ethical duties an attorney owes to a client, and the legal obligations that a GAL must discharge, the committee believes that where fulfilling a specific duty of the guardian ad litem conflicts with the traditional duties required of an attorney under the Code of Professional Responsibility, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the GAL should follow traditional course of action required under the Code of Professional Responsibility.

The *Standards to Govern the Performance of Guardian Ad Litem for Children*[4] ("*The Standards*") outline the specific duties and qualifications of a GAL appointed by the court. *The Standards* were formally adopted by the Judicial Council of Virginia and reviewed by the Supreme Court in September of 2003, after this Committee issued its then latest ethics opinions addressing a GAL's duties. *The Standards* inform Virginia courts as to the expectations regarding the conduct of GALs and provide additional guidance for a GAL's conduct.

As outlined in *The Standards*, and as agreed to in past opinions from this Committee, lawyers serving as GALs are subject to the Rules of Professional Conduct as they would be in any other case, except when the special duties of a GAL conflict with such rules.[5] Therefore, although the lawyer serving as a GAL for the child must generally protect the child's confidences and secrets as required by Rule 1.6, Rule 1.6 (b)(1) permits the disclosure of information protected by Rule 1.6, if disclosure is necessary for the GAL to comply with the law. The Committee believes that the GAL's compliance with *The Standards* and Rule 8:6 may justify the disclosure of confidential information pursuant to Rule 1.6 (b)(1).[6] For example, the GAL may learn from the child that a custodian is taking illegal drugs and may use that information to request that the court order drug testing of the custodian.

The Standards outline, in terms of the GAL's relationship with the child, that the duty of confidentiality is not absolute.[7] In fact, *The Standards* require the GAL to advise the child of the limitations on confidentiality and the fact that there may be circumstances when confidentiality will not apply to their communications and times when it will.[8]

Based upon the obligations set forth in *The Standards*, this Committee opines that the duties of a GAL may extend further than those anticipated by the typical lawyer/client relationship, as the GAL not only serves as the child's advocate but is obliged to identify and recommend the outcome that best serves the child's interests.[9] Therefore, the GAL needs to investigate

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[3] *See* LEO 1725.

[4] See *Standards to Govern the Performance of Guardian Ad Litem for Children* ("*The Standards*"), at http://www.courts.state.va.us/gal/gal_standards_children_080403.html (effective September 1, 2003).

[5] *The Standards*, *supra* at "Introductory Comment." ("Attorneys who serve as GALs are subject to the Rules of Professional Conduct promulgated by the Virginia State Bar as they would be in any other case, except when the special duties of a GAL conflict with such rules."); *See also* Va. Legal Ethics Op. 1810 (2004) *citing* Va. Legal Ethics Op. 1729 (1999).

In addition, *The Standards* describe the GAL as representing the child as a lawyer and advocate. Therefore, even though the relationship is not strictly that of lawyer and client, a lawyer serving as a GAL is generally subject to the Rules of Professional Conduct except where compliance therewith will conflict with his or her specific duties as a GAL.

[6] *Id.*, at *Standard* C.

[7] *The Standards*, *supra* note 1. *Standard* C states in pertinent part: "[t]he GAL must inform the child that there may be circumstances when confidentiality will apply to communication between the child and GAL, and circumstances when it may not."

[8] *Id.*

[9] *Id.*, at Introductory Comment ("The role and responsibility of the GAL is to represent, as an attorney, the child's best interests before the court. The GAL is a full and active participant in the proceedings who independently investigates, assesses and advocates for the child's best interests. Decision-making power resides with the court.").

information obtained from and about the child in order to ascertain certain facts. The GAL must interview parties and other persons who have relevant knowledge of the child and facts that give rise to the allegations. This duty is outlined in *Standard B*, which states that "GALs should independently evaluate all allegations of child abuse or neglect, or of risk to the child's safety or welfare, including but not limited to physical or mental abuse, sexual abuse, lack of supervision, educational neglect, and exposure of the child to domestic violence or substance abuse, regardless of whether such abuse or neglect or risk is identified in the parties' pleadings."

