VIRGINIA BEACH BAR ASSOCIATION
ETHICS PRESENTATION
WITH
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HYPOTHETICAL #1
SCOPE OF PRACTICE FOR FOREIGN LAWYER IN VIRGINIA

A law firm is located only in Virginia. Some of the lawyers in the law firm are active members of the Virginia State Bar and in good standing. However, several of the firm's partners and associates are licensed to practice law in other U.S. jurisdictions, but not in Virginia. These foreign lawyers are: based in the Virginia law firm; use the law firm's Virginia address in their communications with clients, third parties and the general public; and have established an office and a "systematic and continuous presence in Virginia for the practice of law." The firm and these foreign lawyers provide legal services to clients in Virginia, throughout the U.S. and abroad. Some of the foreign lawyers in the firm work on matters involving Virginia clients governed by Virginia law. Others work only on matters involving the law of their admitting jurisdiction. Still others limit their practice exclusively to matters involving areas of federal practice, international law or third country law.

The initial question raised is, are the foreign lawyers practicing in this firm engaged in the unauthorized practice of law? In this hypothetical, the foreign lawyers are practicing "continuously and systematically" in a Virginia law firm. Whether they are authorized to do so is controlled by state and federal law.

Later, this opinion will also discuss foreign lawyer practice in the context of a Virginia law firm hiring a contract lawyer who is not admitted to practice in Virginia, but is admitted to practice in another United States jurisdiction or a foreign nation. If this firm were to hire a contract lawyer to assist with one specific matter involving Virginia law, would the contract lawyer have to be licensed to practice law in Virginia? Does it matter how long the project / matter lasts? Finally, what if the firm hired the contract lawyer to work over a period of time on several different Virginia matters? In this part of the opinion, the Committee will discuss contract lawyers whose activity might be either "temporary and occasional practice" or a "continuous and systematic" practice.

HYPOTHETICAL #2
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.

HYPOTHETICAL #3
GUARDIAN AD LITEM AS VISTITATION
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?

HYPOTHETICAL #4
TRIAL CONDUCT: ATTORNEY WRITING LETTERS TO OPPOSING COUNSEL AND WITNESS WITH COPIES TO THE COURT

You have presented a situation in which attorney C represents the natural father, who is seeking full custody, in a child custody case in juvenile and domestic relations court. The other parties to the suit are the maternal grandparents (represented by attorney A), who presently have custody of the child per court order, and the natural mother (represented by attorney B), who seeks to either obtain custody or continue the current custody order. The court has set a hearing date and ordered home studies of all parties. Attorney C has written letters to a child psychologist, who will be a witness at the hearing, and to attorney A, with copies of the letters to the court. You indicate that the letters contain the attorney's opinion as to the merits of the case as well as his version of the facts.

You have asked the committee to opine whether, under the facts of the inquiry, it is improper for the natural father's attorney to communicate information to the court in the child custody case.

HYPOTHETICAL #5
CONFLICT OF INTEREST - REPRESENTING CLIENT AGAINST FORMER CLIENT IN SUBSTANTIALLY RELATED MATTER

An attorney was retained to represent an individual in a personal injury action. While the investigation of the accident was being conducted, another attorney in that attorney's office determined that the firm was representing the hospital in a collection case against the new personal injury client. The attorney immediately advised both clients that a conflict of interest existed and provided both clients with a letter detailing the conflict of interest and advising both that he could not continue to represent either party unless both agreed in writing to waive any conflict of interest. The personal injury client promptly signed the waiver and the hospital advised orally that they would do the same. The parties understood that no further action would be taken on the collection case against the client until the personal injury matter was resolved, at which time any remaining balance on the collection case would be paid if sufficient funds were available. Thereafter, the personal injury client attempted to discuss the case with the attorney who advised her that he would be unable to represent her until after he had received a written statement from the hospital. Subsequently, she discharged the attorney.

HYPOTHETICAL #6

CONFLICT OF INTERESTS; CONFIDENCES AND SECRETS; REFERRAL NETWORK COMPOSED OF AND FOR USE BY BAR ASSOCIATION MEMBERS FOR LEGAL ADVICE CONCERNING CASES PRESENTED IN HYPOTHETICAL

A bar association of Virginia attorneys wishes to maintain a question referral network for its members, through which any member may seek legal advice, from other volunteer members, about a client's legal matter without disclosing the names or identities of any parties involved. Under the hypothetical, the attorney rendering advice will not be a member of the requesting attorney's firm and will be given only as much information about the underlying facts as the requesting attorney deems appropriate. The attorney rendering advice will not receive confidential or secret information without his or her advance consent. Also, attorneys requesting advice will be admonished not to disclose any confidence or secret of a client without the client's informed and express consent given in advance of the consultation.

You have asked the committee to consider whether Attorney A acquires confidences or secrets of Attorney B's client, or of Attorney B himself, if Attorney B relates specific facts underlying his client's case to enable Attorney A to answer Attorney B's question(s)?

HYPOTHETICAL #7

Advertising and Solicitation: Law Firm's Solicitation of Medical Providers

You have presented a hypothetical situation in which a law firm represents many medical providers regularly in their business and personal affairs. The firm also handles personal injury cases involving clients who are treated for their injuries by many of the same medical providers. You state that, in an effort to limit any potential conflicts of interest between the medical provider clients and the personal injury clients, the firm advises its personal injury clients during the initial consultation of the following: (1) that it represents most of the medical providers in the community; (2) that a medical provider can claim a lien in a portion of the settlement proceeds up to a statutory maximum but that the law does not require an attorney to make any payments to the medical providers out of the settlement proceeds beyond the statutory lien amounts; (3) that because it represents many of the medical providers, the firm only accepts personal injury cases in which the client agrees, in advance, that all of the medical providers will be paid in full for their services rendered to the personal injury client as a result of the personal injury to the extent that settlement proceeds are available for payment of these bills; (4) that the firm is not required to do this by law, and that other attorneys handling personal injury cases may not make this a condition of representation, and (5) that if the potential personal injury client is in agreement with this medical bill arrangement, he must sign a document authorizing the firm to pay all medical bills from the proceeds to the extent of such proceeds.

You further state that the firm has never had a client refuse to grant the authorization and that it believes that most clients want to pay their medical bills. You also state that most of the firm's medical provider clients are unaware of the arrangement with the firm's personal injury clients.
You indicate that the firm wishes to prepare a letter to its medical provider clients and to all other medical providers in the community advising them of the firm's practice of only accepting personal injury cases where the client agrees, in advance and in writing, to allow the firm to pay all outstanding medical bills related to the accident out of the settlement or trial proceeds to the extent that such proceeds are available and without regard to the lien amount. The proposed letter would also indicate that such bills would be paid from proceeds before any money is delivered to the personal injury client. Finally, the proposed letter would also state the firm's policy of attempting to give a medical provider thirty days notice prior to

a summons or subpoena for his testimony.

You have asked the committee to opine whether, under the facts of the inquiry, the letter is proper as to (1) the firm's current medical provider clients and (2) non-client medical providers.

HYPOTHETICAL #8
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?

HYPOTHETICAL #9
THE ETHICAL ISSUES OF LAWYERS TESTIFYING UNDER OATH IN COURT TO DEBTS OWED BY THE CLIENT

In this hypothetical, on the general return docket for civil cases in General District Court, a lawyer appears on behalf of his client, who is the plaintiff in the case. The lawyer or his firm is retained and the lawyer is not employed by the client as in-house counsel. The lawyer's knowledge of the case is typically based solely on what the client has relayed to the lawyer and what the lawyer has determined by his pre-filing investigation of the case. The plaintiff is not personally present, and the initial pleading in the case (warrant in debt, unlawful detainer, etc.) is signed either by the plaintiff personally or by the lawyer as attorney for the client. The defendant fails to appear. The lawyer raises his hand to be sworn in and subsequently testifies under oath as to the amount of the debt and that the debt is still owed.

In the alternative, the lawyer submits an affidavit pursuant to Code of Virginia §8.01-28 that is notarized as required and signed by the lawyer himself or by a member of his firm, attesting to the debt owed by the defendant. The defendant either fails to appear and is in default, or appears but is unsure what the alleged debt is for or of the amount owed, and is, therefore, unable to deny under oath that he owes the debt. The lawyer will ask for judgment based on the affidavit. In cases where the defendant does not appear, the judge cannot determine whether the debt is uncontested based solely on that fact.

QUESTIONS REGARDING ETHICAL CONDUCT

1. Is it permissible for the lawyer to raise his hand to be sworn in by the Court and swear or affirm under oath that the debt is owed to his client and obtain a judgment in favor of his client?

2. In the alternative, may the lawyer obtain a judgment in favor of his client on an affidavit to which he or a member of his firm has sworn on the client's behalf?

HYPOTHETICAL #10
USE OF RECORDINGS

B, a father, sexually abused A, his daughter, for an extended period of time during her childhood. B's sexual abuse of A constituted a felony. As is the case with many victims of sexual abuse, A repressed her memories of this abuse and could not recall its nature or extent until after she received therapy as an adult. As a result of this abuse, A suffers from several substantial psychological disorders and has received extensive therapy including hospitalizations to treat or manage these disorders. A has contacted a lawyer to consider a possible civil claim against B for damages resulting from his abuse of her. There is little corroborating evidence and the claim is essentially A's word against B's. A has continued to have contact with B who has freely admitted, in prior conversations with A, his sexual abuse of her. A's lawyer suggests that A arrange a meeting with B and unbeknownst to B, makes an undisclosed recording of their conversation. B is not currently represented by counsel.

HYPOTHETICAL #11
ATTORNEY OBTAINING NON-CONSENSUAL TAPE RECORDINGS FROM CLIENT

You advise that an attorney has been retained by a wife in a domestic relations matter. The wife has indicated to the attorney that previously she has secretly taped her husband's telephone conversations on a telephone in their marital home. The taping was done through a device having been placed on the telephone and the wires were not disturbed. The wife further informed the attorney that the taped conversations allegedly reveal the husband's intimate involvement with another woman and other marital indiscretions. The attorney instructed the wife to immediately cease any such taping.

You have inquired as to the propriety of the attorney's use of the tapes, in light of a recent Supreme Court of Virginia decision which found it improper for an attorney to instruct his client to tape record telephone conversations in his home. In addition, you have indicated your concern over the attorney's becoming an accessory to any crime which may have been committed by the wife.

HYPOTHETICAL #12
IS IT ETHICAL FOR A LAWYER TO BECOME A MEMBER OF A LEAD-SHARING ORGANIZATION?

In this hypothetical, an attorney wishes to become a member of a lead-sharing organization, which can be either a for-profit or not-for-profit association, in which members pay a $500 membership fee, and meet once a week. The membership fee is not distributed, in whole or in part, back to any member, but rather pays administrative costs of the organization and goes towards the profit of the association. Part of the oath associated with membership is that each member will maintain a high degree of professionalism in dealing with their leads, including, inter alia, timeliness and quality of services. Membership is often dependent on the number of leads a member passes. During the meetings, members take turns giving a 30-second promotional, stating any of the following: their name, professional title, industry, place of employment, and who would represent a "good lead" for them. On an alternating basis, one member per meeting gets to present a fifteen minute presentation in which they can discuss any aspect of their industry they deem appropriate. The presentation may be educational, a plea for business,

etc. The meeting then involves members passing leads to other members. These leads represent potential clients and may have been actively solicited by the lead-passing member whether they know of a particular professional in the lead-receiving member's industry. The lead-receiving member has no control over how the lead was generated, but the lead-receiving member retains full control over their representation of the client, and need not disclose any details of that relationship to any other person or entity. At the end of the meeting, the 30-second promotional process is usually repeated.

QUESTIONS PRESENTED:

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

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

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

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

HYPOTHETICAL #13
OBLIGATIONS OF A LAWYER WHO RECEIVES CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

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

HYPOTHETICAL #14
OBLIGATIONS OF A LAWYER WHO RECEIVES CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

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

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.

HYPOTHETICAL #16
LEGAL ETHICS OPINION MUST AN ATTORNEY COMPLY WITH THE CLIENT'S REQUEST NOT TO PRESENT A DEFENSE AT TRIAL WHEN THE CLIENT IS SUICIDAL?

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

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

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

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

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

HYPOTHETICAL #17

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

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

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

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

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

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

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

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

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

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

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

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

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

HYPOTHETICAL #18

PROSECUTER 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?

HYPOTHETICAL #19
REPRESENTATION ADVERSE TO FORMER CLIENT CO-DEFENDANTS

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

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

HYPOTHETICAL #20
INTERVIEWING CODEFENDANTS SIMULTAEOUSLY

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

HYPOTHETICAL #21
UNDISCLOSED RECORDING OF THIRD PARTIES IN CRIMINAL MATTERS

In this hypothetical, a Criminal Defense Lawyer represents A who is charged with conspiracy to distribute controlled substances. An unindicted co-conspirator, B, who is unrepresented by counsel, has information and will give a statement that will prove helpful to A's defense, for example, that A's involvement and participation in the conspiracy was nominal. B has other charges against him pending that are unrelated to the conspiracy with which A has been charged. A has told Criminal Defense Lawyer that B has been contacted by law enforcement authorities in regard to the investigation of the charges against A. Criminal Defense Lawyer is concerned that B might change his story to give a less favorable statement about A in order to negotiate a more favorable disposition of the charges against B. To preserve B's statement, Criminal Defense Lawyer wants to record an interview with B after identifying himself before B could consider changing his statement later. At the very least, Criminal Defense Lawyer reasons, he/she will be able to attack B's credibility in the event B testifies against A and B's statement is inconsistent with the statement B gave during the recorded interview.

QUESTIONS PRESENTED

You have asked the Committee to reconsider prior opinions and opine as to whether it would be ethical under the *Virginia Rules of Professional Conduct* for a Criminal Defense Lawyer to participate in,

or employ an agent to participate in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party. Stated differently, are there circumstances under which Criminal Defense Lawyer, or an agent under his/her direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge?

Also, your question raises a second question. Under the *Virginia Rules of Professional Conduct,* must a Criminal Defense Lawyer participating in, or employing an agent participating in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, inform that other party of the lawyer's role in the matter under discussion? Stated differently, must Criminal Defense Lawyer or his/her agent inform the third party that he/she is the defendant's lawyer or an agent of the defendant's lawyer?

HYPOTHETICAL #22
TRUST ACCOUNT – CAN A LAWYER REMIT IRREVOCABLY CREDITED FUNDS WHEN ACCOUNT HOLDS FUNDS FOR ONLY ONE CLIENT?

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

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

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

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

HYPOTHETICAL #23
CONFLICT OF INTEREST – ATTORNEY TO SERVE AS COMMISSIONER IN CHANCERY IN LIGHT OF PRIOR REPRESENTATIONS.

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

> Incident #1: Two years prior to the Commissioner's appointment, the Commissioner's law partner represented a realtor in connection with a real estate ethics complaint filed by Defendant B. The realtor worked for the realty company associated with the development where Defendant's A's lot is located. A letter of reprimand was issued

against the realtor for failing to provide Defendant B with a copy of the ratified contract of purchase and commission reduction agreement upon signing or initialing. All other allegations of wrongdoing by the realtor were dismissed. The representation was concluded two to three weeks prior to the Commissioner's association with the law partner and the formation of their law firm. The Commissioner was unaware of the representation prior to Defendant B's allegations of a conflict.

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

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

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

HYPOTHETICAL #24
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?

HYPOTHETICAL #25

WHETHER ATTORNEY, WHO LEAVES A FIRM, IS REQUIRED TO INFORM FIRM WHICH CLIENTS HE CONTACTED ABOUT HIS DEPARTURE AND ABOUT THE CONTENT OF THE COMMUNICATION.

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

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

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

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

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

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

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

HYPOTHETICAL #26

CAN AN ATTORNEY EMPLOYEE OF A RAILROAD COMMUNICATE WITH INJURED RAILROAD WORKERS WHO ARE REPRESENTED BY COUNSEL?

You have presented two hypotheticals involving the employees of a railroad. The underlying situation in each is that an employee was injured on the job. That employee hires an attorney, who notifies the railroad claims department of his representation. The claims department has employees who investigate the claims made by injured employees. That department is supervised by a member of the Virginia State Bar. Some, but not all, of the employees in the claims department are also members of the Bar.

In the first scenario, a nonlawyer claims agent contacts the injured employee to confirm that the lawyer does represent him. That claims agent asks why the injured employee wants a lawyer and recommends

that he not use one. At no time has the department supervisor instructed the claims agent not to communicate with represented claimants.

In the second scenario, the claims department has an office entitled, "Disability Support Services." An employee of that services department, who is a Bar member, contacts the injured employee after receipt of the notice of representation, seeking medical records from the injured employee and offering rehabilitation services. If the injured employee does not respond to that offer, the department employee will testify that rehabilitation was offered and declined. If the injured employee *does* respond, the claims agent asks for a direct interview and broad access to medical records. The claims agent may then testify against the injured employee regarding statements made during the interview.

The claims agents may also consult with the in-house counsel and the railroad's retained counsel who serve as defense counsel in the matter. The railroad claims those conversations are within the protection of the attorney/client privilege.

With regard to these scenarios, your request poses the following questions:

1) Is the claims department prohibited from contacting the employee after receiving notice of representation, as the supervisor of the department is a Bar member?

2) Is the claims department permitted to contact an employee for purposes of "verifying" legal representation after receiving notice from counsel?

3) If that contact is permitted, may a representative of the claims department question the represented employee regarding why he hired counsel and advise the employee that he would be better served by dealing directly with the claims department without the assistance of an attorney?

4) May the claims department contact a represented employee directly in order to request medical records, offer job retraining, or offer vocational services?

5) May the Bar member/claims agent contact a represented employee for purposes of requesting medical records, offering job retraining, or vocational services?

6) While working for an attorney-supervised claims department, is a Virginia attorney bound by the Rules of Professional Conduct, even though maintaining that he is merely offering disability support services?

HYPOTHETICAL #27
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.

HYPOTHETICAL #28

ARE COMMONWEALTH'S ATTORNEYS HELD TO THE SAME ETHICAL REQUIREMENTS AS OTHER ATTORNEYS?

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

Hypothetical 1

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

Hypothetical 2

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

required by statute. As a result of the missing witness and the inadmissibility of the lab analysis, the case is dismissed.
You have asked the Committee to opine, under the facts of the inquiry, the following questions:

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

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

HYPOTHETICAL #29
IS IT ETHICAL FOR A CRIMINAL DEFENSE ATTORNEY TO DISCOURAGE A WITNESS FROM SPEAKING WITH THE COMMONWEALTH'S ATTORNEY?

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

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

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

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

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

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

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

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

HYPOTHETICAL #30

CLIENT FILES - REFUSAL OF ATTORNEY TO RELEASE A COPY OF THE DEFENDANT'S PRE-SENTENCE REPORT TO THE DEFENDANT

Your request presented a hypothetical situation involving a client requesting a copy of his file from an attorney. Specifically, the attorney had represented the client in a criminal matter. The client was convicted in a Virginia circuit court. The trial judge set a sentencing hearing and ordered a probation officer to prepare a pre-sentence report for use at that hearing. The officer forwards a copy of the report to the attorney, who reviews it with his client. One day after the sentencing hearing, the client informs the attorney that the client will be petitioning the Supreme Court of Virginia for a writ of *habeas corpus*. The client requests that the attorney provide the file to the client, including the pre-sentence report.

The question raised by your hypothetical is whether the attorney has a duty to provide the pre-sentence report to the client.

HYPOTHETICAL #31

CONFIDENTIALITY OF INITIAL CONSULTATION

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

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

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

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

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

LEGAL ETHICS OPINION 1856 SCOPE OF PRACTICE FOR FOREIGN LAWYER IN VIRGINIA

Lawyers frequently find it necessary to engage in cross-border legal practice to represent their clients. Multi-jurisdictional practice is on the increase and this trend is not only inevitable, but necessary. Globalization, the explosion of technology, and the increasing complexity of law practice require lawyers to [1] cross state borders to afford clients competent representation.

This opinion explores the extent to which a lawyer not licensed in Virginia may engage in the practice of law in Virginia, both on a temporary basis and "continuously and systematically" under Rule 5.5 of the Virginia Rules of Professional Conduct. For purposes of the opinion, the foreign lawyer is licensed and in good standing in a jurisdiction other than Virginia. The importance of these issues to contemporary law practice cannot be overstated.

A hypothetical will help develop the questions presented:

> A law firm is located only in Virginia. Some of the lawyers in the law firm are active members of the Virginia State Bar and in good standing. However, several of the firm's partners and associates are licensed to practice law in other U.S. jurisdictions, but not in Virginia. These foreign lawyers are: based in the Virginia law firm; use the law firm's Virginia address in their communications with clients, third parties and the general public; and have established an office and a "systematic and continuous presence in Virginia for the practice of law." The firm and these foreign lawyers provide legal services to clients in Virginia, throughout the U.S. and abroad. Some of the foreign lawyers in the firm work on matters involving Virginia clients governed by Virginia law. Others work only on matters involving the law of their admitting jurisdiction. Still others limit their practice exclusively [2] to matters involving areas of federal practice, international law or third country law.

The initial question raised is, are the foreign lawyers practicing in this firm engaged in the unauthorized practice of law? In this hypothetical, the foreign lawyers are practicing "continuously and systematically" in a Virginia law firm. Whether they are authorized to do so is controlled by state and federal law.

Later, this opinion will also discuss foreign lawyer practice in the context of a Virginia law firm hiring a contract lawyer who is not admitted to practice in Virginia, but is admitted to practice in another United States jurisdiction or a foreign nation. If this firm were to hire a contract lawyer to assist with one specific matter involving Virginia law, would the contract lawyer have to be licensed to practice law in Virginia? Does it matter how long the project / matter lasts? Finally, what if the firm hired the contract lawyer to work over a period of time on several different Virginia matters? In this part of the opinion, the Committee will discuss contract lawyers whose activity might be either "temporary and occasional practice" or a "continuous and systematic" practice.

Applicable Rules and Prior Opinions

The controlling authority for these inquiries is Rule 5.5(c) and (d)(4)(i-iv) of Virginia's Rules of Professional Conduct:

> (c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (d) Foreign Lawyers:

(1) "Foreign Lawyer" is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.

(2) A Foreign Lawyer shall not, except as authorized by these Rules or other law:

(i) establish an office or other systematic and continuous presence in Virginia for the practice of law, which may occur even if the Foreign Lawyer is not physically present in Virginia; or

(ii) hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.

(3) A Foreign Lawyer shall inform the client and interested third parties in writing:

(i) that the lawyer is not admitted to practice law in Virginia;

(ii) the jurisdiction(s) in which the lawyer is licensed to practice; and

(iii) the lawyer's office address in the foreign jurisdiction.

(4) A Foreign Lawyer may, after informing the client as required in 3(i)-(iii) above, provide legal services on a temporary and occasional basis in Virginia that:

(i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia or admitted under Part I of Rule 1A:5 of this Court and who actively participates in the matter;

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law.

Comment [4] to Rule 5.5 provides guidance in the application of the foregoing portions of the Rule:

> ...Despite the foregoing general prohibition, a Foreign Lawyer may establish an office or other systematic and continuous presence in Virginia *if the Foreign Lawyer's practice is limited to areas which by state or federal law* do not require admission to the Virginia State Bar. (Emphasis added).

To apply these Rules and Comment [4] in this opinion, the Committee examines how Virginia law addressed foreign lawyer practice prior to their adoption.

Foreign Lawyer Practice Before Rules 5.5 and 8.5 were Amended

Before the Virginia Supreme Court amended Rule 5.5 in March 2009, Virginia's Unauthorized Practice of Law Rules regulated the practice of law in Virginia by non-Virginia lawyers.

UPL Opinions 195 and 201 addressed foreign lawyers practicing in a Virginia law firm. In UPL Opinion 195, the Committee observed that although Part 6, §I (C) would authorize some temporary [3] transactional work by a foreign lawyer in Virginia, it did not allow the foreign lawyer to establish a regular practice in Virginia of advising clients on matters involving Virginia law. The Committee opined that if a foreign lawyer was employed in a law office in Virginia, the foreign lawyer's practice must be limited to advising clients on matters involving the law of the jurisdiction where the lawyer is admitted. If the foreign lawyer provides legal services to clients on matters involving Virginia law, the foreign lawyer may do so only under the direct supervision of a Virginia licensed lawyer before any of the foreign lawyer's work product is delivered to the client.

In UPL Opinion 201, the Committee addressed the issue of a foreign lawyer maintaining an office in Virginia, i.e., practicing in the Virginia office of a multi-jurisdictional law firm and found that this would *not* be unauthorized practice if: 1) the lawyer advised clients on matters involving the law of the jurisdiction in which he/she was admitted to practice; or 2) the lawyer advised and prepared legal documents for a client concerning matters involving federal law for cases before a federal court or agency to the extent the federal matter did not impact Virginia law and to the extent Virginia legal issues were not involved; and provided "any law firm letterhead stationery or other public communications identifying the lawyer as practicing in the Virginia firm [denoted] the limitations on that lawyer's practice," i.e. where the lawyer is licensed to practice. UPL Op. 201 (2001). Outside of the limits of these specific exceptions, "a non-Virginia licensed lawyer practicing in the Virginia office of a multi-jurisdictional law firm cannot meet with clients in Virginia to give legal advice involving the application of the law of a jurisdiction in which the lawyer is not admitted to practice." *Id.*

Foreign Lawyer Practice in Virginia Under Rules 5.5 and 8.5

Rule 5.5 recognizes a similar scope of permissible practice; however neither the rule nor its comments address specifically whether the prohibition against establishing an office or continuous, systematic presence in Virginia applies when a lawyer is practicing only the law of the jurisdiction in which he/she is licensed. Comment [4] to Rule 5.5 provides that a foreign lawyer can maintain/establish "an office or other systematic and continuous presence in Virginia if the foreign lawyer's practice *is limited to areas which by state or federal law do not require admission to the Virginia State Bar.*" (Emphasis added). The italicized language invites the Committee to consider the state law that had authorized a foreign lawyer to practice in Virginia before the adoption of the amendments to Rules 5.5 and 8.5. The cited prior opinions of the UPL Committee were approved and adopted by the Supreme Court of Virginia and, therefore, represent the state law in effect at the time the Virginia State Bar's Multijurisdictional Task Force drafted the amendments to Rules 5.5 and 8.5.

The Committee concludes that the foreign lawyers who are licensed to practice in other U.S. jurisdictions and based in the multi-jurisdictional law firm in Virginia would not be engaging in unauthorized practice of law in violation of Rule 5.5 so long as they limited their practice to the law of the jurisdiction/s where they are licensed, to federal law not involving Virginia law, or to temporary and occasional practice as authorized by Rule 5.5(d)(4)(i)-(iii). The UPL opinions cited herein, approved by the Virginia Supreme Court, defined the scope or permissible foreign lawyer practice and the Multijurisdictional Task Force's proposal to amend Rule 5.5 did not overrule, but rather embraced, the Virginia law that was in effect at that time.

A foreign lawyer may also maintain an office in Virginia to practice the law of a foreign nation in which the lawyer is admitted if the foreign lawyer is certified to practice as a "Foreign Legal Consultant" under Rule 1A:7 of the Supreme Court of Virginia. The Foreign Legal Consultant may also engage in practice in Virginia to the extent authorized by Rule 5.5(d)(4)(i)-(iv). As Comment [13] to Rule 5.5 explains, the general safe-harbor provision found in Rule 5.5(d)(4)(iv) applies to foreign lawyers who are admitted to practice only in a foreign nation.

However, foreign lawyers who are based in Virginia may not practice Virginia law on a "systematic and continuous" basis. Rule 5.5(d)(2)(i). Such activity would be conduct in violation of the rules regulating the practice of law in Virginia. Rule 5.5(c). The foreign lawyer would also be subject to the disciplinary authority of the Virginia State Bar as provided in Rule 8.5.