Only after this investigation can the GAL independently make an evaluation. Through this independent investigation, the GAL assesses the risk of probable harm to the child. That assessment then leads to the determination of whether the GAL has a duty, as an advocate for the child's best interests, to disclose to the court or appropriate authority information necessary to safeguard the best interests of the child. That disclosure would be permitted in light of the Committee's analysis earlier in this opinion of Rule 1.6(b)(1), where a lawyer can reveal protected information to the extent reasonably necessary to comply with law.

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

Committee Opinion
December 18, 2008

LEGAL ETHICS OPINION 1768

PROSECUTOR THREATENING TRIAL BY JURY TO DISSUADE A DEFENDANT FROM APPEALING A CRIMMINAL CONVICTION TO THE CIRCUIT COURT.

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

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

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

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

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

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

Committee Opinion
November 26, 2002

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.

[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.

(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

[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 OPINION 1812 CAN LAWYER INCLUDE IN A FEE AGREEMENT A PROVISION ALLOWING FOR ALTERNATIVE FEE ARRANGEMENTS SHOULD CLIENT TERMINATE REPRESENTATION MID-CASE WITHOUT CAUSE.

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

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

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

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

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

Heinzman at 964.[1]

The committee notes, however, that the court in *Heinzman* did not have before it a termination or conversion clause of the type presented in your inquiry. Thus, the *Heinzman* court did not have an opportunity to consider whether an attorney and client may properly agree upon

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

alternative fee arrangements in the event the client elects to terminate the contingent fee agreement before the contemplated services have been fully performed. However, the Supreme Court did state the following in *Heinzman:*

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

Heinzman at 962 (footnote omitted).

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

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

Heinzman at 963.

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

Other states' ethics opinions have held that a lawyer may ethically include in a contingent fee agreement what he is to receive as a fee in the event he is discharged by the client. Kansas Bar Ass'n Ethics Op. 93-03 (lawyer may included in contingent fee agreement his entitlement to a *quantum meruit* recovery which could include a stated percentage of the client's ultimate recovery); Colo. Bar Ass'n Ethics Op. 100 (1997) (lawyer not ethically precluded from using "conversion clause" providing for alternative fee, so long as the fee charged does not unreasonably interfere with client's absolute right to fire lawyer); Miss. Bar Ethics Op. 144 (1988) (discharge clause entitling lawyer to $60 per hour or 20% of any recovery is permissible as long as it does not result in an excessive fee); New Mexico Bar Ethics Op. 1995-2 (1995) (approving contingent fee agreement that proposes a *quantum meruit* recovery if lawyer is fired without cause or if client gives lawyer cause to withdraw); Nassau County Bar Ass'n Op. 90-24 (1990) (discharged lawyer may charge contingent fee if it is reasonable and represents reasonable value of services rendered prior to discharge); *cf. Kirshenbaum v. Hartshorn*, 539 So. 2d 497 (Fla. Dist. Ct. App. 1989) (lawyer loses right to any fee when contingent fee contract did not specify compensation in event client elected to discharge lawyer before recovering anything).

The committee opines that such alternative fee arrangements are permissible in contingent fee contracts so long as the alternative fee arrangements otherwise comply with the Rules of Professional Conduct. For example, the alternative fee arrangement must be adequately explained to the client (Rule 1.4 and 1.5(b)), be reasonable (Rule 1.5(a)), and not unreasonably hamper the client's absolute right to discharge his lawyer, with or without cause, at any point in