Foreign Lawyers Whose Practice is Limited to Matters Involving Federal Law

Foreign lawyers who practice exclusively federal law need not be licensed in Virginia to maintain an office in Virginia. In *Sperry v. Florida ex rel. Florida Bar,* 373 U.S. 379 (1963), the U.S. Supreme Court addressed the question of whether a non-lawyer practitioner duly registered and authorized to practice before the United States Patent and Trademark Office, but not licensed as an attorney in any jurisdiction, could engage in a patent practice in a jurisdiction other than the jurisdiction in which the Patent Office is located, even though the conduct could be considered the practice of law in the other jurisdiction. The Court's answer was a clear "yes," based on the authority granted in the Supremacy Clause of the U.S. Constitution and the authority granted to the Commissioner of Patents, in 35 U.S.C. §31, to "prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office." The Court recognized that pursuant to the Supremacy Clause of the U.S. Constitution:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress." *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 566.

Id. at 385. Virginia has applied the federal supremacy doctrine in its UPL Opinions and Unauthorized Practice Rules. *See, e.g.*, UPL Op. 210 (2006) and UPR 9 ("Administrative Agency Practice"). [4] In UPL Opinion 210, the requestor asked whether it is the unauthorized practice of law for a foreign lawyer who is a member of a Virginia law firm, to render U.S. patent advice and render patent law opinions in Virginia to clients who may be located anywhere in the world. The Committee responded "no," this conduct would not be the unauthorized practice of law, citing the *Sperry* decision:

> Based on this authority, an attorney who is licensed other than in Virginia, who is registered and authorized to practice before the U.S. Patent Office and who is a member of a Virginia law firm can provide all legal services and representation related to a patent law practice to all clients needing such services and representation regardless of where the clients are located. These services and representation may include rendering legal advice and/or written opinions for clients on issues such as patent infringement, patent claim construction, patent validity, or enforceability of a patent. The patent attorney may provide such advice and opinions to a client whether related to a matter the patent attorney is actually handling for the client before the USPTO or not. The patent attorney can conduct this practice and provide these services while physically in Virginia and without the supervision or association of a Virginia licensed attorney, so long as the patent attorney limits his/her activity to the practice

of patent law and is not in any manner attempting to practice Virginia law. Provided the patent attorney's practice is limited as described herein, he or she may also maintain an office in Virginia to conduct that limited practice. If the patent attorney is a member of a law firm with offices in Virginia and elsewhere, the extent to which the patent attorney can conduct his/her practice outside of Virginia will depend upon the unauthorized practice rules and/or rules of professional conduct in those other jurisdictions. If the patent attorney provides advice and counsel regarding patent law to a Virginia client from a location outside of Virginia, this would not be the unauthorized practice of law in Virginia because the attorney is not physically in Virginia and because he/she is otherwise authorized to practice patent law.

Comment [4] to Rule 5.5 explains that a foreign lawyer may establish an office or other systematic and continuous presence in Virginia if the foreign lawyer's practice is limited to areas which by state or federal law do not require admission to the Virginia State Bar. Examples include those lawyers with practices limited to immigration or military law or who practice before the Internal Revenue Service, the United States Tax Court, or the United States Patent and Trademark Office. See also *Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005) (federal law controls whether a lawyer not licensed in state [5] may represent claimant and recover statutory fees in federal administrative proceeding).

Therefore, the foreign lawyers in the Virginia law firm may engage in their limited scope practice on a "continuous and systematic" basis, and may engage in temporary and occasional practice as permitted by Rule 5.5(d)(4)(i)-(iv), as applicable. Within the scope of their limited practice, these foreign lawyers may advise clients and render legal opinions to clients located in other states or countries without violating Virginia's prohibition against the unauthorized practice of law.

Note, however, that a "federal practice" does not in itself exempt foreign lawyers from the reach of state disciplinary authorities or unauthorized practice laws. For example, the Ninth Circuit made clear in *Gadda v. Ashcroft*, 377 F.3d 934 (9th Cir. 2004), that federal law did not preempt a state from disbarring a foreign lawyer over conduct that occurred in the lawyer's federal immigration practice. Rejecting the foreign lawyer's preemption argument, the court pointed out that the Board of Immigration Appeals' regulations not only "leave room" for supplementary state regulations, but in fact condition a lawyer's ability to practice in immigration court on the lawyer's continued good standing as a member of a state bar. To be sure, Rule 8.5 of the Virginia Rules of Professional Conduct states that "[a] lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia."

In addition, not all types of practices that a lawyer might characterize as a federal practice fit entirely [6] within the *Sperry* "federal practice" exemption. For example, a bankruptcy practice may involve the application of Virginia law to resolve particular legal issues, i.e., such as the debtor's homestead exemption and status or priority of claims or liens. In addition, the local rules of the bankruptcy courts sitting in [7] Virginia require a lawyer to be admitted to the Virginia State Bar to practice regularly in that court.

Although a foreign lawyer is not required to be admitted to practice in Virginia to practice before the United States Patent and Trademark Office, not all issues regarding patents fall within the *Sperry* exemption. For example, the assignment of the patent to a third party or the organization of a corporate entity to market or franchise the invention may be subject to the law of Virginia. This could also be the case regarding contracts with investors in the subject patent. If the legal work related to the patent is outside the scope of practice before the Patent Office, the lawyer must either be admitted in Virginia to perform that work or associate with an active member of the Virginia State Bar.

Similarly, a federal procurement practice may involve contractual agreements with third parties governed by state rather than federal law. Thus, a federal procurement practitioner may need to be admitted to practice in Virginia to perform this work on a "continuous and systematic" basis.

Foreign Lawyers Practicing the Law of a Jurisdiction in which They Are Not Admitted

The facts in the hypothetical state that "the firm and these lawyers provide legal services to clients throughout the U.S. and abroad." UPL Opinions 158, 195 and 201 would hold that the foreign lawyers could not advise clients on a "systematic and continuous" basis with respect to matters governed by the law of a jurisdiction in which the lawyer is *not* admitted to practice. Applying the cited UPL Opinions, a Maryland-licensed lawyer working in this Virginia firm could not practice "continuously and systematically" in Virginia advising clients on matters those clients have pending in New York that are governed by New York law.

The Committee believes that the conclusion reached in the prior UPL Opinions is overruled by the adoption of Rule 5.5 in at least this respect: whether a foreign lawyer violates Rule 5.5(c), by advising clients on matters involving the law of a jurisdiction where the foreign lawyer is not authorized to practice, should be determined by examining the host jurisdiction's rules and regulations instead of Virginia law or the law of the jurisdiction where the foreign lawyer is admitted. Rule 5.5 (c) states:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in *that* jurisdiction, or assist another in doing so. (Emphasis added).

Virginia's rules are not dispositive of whether the foreign lawyer is engaged in the unauthorized practice of law in another jurisdiction. The Committee believes that this language looks to the law of the host state or country to determine if the foreign lawyer is practicing in violation of the regulation of the legal profession in *that* jurisdiction. For example, New York law should govern whether a foreign lawyer not authorized to practice in New York may advise New York clients on matters involving New York law. The foreign lawyer's physical presence in Virginia may not be a sufficient basis to apply Virginia's rules over New York's rules governing foreign lawyer practice. Similarly, whether the Maryland lawyer could advise and counsel a client on a matter pending in New York on a "temporary or occasional" basis would be up to the rules and regulations of the legal profession in New York governing temporary practice by foreign lawyers.

Temporary Practice for Contract Lawyers

The scope of practice permitted of a contract lawyer who is not admitted in Virginia is subject to the foregoing analysis. If a Virginia law firm hires a contract lawyer to work on a matter involving Virginia law, the contract lawyer either must be licensed in Virginia or work in association with a Virginia licensed lawyer in the firm on a temporary basis as permitted under Rule 5.5(d)(4)(i), for transactional work; or Rule 5.5(d)(4)(ii) for pre-litigation activity in a matter in which the contract lawyer reasonably expects to be admitted *pro hac vice*. Rules 5.5(d)(4)(iii) and (iv) [8] are generally not applicable to contract lawyers. If the foreign contract lawyer is hired to work only on matters involving federal law or the law of the jurisdiction in which the foreign contract lawyer is admitted, the foreign lawyer does not need to be licensed to practice in Virginia.

How do the rules define "temporary and occasional practice?" Comment [6] to Rule 5.5 states:

> There is no single test to determine whether a Foreign Lawyer's services are provided on a "temporary basis" in Virginia, and may therefore be permissible under paragraph (d)(4). Services may be "temporary" even though the Foreign Lawyer provides services in Virginia on a recurring basis, or for an extended period

of time, as when the Foreign Lawyer is representing a client in a single lengthy negotiation or litigation. "Temporary" refers to the duration of the Foreign lawyer's presence and provision of services, while "occasional" refers to the frequency with which the Foreign lawyer comes into Virginia to provide legal services.

For example, if a firm hires a contract lawyer who is not licensed in Virginia to work solely on one specific Virginia matter/case in association with a Virginia-licensed lawyer, this should be considered "temporary and occasional practice" and allowed under Rule 5.5(d)(4)(i). If a firm hires a foreign contract lawyer to work on several and various Virginia matters/cases over a period of time, then the foreign lawyer's practice could be regarded as "continuous and systematic," and beyond the scope of temporary practice contemplated by Rule 5.5 (d)(4), thus requiring this contract lawyer to obtain a Virginia license.

Conclusion

Foreign lawyers, i.e., non-Virginia lawyers admitted to practice in the United States or a foreign nation, may practice in a Virginia law firm or may establish an office or other systematic and continuous presence in Virginia if authorized by Virginia or federal law. A lawyer admitted to practice in a foreign nation may establish an office or practice in a law firm in Virginia only if the foreign lawyer is certified as "Foreign Legal Consultant" pursuant to Rule 1A:7 of the Supreme Court of Virginia. Foreign lawyers practicing in a Virginia law firm may not advise clients on matters involving Virginia law except as permitted by Rule 5.5(d)(4). Foreign lawyers who limit their practice exclusively to federal practices in which admission to the Virginia State Bar is not required may maintain an office or practice systematically and continuously in Virginia. Likewise, if their practice is limited to matters involving the law of the state or country in which they are admitted to practice, foreign lawyers may practice in Virginia on a systematic and continuous basis. Contract lawyers not licensed to practice in Virginia who are hired by a Virginia law firm on a temporary basis may practice to the extent permitted by Rule 5.5(d)(4), or on a continuous and systematic basis if Virginia or federal law does not require their admission to the Virginia State Bar.

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

Committee Opinion
September 19, 2011

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[1] Report of the American Bar Association's Multijurisdictional Practice Commission to the ABA House of Delegates (August 2002) at 12; found at http://www.abanet.org/cpr/mjp/intro-cover.pdf

[2] For purposes of this opinion, federal practice excludes bankruptcy practice but refers to practice before agencies of the United States government. Third country law means the law of a foreign nation in which the foreign lawyer is not admitted or otherwise authorized to practice. International law means practice in which international laws, treaties, compacts, conventions, etc., are applicable to a legal matter.

[3] "However the term 'non-lawyer' shall not include foreign lawyers who provide legal services in Virginia to clients under the following restrictions and circumstances: (1) such foreign lawyer must be admitted to practice and in good standing in any state in the United States; (2) the services must be on an occasional basis only and incidental to representation of a client whom the lawyer represents elsewhere; and (3) the client must be informed that the lawyer is not admitted in Virginia." *See* order entered September 18, 1996, by the Supreme Court of Virginia.

[4] Code of Virginia, Vol. 11, Va. S. Ct. R., pt. 6, §I (Unauthorized Practice Rules) (2010)

[5] See generally *Restatement (Third) of the Law Governing Lawyers* §3(2) (2000) (lawyer may represent client before federal tribunal or agency in another jurisdiction in accordance with requirements of tribunal or agency).

[6]
Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963).

[7]
E.D. Va. Local Bankruptcy Rule 2090-1(B) (eff. 12/10/10); W.D. Va. Local Bankruptcy Rule 2090-1(B) (2010).

[8]
Subparagraph (d)(4)(iv) does provide a "safe harbor" which allows a foreign lawyer who is admitted to practice only in a foreign nation to engage in any nonlitigation practice on a temporary basis when that activity arises out of or is "reasonably related" to the foreign lawyer's current practice. The rule does not define "reasonably related," but suggests in the comments that a matter is reasonably related if: (1) there is an ongoing relationship with a client; (2) the client has "substantial contacts" with the jurisdiction where the foreign lawyer is admitted; or (3) the foreign lawyer has developed a recognized expertise in matters involving a particular body of federal, foreign, or otherwise nationally uniform law. As stated in the text of this opinion a foreign contract lawyer hired by a law firm from a temporary placement agency would not likely be able to invoke this "safe harbor."

LEO: Acquiring an Interest in Litigation — LE Op. 1155

Acquiring an Interest in Litigation — Personal Injury Representation: Assisting Client to Obtain Loan from Finance Company.

November 15, 1988

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.

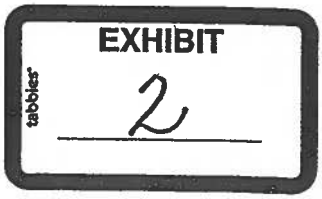
Under the facts as you have presented them in your inquiry, the Committee opines that there would not be a violation of Disciplinary Rule 5-103(B) as long as the attorney does not guarantee or cosign for the loan.

Committee Opinion November 15, 1988

CROSS REFERENCES

See also LE Op. 1269, LE Op. 1343, and LE Op. 1379

LEO: Acquiring an Interest in Litigation -, LE Op. 1155 (1988)



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

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

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

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

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

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

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

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

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

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

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

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

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

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

specified on the reverse and incorporated by reference into this order." The duties incorporated by reference include:

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

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

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

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

Committee Opinion
March 26, 1999

FOOTNOTE:

[1] The exceptions to the "witness-advocate" rule are set out in DR 5-101 (B), permitting the testifying lawyer and his firm to remain as trial counsel if: (1) the testimony will relate solely to an uncontested matter or to a matter of formality and there is no reason to believe that substantial evidence will be offered in

opposition to the testimony; (2) the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (3) recusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Legal Ethics Opinion No. 1462

Trial Conduct: Attorney Writing Letters to Opposing Counsel and Witness With Copies to the Court

You have presented a situation in which attorney C represents the natural father, who is seeking full custody, in a child custody case in juvenile and domestic relations court. The other parties to the suit are the maternal grandparents (represented by attorney A), who presently have custody of the child per court order, and the natural mother (represented by attorney B), who seeks to either obtain custody or continue the current custody order. The court has set a hearing date and ordered home studies of all parties. Attorney C has written letters to a child psychologist, who will be a witness at the hearing, and to attorney A, with copies of the letters to the court. You indicate that the letters contain the attorney's opinion as to the merits of the case as well as his version of the facts.

You have asked the committee to opine whether, under the facts of the inquiry, it is improper for the natural father's attorney to communicate information to the court in the child custody case.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR 7-105(C)(1), (4), and (5) which require, respectively, that, in appearing in his professional capacity before a tribunal, a lawyer shall not: state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence; assert his personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings. Further guidance is available in Ethical Consideration 7-32 which cautions, in pertinent part, that, "[g]enerally, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party"; and Ethical Consideration 7-35 which similarly cautions that a lawyer should follow local customs or courtesy or practice unless he gives timely notice to opposing counsel of his intention not to do so.

If the information will not be admissible in court, will assert only personal opinions, or would violate an established rule of evidence or procedure which would be disruptive of the proceedings, the committee opines that an attorney's practice of sending to the court copies of letters to a witness and to opposing counsel would be improper and violative of DRs 7-105(C)(1), (4), and (5). The committee is of the view that if the information could not be presented in court, there is no ethical justification to present that information via mail to the court. Cf. DR 7-109.

Committee Opinion
June 22, 1992

LEO: Conflict of Interest - Representing LE Op. 1002

Conflict of Interest - Representing Client Against Former Client in Substantially Related Matter.

December 9, 1987

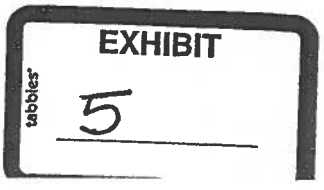
An attorney was retained to represent an individual in a personal injury action. While the investigation of the accident was being conducted, another attorney in that attorney's office determined that the firm was representing the hospital in a collection case against the new personal injury client. The attorney immediately advised both clients that a conflict of interest existed and provided both clients with a letter detailing the conflict of interest and advising both that he could not continue to represent either party unless both agreed in writing to waive any conflict of interest. The personal injury client promptly signed the waiver and the hospital advised orally that they would do the same. The parties understood that no further action would be taken on the collection case against the client until the personal injury matter was resolved, at which time any remaining balance on the collection case would be paid if sufficient funds were available. Thereafter, the personal injury client attempted to discuss the case with the attorney who advised her that he would be unable to represent her until after he had received a written statement from the hospital. Subsequently, she discharged the attorney.

It may be technically proper, given the above, for the attorney to continue to represent the hospital in the collection matter since the two matters are not substantially related and both clients had knowledge concerning the potential conflict and both waived any conflict of interest claim. However, the attorney must consider the following limitations on the method for the hospital's recovery:

1. It is improper, given the above, for the attorney to attempt to collect the hospital account from the proceeds of the personal injury action, because the information was learned through the representation of the attorney's former client. [DR:4-101(B)(2); EC:4-6]

2. It is improper, given the above, for the attorney to advise any other person, including new counsel, of the personal injury claim because the information was learned through the representation of the attorney's former client. [DR:4-101(B)(2), (3)]

Committee Opinion December 9, 1987



LEO #1642 CONFLICT OF INTERESTS; CONFIDENCES AND SECRETS; REFERRAL NETWORK COMPOSED OF AND FOR USE BY BAR ASSOCIATION MEMBERS FOR LEGAL ADVICE CONCERNING CASES PRESENTED IN HYPOTHETICAL

A bar association of Virginia attorneys wishes to maintain a question referral network for its members, through which any member may seek legal advice, from other volunteer members, about a client's legal matter without disclosing the names or identities of any parties involved.
Under the hypothetical, the attorney rendering advice will not be a member of the requesting attorney's firm and will be given only as much information about the underlying facts as the requesting attorney deems appropriate. The attorney rendering advice will not receive confidential or secret information without his or her advance consent. Also, attorneys requesting advice will be admonished not to disclose any confidence or secret of a client without the client's informed and express consent given in advance of the consultation.

I. Revealing Confidences and Secrets During Consultation.

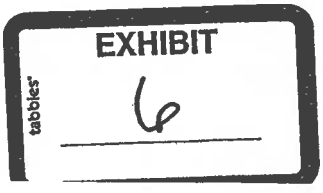
You have asked the committee to consider whether Attorney A acquires confidences or secrets of Attorney B's client, or of Attorney B himself, if Attorney B relates specific facts underlying his client's case to enable Attorney A to answer Attorney B's question(s)?

The Disciplinary Rule that governs this question is DR 4-101(B)(1) which requires that a lawyer shall not knowingly reveal a confidence or secret of his client. In addition, EC 4-2 gives further guidance by stating:

> A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of the matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

The committee assumes that in order for a meaningful consultation to occur, Attorney B will probably need to reveal, and Attorney A will likely acquire, confidences and secrets of Attorney B's client(s). However, this is a factual determination based upon facts outside the committee's knowledge. If Attorney B asks Attorney A a question regarding a particular situation involving Attorney B's client(s), then Attorney B has a duty under DR 4-101 to obtain client consent before revealing any confidences or secrets of his clients in the process. Thus, while consulting with another and more experienced attorney may be neccessary to competent representation, the attorney must be careful not to violate client confidentiality in the process of consulting with another attorney.

The anonymous hypothetical is regarded as an ethically acceptable



form of consultation because the consulting attorney is discreet in asking for guidance and discussions about abstract questions of law do not compromise client confidences or secrets. See, G. HAZARD & W. HODES, The Law of Lawyering [11] 1.6:202 and 1.6:203 (2d ed. 1990). However, the anonymous hypothetical approach to consultation encounters difficulties as more details are revealed during the consultation, and seemingly innocuous information may be harmful to the client if revealed to others. See, Kershen, The Ethics of Ethics Consultation, 6 Professional Lawyer, Vol. 3 at 3 (May 1995). Thus, the committee opines that Attorney B should obtain client consent before seeking advice from Attorney A, where particular details or facts about the client or his or her case must be revealed in order to obtain such advice.

Regarding Attorney A's duties to Attorney B and Attorney B's client, the committee recognizes that no attorney-client relationship arises between Attorney A and Attorney B, nor does such relationship exist between Attorney A and Attorney B's client. The consultation described in the hypothetical creates a special relationship between Attorney A and Attorney B which is not easy to define but which the committee will endeavor to describe.

The relationship between Attorney A and Attorney B is best described as a simple consultation of an attorney in his professional capacity by another attorney which, under the circumstances given in the hypothetical, would give rise to a reasonable expectation of confidentiality. The committee has previously opined that an ethical duty to keep the confidences of another person can arise even before the actual beginning of an attorney-client relationship. (See LEOs 1453 and 1546.) In those opinions the hypothetical presented concerned prospective clients who were consulting attorneys before hiring them and the committee found the consultations created expectations of confidentiality. Similarly, in LEO 629 the committee opined that an attorney who was consulted in a professional capacity at a social engagement was obligated to keep confidential the contents of the consultation. Again in LEO 1601 the committee found that a professor who was also an attorney would violate DR 4-101 if she were to disclose to the administration of her school the confidences and secrets of academic colleagues or students who requested her legal advice. The expectation of confidentiality that the committee has previously recognized can be attributed to the widespread understanding that attorneys provide confidential advice and counsel. Thus, the committee recognizes a duty to keep confidential those consultations that occur outside formal attorney-client relationships which nonetheless create an expectation of confidentiality. Attorneys can avoid this situation by making it clear through a disclaimer given to the inquirer, that the attorney cannot keep the information confidential. The committee believes this applies with equal force when attorneys consult attorneys and cites the concept with favor in LEO 1601. Thus, the committee believes it would be improper under DR 4-101(B) for Attorney A to reveal the contents of Attorney B's inquiry. Attorney A may not reveal the fact that Attorney B consulted him, the nature of the consultation, what was asked and what was discussed.

II. Attorney A Representing a Party Adverse to Attorney B's Client.

You also ask the committee to consider whether, if Attorney A has rendered advice to Attorney B, an independently practicing

attorney, about a hypothetical question based on facts underlying a real dispute involving Attorney B's client, and Attorney A did not know the identities of the parties to the dispute at the time Attorney A rendered such advice to Attorney B, may Attorney A ethically represent a party adverse to Attorney B's client?

The Disciplinary Rule that is controlling is again DR 4-101(B) which requires that a lawyer shall not knowingly (2) use a confidence or secret of his client to the disadvantage of his client; and (3) use a confidence or secret of his client for the advantage of himself or a third party Also appropriate is DR 5-105(D) which prohibits an attorney who has represented a client from representing another client in the same or a substantially related matter if the interest of that person is in any way adverse in any material respect to the interest of the former client unless the former client consents.

As stated above, Attorney A does not enter into any formal attorney-client relationship with Attorney B's client merely by answering Attorney B's questions, whether or not these questions revealed to Attorney A any of the client's confidences and secrets. Nevertheless, while no attorney-client relationship arises out of the consultation, the prior legal ethics opinions cited above would clearly prohibit Attorney A from representing a party adverse to Attorney B's client, having obtained confidential information as a result of the consultation with Attorney B, unless Attorney B's client consents to Attorney A's representation of such adverse party. See LEOs 1453, 1546 and 1601.

Therefore, as a precaution to avoid possible disqualification of Attorney A or Attorney A's firm, Attorney A may want to require that Attorney B disclose the identity of his or her client, so that a conflicts check can be made, before obtaining any further information from Attorney B. This is simply a prudent precaution and not an ethical obligation. Attorney B will need his or her client's consent in order to disclose the client's identity. See Legal Ethics Opinions 1270, 1284 and 1300.

[DRs 4-101(B)(1), 5-105(D); EC 4-2; LEOs 629, 1270, 1284, 1300, 1453, 1546, 1601; G. HAZARD & W. HODES, The Law of Lawyering 1.6:202 and 1.6:203 (2d ed. 1990); Kershen, The Ethics of Ethics Consultation, 6 Professional Lawyer, Vol 3 at 3 (May 1995)]

Committee Opinion
June 9, 1995

Legal Ethics Opinion No. 1480

Advertising and Solicitation: Law Firm's Solicitation of Medical Providers

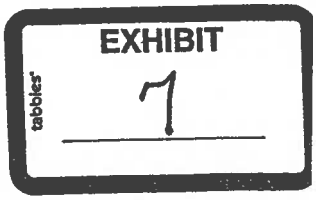
You have presented a hypothetical situation in which a law firm represents many medical providers regularly in their business and personal affairs. The firm also handles personal injury cases involving clients who are treated for their injuries by many of the same medical providers. You state that, in an effort to limit any potential conflicts of interest between the medical provider clients and the personal injury clients, the firm advises its personal injury clients during the initial consultation of the following: (1) that it represents most of the medical providers in the community; (2) that a medical provider can claim a lien in a portion of the settlement proceeds up to a statutory maximum but that the law does not require an attorney to make any payments to the medical providers out of the settlement proceeds beyond the statutory lien amounts; (3) that because it represents many of the medical providers, the firm only accepts personal injury cases in which the client agrees, in advance, that all of the medical providers will be paid in full for their services rendered to the personal injury client as a result of the personal injury to the extent that settlement proceeds are available for payment of these bills; (4) that the firm is not required to do this by law, and that other attorneys handling personal injury cases may not make this a condition of representation, and (5) that if the potential personal injury client is in agreement with this medical bill arrangement, he must sign a document authorizing the firm to pay all medical bills from the proceeds to the extent of such proceeds.

You further state that the firm has never had a client refuse to grant the authorization and that it believes that most clients want to pay their medical bills. You also state that most of the firm's medical provider clients are unaware of the arrangement with the firm's personal injury clients.

You indicate that the firm wishes to prepare a letter to its medical provider clients and to all other medical providers in the community advising them of the firm's practice of only accepting personal injury cases where the client agrees, in advance and in writing, to allow the firm to pay all outstanding medical bills related to the accident out of the settlement or trial proceeds to the extent that such proceeds are available and without regard to the lien amount. The proposed letter would also indicate that such bills would be paid from proceeds before any money is delivered to the personal injury client. Finally, the proposed letter would also state the firm's policy of attempting to give a medical provider thirty days notice prior to a summons or subpoena for his testimony.

You have asked the committee to opine whether, under the facts of the inquiry, the letter is proper as to (1) the firm's current medical provider clients and (2) non-client medical providers.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR 2-101(A) which states that a lawyer shall not participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading or deceptive statement or claim.



The committee believes that your inquiry as to the mailing involves primarily an issue of solicitation. The committee has previously opined that a solicitation letter is not improper, provided that it complies with Disciplinary Rules 2-101(A) and (B). See LEOs #862, #904, #1001; see also Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

The committee views the letter's transmittal to the firm's current medical provider clients as normal and open communication essential to the attorney-client relationship and therefore not improper under the Code of Professional Responsibility. Regarding the propriety of the letter as to non-client medical providers, the committee opines that the solicitation letter is not improper, as long as it does not make any false, fraudulent, misleading, or deceptive claims. The committee is without facts to enable it to opine whether or not the soliciting firm has made any such improper claims.

Although the committee cautions that the firm's simultaneous representation of personal injury clients and medical service providers may raise questions as to potential conflicts of interest, you requested that the committee opine solely as to the propriety of the proposed letter. Therefore, the committee is specifically not opining as to any issues related to multiple representation.

Committee Opinion
August 24, 1992

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 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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[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."

[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 1849 THE ETHICAL ISSUES OF LAWYERS TESTIFYING UNDER OATH IN COURT TO DEBTS OWED TO THE CLIENT

In this hypothetical, on the general return docket for civil cases in General District Court, a lawyer appears on behalf of his client, who is the plaintiff in the case. The lawyer or his firm is retained and the lawyer is not employed by the client as in-house counsel. The lawyer's knowledge of the case is typically based solely on what the client has relayed to the lawyer and what the lawyer has determined by his pre-filing investigation of the case. The plaintiff is not personally present, and the initial pleading in the case (warrant in debt, unlawful detainer, etc.) is signed either by the plaintiff personally or by the lawyer as attorney for the client. The defendant fails to appear. The lawyer raises his hand to be sworn in and subsequently testifies under oath as to the amount of the debt and that the debt is still owed.