the representation (Rule 1.16)[2]. Given these parameters, the committee believes that when determining reasonableness, the reasonableness of the alternative fee must be evaluated and judged not only in the context of when the fee agreement was signed, but also as of the time that the lawyer's services were terminated, as well as when the recovery, if any, was obtained. An example is in order. Client retains Lawyer A on a one-third contingent fee, with an alternative hourly fee arrangement to apply if the Client terminates Lawyer A's services before recovery. After discovery is completed, Lawyer A concludes that the insurance coverages available total $25,000.00 and the defendant has no means to satisfy a judgment in any amount. Given the expenses involved in trying the case and the risks associated with litigation, Lawyer A recommends to the Client that the Client accept the defendant's last and final offer of $22,500.00. The Client not only rejects the offer, but terminates the relationship with Lawyer A. Employing the alternative hourly fee arrangement, Lawyer A sends Client a bill for $20,000.00, which is properly calculated by Lawyer A by multiplying his stated hourly rate by the number of hours worked on the file. Lawyer A also claims a lien in this amount on any recovery in the case and notifies Lawyer B, who now is reviewing the case to determine whether he will represent Client. The committee believes that while the alternative hourly fee arrangement may have been reasonable at the time the fee agreement was signed, it is not reasonable when viewed at the time of discharge. Under this scenario, the alternative hourly fee arrangement is impermissible and, therefore, Lawyer A would only be left with a quantum meruit claim.

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

Second Sentence of the Proposed Language

The second sentence states as follows:

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

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

Furthermore, this provision is misleading if it purports to establish a *quantum meruit* fee. An attorney stating in a fee agreement that a particular hourly rate meets *quantum meruit* standards does not in fact make it so. *Quantum meruit* is a common law concept, with case law presenting appropriate factors for determining the fee in a particular case. *See County of Campbell v. Howard*, 133 Va. 19, 112 S.E. 876 (1922) (discussing the pertinent factors). *See also* Virginia Rule 1.5 which sets out the factors used to determine whether a lawyer's fee is reasonable. Significantly, neither *Howard* nor Rule 1.5 employs the attorney's usual hourly rate or "lodestar" as a factor in determining the reasonableness of the fee. If an attorney states a rate in the agreement that would not be reasonable under the *quantum meruit* concept, such a provision would be misleading to the client. Rule 1.5 places an affirmative obligation on an attorney to

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[2] Comment 6 to Rule 1.16 ("Declining or Terminating Representation") states that a "client has the right to discharge a lawyer at any time, with or without cause." *See also* Law. Man. On Prof. Conduct (ABA/BNA) 41:116 (2005), citing *Florida Bar v. Hollander*, 607 So. 2d 412 (Fla. Sup.Ct. 1992); *Florida Bar v. Doe*, 550 So.2d 1111 (Fla. Sup.Ct. 1989); *Cincinnati Bar Association v. Schultz*, 643 N.E.2d 1139 (Ohio Sup.Ct. 1994).

adequately explain his fee to the client. While the committee believes that an attorney is not required to do so, some attorneys may want to advise their clients that if the attorney is terminated without cause before completion of the attorney's services, the attorney will present evidence of her normal hourly rate in determining an appropriate *quantum meruit* amount. It is not impermissible for the attorney to state that her normal hourly rate is $200 an hour, if that is so, and to indicate to the client that in the event the client prematurely terminates the representation, the attorney will seek *quantum meruit* compensation based on that hourly rate for services performed up to the date of termination. Unfortunately, the second sentence of the proposed language goes too far and actually appears to attempt to set an hourly rate for *quantum meruit* analysis, which is misleading and, therefore, impermissible.

Based on the foregoing, the committee opines that the second sentence of the termination clause in the proposed contract is improper as it is misleading and fails to fully inform the client of the basis of the attorney's fee when a contingent fee representation is terminated by the client before its completion. See Virginia Rules 1.4 and 1.5.

Third Sentence of the Proposed Language

The third sentence states as follows:

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

The committee is of the opinion that this provision is likewise improper as it is misleading and fails to fully and properly inform the client of the lawyer's entitlement to compensation in the event the client terminates the representation prior to a recovery from the defendant. The committee notes that the provision does state that it applies "where permitted by law." However, the contract does not explain under what circumstances law may permit the attorney to elect compensation based on the agreed contingent fee or any settlement offer made to client prior to termination. As stated by the Supreme Court in the *Heinzman* case, contracts for legal services are not the same as other contracts. The client actually retains the lawyer for the purposes of explaining the client's legal rights and to advise the client as to what actions are "permitted by law." In this hypothetical, the lawyer's contract does not fully explain when the lawyer would be entitled to elect to receive a contingent fee "where permitted by law."

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

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

Committee Opinion
October 31, 2005