In the alternative, the lawyer submits an affidavit pursuant to Code of Virginia §8.01-28 that is notarized as required and signed by the lawyer himself or by a member of his firm, attesting to the debt owed by the defendant. The defendant either fails to appear and is in default, or appears but is unsure what the alleged debt is for or of the amount owed, and is, therefore, unable to deny under oath that he owes the debt. The lawyer will ask for judgment based on the affidavit. In cases where the defendant does not appear, the judge cannot determine whether the debt is uncontested based solely on that fact. [1]

QUESTIONS REGARDING ETHICAL CONDUCT

1. Is it permissible for the lawyer to raise his hand to be sworn in by the Court and swear or affirm under oath that the debt is owed to his client and obtain a judgment in favor of his client?

2. In the alternative, may the lawyer obtain a judgment in favor of his client on an affidavit to which he or a member of his firm has sworn on the client's behalf?

APPLICABLE RULES

The appropriate and controlling rule relative to this hypothetical is Rule 3.7(a)(1). [2]

ANALYSIS OF THE QUESTIONS PRESENTED

The initial analysis of the questions rests upon the inevitability of whether the defendant appears in court to defend or deny the debt. Clearly, if the defendant makes an appearance in the case and either denies or contests the debt as stated in the warrant or detainer, the lawyer cannot personally affirm the debt or personally testify as to the debt owed. The underlying analysis of the questions revolves around the legal analysis of admissible evidence, testimonial evidence, and hearsay, which this Committee cannot address because these are legal issues that are beyond its purview.

A threshold inquiry is whether an attorney who submits an affidavit in a matter thereby becomes a necessary witness for purposes of Rule 3.7. Jurisdictions vary on this issue. [3] In the facts presented, the plaintiff's attorney submits an affidavit on the only substantive issue in the case—the indebtedness of the defendant—and without any other witness in the court to testify asks the court to enter judgment for the plaintiff on his affidavit. In this capacity, the lawyer is acting both as witness and advocate. The Committee opines that by submitting the affidavit under these circumstances the attorney has become a necessary witness within the meaning of Rule 3.7(a).

Given that the ethics issue is inextricably linked to a legal issue, this Committee sought an Attorney

EXHIBIT 9

General's opinion as to whether a plaintiff's lawyer in a debt collection case, is authorized, pursuant to Code of Va. §8.01-28, to serve as agent for the plaintiff and sign and file an affidavit stating the amount of the plaintiff's claim even though that lawyer does not have first hand knowledge of the amount owed. The Attorney General's office opined that a plaintiff's lawyer in a debt collection case is an "agent," as that term is used in §8.01-28, and may sign and file an affidavit stating the plaintiff's claim. [4] While this Committee does not give legal advice or analysis, the Committee relies upon the Attorney General's opinion that legally a plaintiff's lawyer may sign as agent for the client when filing a warrant in debt or affidavit in a debt collection matter.

As Code of Virginia §8.01-28 allows an agent of the plaintiff to sign and file an affidavit affirming the debt and the Attorney General of Virginia has opined that the attorney for the plaintiff may sign the affidavit as agent of the plaintiff, the next question is whether the statute, as interpreted by the Attorney General of Virginia, precludes the application of Rule 3.7(a) or any other Rule of Professional Conduct to the facts presented. Conduct may be lawful but nevertheless unethical under rules regulating the legal profession. *Gunter v. Virginia State Bar,* 238 Va. 617, 621, 385 S.E.2d 597 (1989) ("The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct which would be lawful if done by laymen.")

Under the facts of the hypothetical, the judge in these cases decides not to treat these matters as uncontested because the defendant does not appear. Rule 3.7(a)(1) would not allow the lawyer to become a witness either by testimony or affidavit because the lawyer would be testifying as to an essential element of the case, that a debt exists and the amount of the debt. While the lawyer can act as agent and can advocate the client's case, the lawyer cannot become a witness to a material fact, unless the court finds the matter to be uncontested based upon factors other than the defendant's failure to appear.

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

Committee Opinion
September 29, 2010

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[1] The Committee notes that when this draft opinion was published for comment, some of the commentators criticized the factual predicate set out in the hypothetical that the judge cannot determine whether the debt is uncontested solely on the basis that the debtor-defendant fails to appear. First, this is not a statement or conclusion of the Committee. It is the requesting party's statement or observation based upon her experience with debtors in collection cases. Second, the requestor draws a distinction between (i) the debtor's failure to appear, which places the debtor in *default* and (ii) the court reaching the conclusion that the underlying debt is "uncontested" for purposes of Rule 3.7(a) simply because the debtor—for whatever reason (i.e., lack of notice, illness, inability to obtain leave from work, etc)—fails to appear in court. These, of course, are factual and legal issues the Committee cannot decide. However, the Committee's opinion is based, as it must be, upon the facts and reasonable inferences drawn therefrom as presented by the requestor.

[2]
Rule 3.7 Lawyer As Witness

(a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

* * *

[3] *Compare Int'l Res, Ventures v. Diamond Mining*, 934 S.W.2d 218 (Ark. 1996)("Rule 3.7 is applicable to a lawyer giving evidence by affidavit as well as by testimony in open court."); *and Mauze v. Curry*, 861 S.W.2d 869 (Tex. 1993)(lawyer in medical malpractice case became necessary fact witness by submitting affidavit opining that defendant was negligent), *with Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555 (Ky. 2001)(lawyer who files personal affidavit in opposition to motion for summary judgment does not automatically become necessary witness subject to disqualification) *and Bank One Lima N.A. v. Altenburger*,

616 N.E.2d 954 (Ohio Ct. App. 1992)(disqualification reversed; lawyer did not become necessary witness regarding substantive matters by submitting affidavit stating only that documents attached to it from him were received by opposing counsel).

[4]
Letter from William C. Mims, Acting Att'y Gen. of Virginia, to Karen A. Gould, Executive Director, Virginia State Bar (February 25, 2009) (on file with the Virginia State Bar).

Legal Ethics Opinion No. 1448

Misconduct--Representing a Client Within the Bounds of the Law: Advising Client/Potential Civil Plaintiff to Record Oral Conversation With Unrepresented Potential Civil Defendant

You have presented a hypothetical situation in which Attorney represents A, who was sexually abused by her father, B, for an extended period during her childhood. B's sexual abuse of A, if proven, would constitute a criminal felony act.

You indicate that A repressed the memories of the abuse and did not recall the extent and nature of the abuse until she received therapy as an adult. Furthermore, as a result of the abuse, A suffers from several significant psychiatric disorders and has required extensive therapy, including several periods of hospitalization.

Attorney represents A as to a possible civil suit against B for damages related to his alleged sexual abuse of A. You advise that, for several reasons, there is little corroborating evidence. Finally, you indicate that Attorney has suggested that A arrange a meeting with B, who is not currently represented by counsel, and surreptitiously record their conversation, since B has continued to have contact with A, and in some conversations, has freely admitted his sexual abuse of A.

You have asked the committee to opine whether, under the facts of the inquiry, it would be violative of the Code of Professional Responsibility for an attorney to advise a client to record a conversation between the client and another party, without the consent or prior knowledge of that party, for the purpose of obtaining an admission of the party's sexual abuse of the client, when the party is not represented by counsel.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR 1-102(A)(4), which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law; DR 7-102(A)(8), which mandates that a lawyer shall not knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule; DR 7-103(B), which mandates that a lawyer, in dealing on behalf of a client with a person who is not represented by counsel, shall not state or imply that the lawyer is disinterested; and DR 1-102(A)(2) which precludes a lawyer from circumventing a disciplinary rule through the actions of another.

Whether or not the surreptitious recordation of conversations by a lawyer, or by his authorization, to which the lawyer's client is a party is legal in Virginia is, of course, a question of law and, as such, is beyond the purview of the committee. The committee has previously opined, however, that even if non-consensual tape recordings are not prohibited by Virginia or federal law, a lawyer's engaging in such conduct, or assisting a client in such conduct may be violative of DR 1-102(A)(4), since a lawyer is prohibited from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on the lawyer's fitness to practice law. See LEOs #1217 and #1324; Gunter v. Virginia State Bar, 238 Va. 617 (1989). Under the facts you present, the committee opines that advising one's client to initiate a conversation under possibly

false pretenses and to secretly record such conversation is improper deceptive conduct which may reflect on the lawyer's fitness to practice law, in violation of DR 1-102(A)(4). The committee further opines that since it would be unethical under DR 1-102(A)(4) for the attorney to so advise the client, such instructions would also be in violation of DR 7-102(A)(8).

Finally, it appears to the committee that the attorney is attempting to do indirectly, through the client, what the attorney could not ethically accomplish directly and personally under the proscription of DR 7-103(B), i.e., contact the potential defendant directly under the appearance of disinterestedness and surreptitiously record the conversation in order to manufacture evidence for her client. See LEO #233. Therefore, it is the view of the committee that it would be improper and violative of DR 1-102(A)(2) for the attorney to advise her client to accomplish the same objective since the attorney is attempting to circumvent the Disciplinary Rules. See, e.g., LEOs #848 and 1170.

Committee Opinion
January 6, 1992
□

LEO: Confidentiality — Misconduct LE Op. 1324

Confidentiality — Misconduct — Representing a Client Within the Bounds of the Law: Attorney Obtaining Non-Consensual Tape Recordings From Client.

February 27, 1990

You advise that an attorney has been retained by a wife in a domestic relations matter. The wife has indicated to the attorney that previously she has secretly taped her husband's telephone conversations on a telephone in their marital home. The taping was done through a device having been placed on the telephone and the wires were not disturbed. The wife further informed the attorney that the taped conversations allegedly reveal the husband's intimate involvement with another woman and other marital indiscretions. The attorney instructed the wife to immediately cease any such taping.

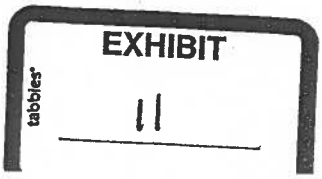
You have inquired as to the propriety of the attorney's use of the tapes, in light of a recent Supreme Court of Virginia decision which found it improper for an attorney to instruct his client to tape record telephone conversations in his home. In addition, you have indicated your concern over the attorney's becoming an accessory to any crime which may have been committed by the wife.

Whether or not non-consensual tape recording of telephone conversations is legal in Virginia is, of course, a question of law and, as such, is beyond the purview of the Committee. If such recordings are prohibited by law, then, by definition, a lawyer's participation in such an activity would be improper and violative of both DR:1-102(A)(3) which proscribes a lawyer's commission of a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law and DR:7-102(A)(8) which prohibits a lawyer from knowingly engaging in (other) illegal conduct or conduct contrary to a Disciplinary Rule.

The Committee is of the opinion that, in the facts you have presented, since the client had already taped the telephone conversations at the time she presented herself to the attorney, it is incumbent upon the attorney to preserve that information as a confidence or secret of the client, as required under DR:4-101. The Committee has previously opined that it would be improper for a lawyer to reveal any knowledge he gained from his client during the course of his representation regarding a crime which the client had already committed. (See LE Op. 1087) Additionally, the Committee has earlier opined that a "continuing wrong" does not fall into the category of a prospective crime, thereby decreeing the disclosure of the continuing wrong to be improper and violative of DR:4-101(A) and (B). (See LE Op. 929)

In addition, the Committee believes that even if non-consensual tape recording of telephone conversations is not prohibited by Virginia or federal law, a lawyer's engaging in such conduct, or assisting a client in such conduct, would be improper and violative of DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law. In holding that a lawyer's advising a client to non-consensually tape record telephone conversations was proscribed by DR:1-102(A)(4), the Supreme Court of Virginia recently found that "conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful . . . . The surreptitious recordation of conversations authorized by Mr. Gunter . . . was an 'underhand practice' designed to 'ensnare' an opponent." *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). (See also ABA Formal Opinion No. 337 (1974))

Notwithstanding the Committee's opinion as to the propriety of a lawyer participating in non-consensual tape recording of telephone conversations, the Committee believes that the facts you have presented may be distinguishable from the circumstances addressed in *Gunter* and ABA Formal Opinion No. 337. Earlier this Committee has opined that where an attorney's client had improperly removed medical records from a treating physician's office and presented those records to the attorney, the attorney was required to advise the client of his duty to return the file to the physician. However, the Committee was further of the view that it would not be improper for the attorney to continue to represent the client and to use the documents presented, acquisition of which may or may not have been authorized by the physician, providing the attorney was not a conspirator or an accessory to the illegal or improper obtaining of the evidence. The Committee further declined between the medical records in the client's possession and the "fruits of a crime" as defined in *In re Ryder*, 381 F.2d 713 (4th Cir. 1967). (See LE Op. 1141 and LE Op. 278)



Thus, the Committee is of an opinion that the facts you have presented are appropriately addressed in those earlier opinions. Therefore, the Committee is of the view that it would not be improper for the attorney to continue to represent the wife who had earlier taped the telephone conversations and to use the tape recordings, which acquisition may or may not have been legal, providing that the attorney was not a conspirator or an accessory to the obtaining of the tapes. Furthermore, by having advised the client of the need to immediately cease the tape recording, it is the Committee's opinion that the attorney appears to have fulfilled his duty with regard to any future illegal or improper activity of the client.

Finally, however, the Committee cautions that the attorney's review and use of the tapes may result in the unwitting invasion of privileged communication between the husband and his attorney, should the tapes coincidentally contain recordings of such attorney/client telephone conversations.

To the extent that this opinion overrules LE Op. 1217, that opinion is so overruled.

Committee Opinion February 27, 1990

CROSS REFERENCES

See also LE Op. 1364

LEO: Confidentiality - Misconduct, LE Op. 1324 (1990)

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

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

QUESTIONS PRESENTED:

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

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

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

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

APPLICABLE RULES & OPINIONS

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

ANALYSIS

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

EXHIBIT 12

The Committee's analysis starts with Rule 7.3(d) and Rule 7.2(c) and the basic prohibition against a lawyer giving anything of value to a person or organization for securing employment by a client or as a reward for having made a recommendation resulting in employment by a client.[2] This prohibition is designed to prohibit lawyers from compensating another for recommendations or as a reward for influencing a prospective client to employ the lawyer. The Committee considers the "leads" or referrals exchanged among members of this group to be things of value. The Committee finds that this practice of reciprocal referrals amounts to *quid pro quo* payment for services, in violation of Rules 7.3(d) and 7.2(c) and possibly in violation of Virginia's statutory prohibition on "running and capping.".[3] The lawyer, in this hypothetical, would be giving something of value to another organizational member in the form of return referrals as a term of membership. When membership in a lead-sharing organization is dependent on the number of leads a member passes, the Committee finds that this type of membership requires the lawyer to exchange something of value for referrals.

The rationale against permitting a lawyer to make such exclusive or *quid pro quo* referrals is that this activity may compromise the professional judgment of the lawyer. Rule 5.4 precludes the lawyer from allowing another person who recommends the lawyer from directing or regulating the lawyer's judgment.[4] A lawyer who is beholden to an organization may feel obligated to accept a case he is not competent to handle, or conversely, a lawyer may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client's needs. Either of these situations may put the client's interests at risk.

The prior analysis deals with a lawyer's acceptance of leads, however, there are additional concerns raised by a lawyer's passing leads. The passing of leads creates potential conflicts of interest for the lawyer pursuant to Rule 1.7(a)(2).[5] This rule specifically cautions the lawyer regarding potential conflicts stemming from the lawyer's personal interests. Participation in a lead-sharing organization potentially creates such a conflict when the lawyer's membership is dependent on the number of leads the member lawyer passes, thereby impacting the lawyer's freedom to choose the most appropriate specialty provider for a client.

Other issues triggered by your hypothetical are the confidentiality provisions that protect the client, even to the level of client identity in some representations. A lawyer may not participate in a plan that requires the lawyer to disclose information relating to the representation of a client except in compliance with Rule 1.6.[6] The mere disclosure of a client's name and specific need in certain circumstances may be enough to violate the Rule without consent of the client.

CONCLUSION:

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

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

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

3) This Committee finds there to be no ethical violation when a lawyer participates in a lead-sharing organization as a title insurance agent or in some other professional capacity, operating through an ancillary

business as long as the lawyer does not violate any of the Rules of Professional Conduct.

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

These same questions have been addressed by the states of Maryland, Massachusetts, Arizona, New Hampshire, Oregon, New York, and Montana, all of which have come to the same conclusion that membership in such an organization compromises the lawyer's independence, potentially creates [7] undisclosed conflicts of interest, and violates solicitation rules.

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

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

Committee Opinion
February 2, 2009
Committee Revised
December 29, 2010

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

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

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

[3]
See Letter from Att'y Gen. of Virginia Kenneth T. Cuccinelli, II to Karen A. Gould, Executive Director, Virginia State Bar

(December 7, 2010) (on file with the Virginia State Bar), which cites to §54.1-3939 and §54.1-3941.

[4]

Rule 5.4 Professional Independence Of A Lawyer

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[5]

Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[6]

Rule 1.6 Confidentiality of Information

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

[7]

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

LEGAL ETHICS OPINION 1842 OBLIGATIONS OF A LAWYER WHO RECEIVES CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Opinion
September 30, 2008

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[1] Rule 1.6 Confidentiality of Information

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

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

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

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

[5]
Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

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

LEGAL ETHICS OPINION 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:

> 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] ("T

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 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

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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;

[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.").

LEGAL ETHICS OPINION 1816

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) what pleas to enter;

(ii) whether to accept a plea agreement;

(iii) whether to waive jury trial;

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

(v) whether to appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Opinion
August 17, 2005

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

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

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

[4] *Id.*

[5] *Id.*

[6] *Id.*

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

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

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

[10] *See LEO 1737 and cases cited therein.*

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

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

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

[14]

Id; and see Sexton v. French, 163 F.3d 874 (4th Cir. 1998); *State v. Gibbs*, 758 A.2d 327 (Conn. 2000); *State v. Mecham*, 9 P.3d 777 (Utah 2000); *State v. Oswald*, 606 N.W.2d 207 (Wis. Ct. App. 1999).

[15]

See, e.g., United States v. Washington, 198 F.3d 721 (8th Cir. 1999).

[16]

See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

[17]

New York v. Hill, 528 U.S. 110 (2000).

[18]

Bonnie, "The Dignity of the Condemned", 74 Va. L. Rev. 1363, 1375 (1988).

LEGAL ETHICS OPINIONS 1817

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) the client consents after consultation.

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

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

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

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

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

Committee Opinion
August 17, 2005

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[1] Effective July 1, 2005.

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

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.

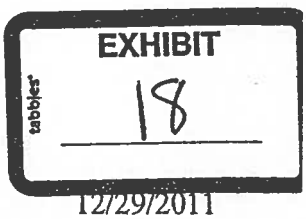
The Rule that specifically addresses conduct of a prosecuting attorney is Rule 3.8. That provision places special restrictions on the activities of a prosecutor; however, none of those apply here. Those provisions deal with probable cause, unrepresented defendants, communication with witnesses, disclosure 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



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

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

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

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

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

the existing client. See, e.g., Legal Ethics Opinion No. 1181.

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

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

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

Committee Opinion
May 16, 1996

Legal Ethics Opinion No. 1363

Confidences and Secrets--Conflict of Interests: Interviewing Codefendants Simultaneously

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

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

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

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

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

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

Therefore, the committee opines that it is possible that, after interviewing one defendant whose interests are potentially adverse to the interests of another codefendant, interviewing of another codefendant charged in the same or substantially related crime may result in a violation of DR 5-105(C) if it is obvious that the attorney could not have adequately represented the interests of each client. Even if the initial client would have consented to the potential adverse representation, the committee opines that the potential for prejudicing a client by the use of or divulging a confidence or secret would outweigh any informed consent. See DR 7-101(A)(3) and LEO #1181.

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

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

Committee Opinion
June 13, 1990

LEGAL ETHICS OPINION 1814

UNDISCLOSED RECORDING OF THIRD PARTIES IN CRIMINAL MATTERS

In this hypothetical, a Criminal Defense Lawyer represents A who is charged with conspiracy to distribute controlled substances. An unindicted co-conspirator, B, who is unrepresented by counsel, has information and will give a statement that will prove helpful to A's defense, for example, that A's involvement and participation in the conspiracy was nominal. B has other charges against him pending that are unrelated to the conspiracy with which A has been charged. A has told Criminal Defense Lawyer that B has been contacted by law enforcement authorities in regard to the investigation of the charges against A. Criminal Defense Lawyer is concerned that B might change his story to give a less favorable statement about A in order to negotiate a more favorable disposition of the charges against B. To preserve B's statement, Criminal Defense Lawyer wants to record an interview with B after identifying himself before B could consider changing his statement later. At the very least, Criminal Defense Lawyer reasons, he/she will be able to attack B's credibility in the event B testifies against A and B's statement is inconsistent with the statement B gave during the recorded interview.

QUESTIONS PRESENTED

You have asked the Committee to reconsider prior opinions and opine as to whether it would be ethical under the *Virginia Rules of Professional Conduct* for a Criminal Defense Lawyer to participate in, or employ an agent to participate in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party. Stated differently, are there circumstances under which Criminal Defense Lawyer, or an agent under his/her direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge?

Also, your question raises a second question. Under the *Virginia Rules of Professional Conduct,* must a Criminal Defense Lawyer participating in, or employing an agent participating in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, inform that other party of the lawyer's role in the matter under discussion? Stated differently, must Criminal Defense Lawyer or his/her agent inform the third party that he/she is the defendant's lawyer or an agent of the defendant's lawyer?

APPLICABLE RULES & OPINIONS

The applicable *Rules of Professional Conduct* are Rule 1.1,[1] requiring a lawyer to render competent representation to a client; Rule 1.3[2], requiring the lawyer to act with diligence in representing a client; Rule 4.3, dealing with unrepresented persons[3]; and Rule 8.4,[4] prohibiting the lawyer, or the lawyer's agent, from engaging in deceitful conduct that reflects adversely on the lawyer's fitness to practice law. Also pertinent to the Committee's analysis are LEOs 1217, 1738, 1765 and 1802.

ANALYSIS

You have requested reconsideration of prior LEOs 1217 and 1738. Each of those opinions involved the tape-recording of conversations by lawyers or by non-lawyers at their direction without consent of all parties to the conversations. LEO 1217, the earliest opinion of the Committee on the subject, concluded that even though an undisclosed recording may be permissible under Virginia or federal law, it may nevertheless be improper under DR 1-102(A)(4) if there are additional facts which would make such recording dishonest, fraudulent, deceitful or a misrepresentation. After LEO 1217 was issued, the Virginia Supreme Court decided *Gunter v. Virginia State Bar,* 238 Va. 617 (1989) and during the next 11 years this committee issued opinions generally prohibiting non-consensual recordings as unethical. LEO 1738

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considered whether the general prohibition against the non-consensual tape-recording by lawyers should yield to some exceptions including undercover law enforcement investigations, housing discrimination testing and situations in which the recording lawyer was the victim of a crime. The Committee in LEO 1738 reviewed that conduct with regard to former Rule 8.4(c)'s prohibition against "conduct involving dishonesty, fraud, deceit, or misrepresentation" and *Gunter*. Prior legal ethics opinions have cited *Gunter* for the general proposition that "the mere fact that particular conduct is not illegal does not mean that such conduct is ethical," as well as for the more specific proposition that just because a lawyer may legally tape-record a particular conversation does not necessarily mean he/she is permitted to do so under the ethics rules. *See*, LEO 1738. The Committee opined that, in most instances, undisclosed recording is improper conduct under DR 1-102(A)(4). However, the Committee identified three necessary exceptions: lawyers working in law enforcement or in connection with housing discrimination testers and where the lawyer is the victim of either the threat or actual commission of criminal activity. The Committee clarified that this list of exceptions was not necessarily an exhaustive list; the opinion acknowledges that there may be "other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical." The opinion suggested that the Committee would await a subsequent specific inquiry before addressing any other possible scenarios.

Many of the states originally issued ethics opinions stating that undisclosed recording was either generally improper or *per se* unethical, subject to some limited exceptions. Not all states subscribed to this view and more recently a number of states have reversed or significantly revised their opinions to allow undisclosed recording.[5]

This change in how the organized bar regards undisclosed recording, coupled with this committee's view that some of its prior opinions overextended the application of the *Gunter* decision, influenced the Committee's view of undisclosed recording in LEO 1802. The issue presented in LEO 1802 was whether a lawyer may ethically advise or suggest to a client that lawful, but undisclosed recording be used by the client to gather information relevant to a legal matter. In LEO 1802 the Committee concluded that, in determining when to use undisclosed recording, a lawyer must balance his/her obligations to fairness to third parties with a lawyer's duty to pursue diligently the legal objectives of his/her client, pursuant to Rule 1.3. Comment [1][6] to Rule 1.3 directs a lawyer to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." It is an essential part of a lawyer's legal judgment to pursue his/her role as advocate within the ethical bounds established throughout the *Rules of Professional Conduct*. *Gunter, supra,* and LEOs 1738 and 1765 did not present situations in which the Supreme Court of Virginia or the Committee were asked to balance a lawyer's duty to advise a client competently and diligently regarding lawful means by which to conduct an investigation against the Virginia State Bar's and the Court's disapproval of undisclosed recording.

In LEO 1802, a client wishing to bring a civil suit for past sexual abuse with little corroborating evidence and a client seeking evidence of a hostile work environment because a co-worker repeatedly makes sexually offensive remarks in the workplace, sought advice from the lawyer on how to address the client's legal problem. The undisclosed recording the lawyer proposed is not only lawful, but could very well be the only means by which the client may obtain relevant information. Nothing that the lawyer has suggested or recommended to the client violated the legal rights of the person whose statements are to be recorded. Further, as the Committee noted in LEO 1802, the Supreme Court of Virginia in the *Gunter* decision did not rule that undisclosed recording with the consent of one of the parties to the conversation was "deceitful" conduct and expressly declined to decide that issue. This committee believes that the undisclosed recording considered in LEO 1802 and the circumstances you present stand in stark contrast to the illegal wiretapping case presented in *Gunter*. Both present situations requiring the lawyer to weigh the competing ethical obligations of a lawyer's duties to third parties against those owed to the client.

In LEO 1765, the Committee extended LEO 1738's list of exceptions to include lawful use of non-consensual recording performed by federal lawyers as part of the federal government's intelligence work.

As suggested by the closing language of LEO 1738, the Committee contemplated that there may be additional circumstances in which a lawyer may use or direct others to use undisclosed, but lawful recording without violating 8.4(c); the Committee agrees with the requester that a Criminal Defense Lawyer's use of lawful undisclosed tape-recording under the circumstances described in the request is not deceptive conduct under Rule 8.4(c) that "reflects adversely on the lawyer's fitness to practice law."

As to the second question, Rule 4.3(a) states that when a lawyer is dealing on behalf of a client with a person not represented by counsel, such as the potential witness in the hypothetical above, not only shall a lawyer not state or imply that the lawyer is disinterested, but when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In interpreting Rule 4.3(a) in this hypothetical, the Committee opines that with undisclosed tape-recording there is a higher risk of the unrepresented party misunderstanding the lawyer or the lawyer's agent's role, which correspondingly places a higher burden on the lawyer or the lawyer's agent to ensure that the unrepresented person does not misunderstand the lawyer or the agent's role. The Committee finds it persuasive that in some jurisdictions, when a lawyer contacts an unrepresented party on behalf of a client, the lawyer must identify him/herself and his/her representational role. *See Louisiana State Bar Ass'n v. Harrington,* 585 So.2d 514, 517 (La. 1990) (lawyer's failure to identify himself as a lawyer or carefully explain role in matter violated Rule 4.3 of the Rules of Professional Conduct of the Louisiana State Bar Association); *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.Supp. 1116, 1123 (N.D. Ill. 1995) (questionnaire sent to Defendant's employees that did not disclose on its face the fact that it was prepared on behalf of plaintiffs' attorney and implied that it was of a neutral and unbiased character violated Rule 4.3 of Rules of Professional Conduct for the Northern District of Illinois).[7]

Accordingly, the Committee opines that when a Criminal Defense Lawyer or an agent acting under their supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, those methods cannot be seen as reflecting adversely on his/her fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).

The Committee further opines that when a Criminal Defense Lawyer or an agent acting under his/her supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, the lawyer or his/her agent must assure that the unrepresented third party is aware of the lawyer or agent's role.

To the extent that anything in this opinion is in contradiction to the language in LEO 1217 or LEO 1438, that opinion is overruled.

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

Committee Opinion
May 3, 2011

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[1] Rule 1.1. Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[2] Rule 1.3. Diligence. (a) A lawyer shall act with diligence and promptness in representing a client.

[3] Rule 4.3 Dealing With Unrepresented Persons.
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the

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

[4] 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; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

[5] In Arizona Bar Opinion 00-04 (2000) a lawyer may ethically advise a client that the client may tape record a telephone conversation in which one party to the conversation has not given consent to its recording, if the lawyer concludes that such taping is not prohibited by federal or state law. In the Hawaii Superior Court, Formal Op. 30 (Modification 1995), it is not per se unethical for lawyer to engage in undisclosed recording; whether such conduct is deceitful must be determined on a case-by-case basis. In Michigan Bar Association Opinion RI-309 (1998), whether a lawyer may ethically record a conversation without the consent or prior knowledge of the parties involved is situation specific, not unethical *per se*, and must be determined on a case by case basis. In *Attorney M. v. Mississippi Bar,* 621 So.2d 220 (Miss. 1992), the lawyer's surreptitious taping of two telephone conversations with doctor who was a potential codefendant in medical malpractice suit did not violate rule of professional conduct, as conduct did not rise to level of dishonesty, fraud, deceit, or misrepresentation. The Missouri Bar Association Ethics Opinion 123 (3/8/06), allows the lawyer/participant to tape record telephone communication if it is not prohibited by law. In New York City Bar Association Ethics Opinion 2003-02, lawyers may not routinely tape-record conversations without disclosing that the conversation is being taped, but they may secretly record a conversation where doing so promotes a generally accepted societal benefit. In the Oregon State Bar Opinion 1999-56 (1999), if the substantive law does not prohibit recording a lawyer may do it unless his/her conduct would otherwise cause the other person to believe they are not being recorded. The Tennessee Supreme Court amended the commentary to Rules 4.4 and 8.4 of the Tennessee Rules of Professional Conduct in 2003 to make clear that the secret recording of conversations was not unethical *per se*. In Utah State Bar Ethics Opinion 96-04, recording conversations to which a lawyer is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation.

[6] Rule 1.3, Comment [1]: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[7] The rules in these two cases were modeled after Rule 4.3 of the *Model Rules of Professional Conduct*, which provides that: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

LEGAL ETHICS OPINION 1835

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

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

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

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

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

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

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

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

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

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

Committee Opinion
September 7, 2006

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

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

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

LEGAL ETHICS OPINION 1824

CONFLICT OF INTEREST – ATTORNEY TO SERVE AS COMMISSIONER IN CHANCERY IN LIGHT OF PRIOR REPRESENTATIONS.

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

> Incident #1: Two years prior to the Commissioner's appointment, the Commissioner's law partner represented a realtor in connection with a real estate ethics complaint filed by Defendant B. The realtor worked for the realty company associated with the development where Defendant's A's lot is located. A letter of reprimand was issued against the realtor for failing to provide Defendant B with a copy of the ratified contract of purchase and commission reduction agreement upon signing or initialing. All other allegations of wrongdoing by the realtor were dismissed. The representation was concluded two to three weeks prior to the Commissioner's association with the law partner and the formation of their law firm. The Commissioner was unaware of the representation prior to Defendant B's allegations of a conflict.
>
> Incident #2: Several years ago (the exact date is unknown), Defendant B consulted with one of the other defendants, an attorney then in private practice, regarding a possible fraud claim against Defendant A. The alleged basis of the fraud claim is unknown. Defendant B believes that the attorney with whom she consulted, in turn, contacted the Commissioner's law partner about her case. The law partner has no recollection of the matter.

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

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

[1]

The governing provision for this question is Rule 1.11 , which in pertinent part, addresses attorneys serving in public roles and their potential conflicts from private practice. Specifically, Rule 1.11(d)(1) states as follows:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.

An application of this provision to this attorney serving as Commissioner in Chancery means that the attorney could not work as Commissioner on the unpaid assessments matter if he participated "personally and substantially" in that assessment case in his private practice.

The hypothetical presents two possible sources of conflict under Rule 1.11(b). First is Incident #1, which involves work done by a partner of the Commissioner on behalf of one of the defendants in the assessment case. The partner assisted that defendant in bringing a complaint against a realtor, who was associated with the development where the lot in the assessment case is located. Rule 1.11(b) only creates a conflict where the attorney in the public role himself had worked on the matter in question; hence, the descriptor

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"personally." This is not a provision imputing work done by other members of the government officer's firm to that officer; the conflict is personal to him. As this Commissioner did not at any time work on this assessment collections matter either personally or substantially, Incident #1 does not create a conflict for his service as Commissioner.

Similarly, Incident #2 is also not the source of a conflict of interest here. That incident is the not the subject matter of the Commissioner's service: the assessments case. Rather, the second incident involved fraud charges brought by one person against another, both of whom are now defendants in the assessment case. Even if the fraud case and the assessments case are somehow so inextricably linked as to count as the same "matter", the Commissioner never worked on the fraud case. [2] Again, the Commissioner never worked personally or substantially on the assessment case in private practice; accordingly, he does not have a conflict of interest under Rule 1.11.

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

Committee Opinion
January 10, 2006

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[1]
Note that under the current Rules of Professional Conduct, Rule 1.11 is the governing provision for potential conflicts of interest for attorneys in the public sector. That provision, in effect since January 1, 2000, does not contain the phrase "appearance of impropriety" which had been found in the title of the predecessor to Rule 1.11, DR 9-101. As that phrase does not appear in the current rules, this opinion does not use that language to determine whether or not there is a conflict of interest in this Commissioner's service.

[2]
Note that Rule 1.11 contains the following definition of "matter":

> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
>
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

While the Committee assumes that the assessment enforcement case is not the same matter as the fraud case or the realtor complaint, the hypothetical lacks sufficient detail to make an unqualified, definitive determination of that point.

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

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

Regarding this hypothetical, you have asked the following questions:

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

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

Rule 1.2 governs the parameters of the scope of an attorney's authority. Rule 1.2 provides as follows:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer may limit the objectives of the representation if the client consents after consultation.
>
> (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.
>
> (d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

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

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

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

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

1) Rule 1.2, as discussed above;

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

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

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

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

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

Committee Opinion
January 10, 2006

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

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

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

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

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

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

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

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

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

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

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

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

ABA Formal Op. 99-414.

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

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

Rule 1.16, in pertinent part, provides as follows:

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

This Committee has addressed the ethical obligations of both a departing attorney and the firm he leaves in [2] LEO 1332. LEO 1332 discusses the duty of an attorney to notify clients of his departure from a firm. Rule 1.4 requires an attorney to inform clients of pertinent facts about their case and to keep them updated regarding the status of that case. That the attorney, or one of the attorneys, representing a client is departing the firm is the sort of information that must be provided to a client. LEO 1332 recommends but does not require that the firm and the departing attorney prepare a joint letter to all appropriate clients that:

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

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

> 1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);
> 2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
> 3) the departing attorney must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
> 4) the departing lawyer must not disparage the lawyer's former firm.

The Committee endorses this advice from the ABA.

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

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

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

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

The request raises the concern as to how the firm is to ensure that the letters are appropriate in content and the list of clients contacted is not overly inclusive if the departing attorney is not required to provide that information. The Committee opines that while the departing attorney has this duty to communicate, nothing in the rules establishes a right on the part of the firm to police the exercise of that duty. The Committee sees no provision in the Rules of Professional Conduct creating an affirmative duty to provide that information to the firm. Nonetheless, the Committee recognizes that this sort of lack of cooperation serves no valuable purpose beyond continuing the hostilities between a departing attorney and the firm which he leaves.

Your second question asks whether the letters themselves were misleading. The facts do not provide the content of most of the letters but do provide language from one letter. The Committee can only answer this

question with regard to that language; consideration of any other letters would only be speculative.

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

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

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

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

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

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

Finally, your request suggests that the language is misleading in that the order of options presented places the choice of staying with the firm *last*. While the Committee recognizes a time-honored etiquette tradition of always mentioning oneself last, the Committee finds no provision in the Rules of Professional Conduct requiring that particular courtesy in these departure letters. So long as nothing in the language attempts to persuade the client to make one choice over another regarding choice of counsel, the particular order in which the choices are presented is not an issue. The listing of the choices in the quoted language comports with proper notice requirements as articulated earlier in this opinion and in LEO 1332.

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

Committee Opinion
January 10, 2006

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[1]

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

[2]

The Committee clarifies that as this opinion request is specifically about the letters used as notice to clients when an attorney departs a firm, the discussion will focus on that issue and LEO 1332's prior discussion of it. However, the Committee notes the prior LEOs, involving departing attorneys, that address other ethical responsibilities in this situation. *See* LEO 1757 (provision of client list to departing attorney to perform conflicts checks); LEO 1732 (fee arrangement regarding cases departing attorney takes with him); LEO 1556 (financial arrangements with departing attorneys); LEO 1506 (firm's refusal to provide contact information for departed attorney); LEO 1403 (handling of client files and fees when attorney departs).

[3]

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

[4]

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

LEGAL ETHICS OPINION 1820

CAN AN ATTORNEY EMPLOYEE OF A RAILROAD COMMUNICATE WITH INJURED RAILROAD WORKERS WHO ARE REPRESENTED BY COUNSEL?

You have presented two hypotheticals involving the employees of a railroad. The underlying situation in each is that an employee was injured on the job. That employee hires an attorney, who notifies the railroad claims department of his representation. The claims department has employees who investigate the claims made by injured employees. That department is supervised by a member of the Virginia State Bar. Some, but not all, of the employees in the claims department are also members of the Bar.

In the first scenario, a nonlawyer claims agent contacts the injured employee to confirm that the lawyer does represent him. That claims agent asks why the injured employee wants a lawyer and recommends that he not use one. At no time has the department supervisor instructed the claims agent not to communicate with represented claimants.

In the second scenario, the claims department has an office entitled, "Disability Support Services." An employee of that services department, who is a Bar member, contacts the injured employee after receipt of the notice of representation, seeking medical records from the injured employee and offering rehabilitation services. If the injured employee does not respond to that offer, the department employee will testify that rehabilitation was offered and declined. If the injured employee *does* respond, the claims agent asks for a direct interview and broad access to medical records. The claims agent may then testify against the injured employee regarding statements made during the interview.

The claims agents may also consult with the in-house counsel and the railroad's retained counsel who serve as defense counsel in the matter. The railroad claims those conversations are within the protection of the attorney/client privilege.

With regard to these scenarios, your request poses the following questions:

1) Is the claims department prohibited from contacting the employee after receiving notice of representation, as the supervisor of the department is a Bar member?

2) Is the claims department permitted to contact an employee for purposes of "verifying" legal representation after receiving notice from counsel?

3) If that contact is permitted, may a representative of the claims department question the represented employee regarding why he hired counsel and advise the employee that he would be better served by dealing directly with the claims department without the assistance of an attorney?

4) May the claims department contact a represented employee directly in order to request medical records, offer job retraining, or offer vocational services?

5) May the Bar member/claims agent contact a represented employee for purposes of requesting medical records, offering job retraining, or vocational services?

6) While working for an attorney-supervised claims department, is a Virginia attorney bound by the Rules of Professional Conduct, even though maintaining that he is merely offering disability support services?

Before addressing your specific questions, it would be helpful to clarify the ethical responsibilities of the individuals in the differing roles outlined in your scenario. In all instances, the Virginia Rules of Professional Conduct govern conduct only of licensed attorneys. The rules do not govern the conduct of nonlawyers. Regulation of nonlawyers is governed by the Virginia State Bar and the Unauthorized Practice

EXHIBIT 26

[1]

Rules. Interpretation of the Unauthorized Practice Rules is not within the purview of this Committee. Thus, in the discussion of this opinion request, this Committee can apply pertinent provisions of the Rules of Professional Conduct to the *lawyers* in the scenario, not to the nonlawyer employees, or to corporate departments. In answering the questions, this Committee will not be determining whether the conduct of the lawyers, if performed by nonlawyers, would constitute the unauthorized practice of law. Such an issue is outside the purview of this Committee. The remarks in this opinion will focus specifically on whether the outlined conduct of the attorneys employed by this railroad is permissible under the Rules of Professional Conduct.

The crux of the presented scenario and questions is whether these contacts by railroad claims agents with the injured workers are permissible. The pertinent provision in the ethics rules is Rule 4.2, which states as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyers knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The portion of the rule especially at issue here in resolving the questions presented is the phrase, "in representing a client." The plain language of this rule suggests that the prohibition is only triggered when the lawyer actually represents a client in the matter to be discussed. Reviewing the various attorneys in the scenario, which come within that language? Of the in-house counsel, the claims department head, and the attorney/claims agents, which actually represent the railroad such that Rule 4.2 governs their communications with the injured workers?

Whether an attorney/client relationship has been formed in any particular situation is a fact-specific determination. The Rules of Professional Conduct do not specifically contain a definition of "attorney/client relationship". This Committee has consistently relied upon the definition found in the Unauthorized Practice Rules:

> Generally, the relation of attorney and client exits, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge.

That definition looks to the nature of the work performed more than to some formalistic requirement of an express agreement by the client to retain the lawyer as his attorney. Consistent with that approach, this Committee found in LEO 1819 that a lawyer who works as a lobbyist may have created an attorney/client relationship with his lobbying customers if he provided them with legal advice as part of the lobbying services. Similarly, in LEO 1803, this Committee opined that an institutional attorney assisting prison inmates created attorney/client relationships with those inmates for whom he provides legal advice regarding the inmates' legal documents as well as those for whom he actually drafted their documents. In LEO 1592, this Committee concluded that an attorney/client relationship was established where the attorney hired to represent an uninsured motorist carrier had also provided legal advice and assistance to the *pro se* driver. Similarly, in LEO 1127, this Committee found an attorney/client relationship where the attorney provided legal assistance on items such as discovery requests for *pro se* litigants. In each of these opinions, the Committee focused on the nature of the services provided.

Applying this concept to the present scenario, the Committee notes that the in-house counsel represents the railroad. Regarding the head of the claims department, the Committee opines that he also represents the railroad with regard to these injured workers' claims. That attorney operates his claims department to, among other things, assist the railroad in gathering information from the claimants for the use of the railroad and its litigation attorney, the in-house counsel, and in persuading the claimants to fire their retained

counsel. Such work is squarely within the concept of furnishing "to another advice or service under circumstances which imply his possession and use of legal knowledge;" the standard from the above-quoted definition. For the same reason, the work of the attorney/claims agents also constitutes representing the railroad in these matters. Those attorney/agents gather information potentially useful in any litigation that develops out of these claims and try to dissuade the claimants from legal representation. If the railroad hired a lawyer specifically for those tasks, there would be no question that the law firm was providing legal representation to the railroad. That instead the railroad places these lawyers in-house and labels them claims agents does not change the underlying character of their work. The claims management work performed by the attorneys employed by the railroad involves legal representation of the railroad. As these claims lawyers, both the department head and the claims agents, are providing legal services to the railroad, their communications with represented persons is limited by Rule 4.2.

The attorney serving as department head in this scenario has additional responsibilities in this context. The Rules of Professional Conduct establish obligations regarding how he supervises his staff. First, in considering communications with the represented workers, he must consider the interplay of Rule 8.4(a) with Rule 4.2. Rule 8.4(a) declares it impermissible for an attorney to:

> 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.

Thus, the attorney/department head, where precluded from communicating with a represented claimant by Rule 4.2, could not permissibly direct his staff to do so. *See* LEOs ##233, 1375.

Also establishing ethical obligations regarding this department head's staff supervision are Rules 5.1 and 5.3, which govern the supervision of attorney staff and nonattorney staff respectively [2]. While the precise details of each rule differ, both rules direct the supervising attorney to supervise his staff in a manner consistent with his own ethical obligations. This attorney cannot establish and implement a procedure for his staff to routinely contact represented workers when the initiation of that contact as well as the content of the communications are incompatible with the attorney's responsibilities under Rule 4.2.

While the in-house counsel was not the focus of your inquiry, the Committee notes that this same point applies equally to the in-house counsel. Because the claims department is housed within her legal department, she also has ethical obligations stemming from her supervisory responsibilities regarding the activities of the claims department.

Based on the general principles established above, the Committee answers your particular question as follows:

1) Is the claims department prohibited from contacting the employee after receiving notice of representation, as the supervisor of the department is a Bar member?

The Virginia Rules of Professional Conduct govern members of the Virginia State Bar. The rules do not apply to corporations, or departments of corporations, such as the claims department of this railroad. Accordingly, the provision in the rules, Rule 4.2, regarding contact with a represented party does not apply to the claims department. However, see the response to Question 3, below, for discussion of application of the rule to the individual lawyers in the claims department, including the department head.

2) Is the claims department permitted to contact an employee for purposes of "verifying" legal representation after receiving notice from counsel?

The answer to Question 1 also addresses this second question.

3) If that contact is permitted, may a representative of the claims department question the represented employee regarding why he hired counsel and advise the employee that he would be better served by dealing directly with the claims department without the assistance of an attorney?

For this third question, the identity of the particular "representative of the claims department" is important. If the representative is a nonlawyer, the rules do not directly apply to that employee's conduct. However, if the representative is a member of the Virginia State Bar, the rules do apply to his activities. The Committee has consistently opined that lawyers working in other fields nevertheless may be subject to the authority of [3] applicable Rules of Professional Conduct. This is no less true for these lawyers working in the railroad's claims department.

As discussed earlier, the particular rule at issue is Rule 4.2, governing contact with represented persons. The Committee reiterates that the lawyer/claims agents *are* providing legal services to their employer, the railroad. The conversations between claims agents and the injured workers include the lawyer/agent's analysis of the legal needs of the worker and advice regarding each worker's case. When a lawyer/claims agent tries to persuade a worker that he does not need a lawyer and that his claim will be better resolved without one, that agent is providing legal analysis and advice. The Committee opines that such a service comes within the reach of Rule 4.2. Accordingly, the lawyers operating as railroad claims agents should only be communicating with workers known to have counsel if that counsel has already provided consent to that communication. The attorney/agents in the present scenario have improperly failed to obtain that consent.

A final note regarding the issues raised in these first three questions. The counsel in each instance has already written the railroad to provide notice of the representation. There is suggestion that the purpose of the claims department's contact with the injured workers is to confirm that they are represented. That stated reason for these contacts cannot justify the communications. First, written notice from counsel is sufficient; the attorneys should rely upon that and begin any contact in these matters with counsel, and not the represented workers. Second, even if written notice was less than clear for some reason, these contacts should begin with an inquiry as to whether each worker is represented. When the workers answer that they do have counsel, the communication should stop at that point. Any further communication regarding the matter would need to be redirected to counsel. Requests for information and advice regarding the worth of legal representation would be improper.

For this third question, the role of the "representative of the claims department" is determinative. If the representative is a nonlawyer, the rules do not directly govern that individual. If the representative is a member of the Virginia State Bar, the rules do apply to his activities; the lawyer/claims agents must work within the communication restriction established by Rule 4.2. Furthermore, the department head attorney's supervision of and/or interaction with his staff must not contradict his Rule 4.2 ethical obligation.

4) May the claims department contact a represented employee directly in order to request medical records, offer job retraining, or offer vocational services?

As with Questions 1 and 2, above, this question is outside the purview of this Committee as the Rules of Professional Conduct do not apply to the railroad's claims department. However, the analysis in Question 3 regarding the individual members of the claims department is equally applicable here. If the member of the department is a nonlawyer, the Rules do not regulate his or her conduct. If the member of the department is a lawyer, any contact with the represented worker is impermissible if in violation of Rule 4.2. That would include communications requesting medical records as well as offering job training and/or vocational services as such requests and offers are part of the negotiation of the particular claim for which the worker has legal counsel.

5) May the Bar member/claims agent contact a represented employee for purposes of requesting medical

records, offering job retraining, or vocational services?

The discussion in answer to Question 4 responds to this fifth question.

6) While working for an attorney-supervised claims department, is a Virginia attorney bound by the Rules of Professional Conduct, even though maintaining that he is merely offering disability support services?

The Committee fully discussed this question in the introduction to this opinion as well as in the response to Question 3. The attorney/claims agents are bound by the Rules of Professional Conduct while providing these claims management services. The Committee notes that offering disability support services is within the subject matter of the representation for purposes of Rule 4.2 as those services are in response to the claims of the injured workers.

Finally, the Committee would like to comment on two issues not asked expressly in one of the questions but nonetheless suggested by the facts presented. First, the facts note that the railroad does have a legal department, with an in-house counsel who represents the railroad generally and therefore, presumably, in these claims cases. That attorney would, in line with the discussion presented in response to Questions 3, 5, and 6, above, need to limit all communications with the represented workers in the claims cases to conform to Rule 4.2. Also, that attorney should be mindful of Rule 8.4(a), which precludes an attorney from violating the Rules through the acts of another. Thus, the Committee cautions that the attorney in the legal department cannot circumvent the requirements of Rule 4.2 by directing members of the claims department to initiate communications the attorney himself is precluded from conducting. Any factual determination as to whether, in a particular instance, the communication by a claims agent occurred with sufficient involvement of the in-house counsel as to trigger Rules 4.2 and 8.4(a) would depend on facts far more detailed than those provided in the present hypothetical.

Finally, the Committee clarifies that in no way do the conclusions of this opinion prohibit *parties* from direct communication. As pointed out in Comment 1 to Rule 4.2, "parties to a matter may communicate directly with each other." In many instances such communication can be effective in speedy resolution of the dispute. However, a lawyer communicating on behalf of a client, even where that client is his employer, is not a party to the dispute but instead is counsel for a party. In the context of attorneys employed in various capacities by party employers, there may be circumstances where it is unclear whether particular communication derives from the lawyer as counsel or from the party itself. As discussed throughout this opinion, the Committee opines that the present context of the railroad employees is not one of those cases that are hard to determine. The Committee reiterates that both the attorney department head and the attorney claims/agents represent the railroad in negotiating these claims. Accordingly, their communications with the represented, injured workers come within the prohibition of Rule 4.2 rather than the allowance in Comment One for parties to communicate directly with each other.

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

Committee Opinion
January 27, 2006

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[1] Issuing opinions interpreting the Unauthorized Practice Rules is the task of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law.

[2] Those rules state as follows:

RULE 5.1 Responsibilities of Partners and Supervisory Lawyers

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(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.

RULE 5.3. Responsibilities Regarding Nonlawyer Assistants. — With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[3]
See 1819 (lobbying firm);1764 (attorney fee sharing with finance company); 1754 (attorney selling life insurance products); 1658 (employment law firm/human resources consulting firm); 1647 (employee-owned title agency); 1634 (accounting firm); 1579 (serving as fiduciary such as guardian or executor);1584 (partnership with non-lawyer); 1368 (mediation/arbitration services); 1442 (lender's agent); 1345 (court reporting); 1318 (consulting firm); 1311 (insurance products); 1254 (bail bonds); 1198 (court reporting); 1163 (accountant; tax preparation); 1131 (realty corporation); 1083 (non-legal services subsidiary); 1016 (billing services firm); 187 (title insurance).

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...

[1]
Heinzman at 964.

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 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

> 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 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 paragraph 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

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[1] While not expressly at issue here or in *Heinzman*, the committee does note a body of cases from a number of 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.

[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).

LEGAL ETHICS OPINION 1798 ARE COMMONWEALTH'S ATTORNEYS HELD TO THE SAME ETHICAL REQUIREMENTS AS OTHER ATTORNEYS?

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

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

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

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

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

Fundamental to your first question is whether Commonwealth's Attorneys are held to the same ethical requirements as other attorneys. Specifically, can the handling of a busy caseload ever trigger a violation of Rules 1.1 and 1.3 by a Commonwealth's Attorney?

Rule 1.1 requires an attorney to provide competent representation for his client; the rule defines "competent" as including "the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation." Further pertinent clarification is found in Comment 5 to Rule 1.1; "adequate preparation" is presented as an aspect of the duty of competence.

Rule 1.3 requires an attorney to perform his legal services with diligence and promptness. Comment 1 to that rule notes that a lawyer should control his work load, "so that each matter can be handled adequately." Also, Comment 2 to that rule explains that the duty of diligence includes *timely* performance of the legal work. As expressed in that comment, a "client's interests often can be adversely affected by the passage of time or the change of conditions."

The language of Rules 1.1 and 1.3 includes no exceptions; there is no language creating a different standard for prosecutors. The "Scope" section for the Rules of Professional Conduct states that the rules "apply to all lawyers, whether practicing in the private or public sector." While that section does reference that Commonwealth Attorneys may have additional authority under state and/or constitutional law, nothing in the Scope section creates a lower standard for ethical compliance with the rules for prosecutors. The general duties of competence and diligence apply equally to all attorneys licensed to

[2]

practice in Virginia, including Commonwealth's Attorneys.

The Committee recognizes that Commonwealth's Attorneys have a somewhat different attorney/client relationship than that of attorneys in the private sector. The client for Commonwealth's Attorneys is the Commonwealth of Virginia. That client must receive the same protection under the ethics rules as any client obtaining legal services.

Any attorney serving as a Commonwealth's Attorney, in fulfilling his duties of competence and diligence, must be mindful of a pertinent directive from Rule 1.16. Paragraph (a) of Rule 1.16 dictates that a lawyer not accept or continue a particular representation if it means violating another ethical rule. As explained in Comment [1] to the rule:

> A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

This Committee finds persuasive the analysis and conclusions drawn by the Arizona Bar regarding a prosecutor's obligations, in its Ethics Opinion 86-4:

> Ethical Rule 1.16 makes clear that a lawyer with a maximum caseload must decline new cases or terminate representation where the representation will result in violation of the Rules of Professional Conduct or other law. Consequently, where the demands of an extreme caseload make an attorney unable to devote sufficient attention to a particular case, acceptance of that case will cause a violation of Ethical Rules 1.1 on competent representation, 1.3 on attorney diligence and 1.16 for failing to decline or terminate representation where the representation will violate these rules.
>
> Thus, a lawyer who accepts more cases than he can competently prosecute will be committing an ethical violation.

This Committee agrees and opines that a Commonwealth's Attorney who operates with a caseload so overly large as to preclude competent, diligent representation in each case is in violation of the ethics [3]
rules.

Your inquiry presents very specific details regarding Attorney Smith's cases and asks whether those details constitute a violation of Rules 1.1 and 1.3. Whether a particular matter has been handled with competence and diligence is very fact-specific, involving many factors such as the complexity of the matter as well as the knowledge, skill and preparation needed for the matter. Such a context-specific determination is for a fact-finder and goes beyond the purview of this Committee. Accordingly, the Committee declines to opine as to whether the two instances provided violate the rules. Nonetheless, the Committee notes that if an attorney fails to take critical steps or makes a critical mistake in a client's case where such omission or error rises to the level of a Rule 1.1 and/or 1.3 violation, the fact that the attorney represents the Commonwealth and has a large caseload does not provide a safe harbor.

Your second question regards the supervision of Attorney Smith. If Attorney Smith has violated Rule 1.1 and/or Rule 1.3, is there any ethical issue faced by the lead Commonwealth's Attorney who supervises him?

Rule 5.1 (a) requires that a lawyer in a managerial position make reasonable efforts to ensure that the firm has measures in place so that lawyers in the office conform to the Rules of Professional Conduct. Also, paragraph (b) of Rule 5.1 states that where one attorney has direct supervision over another lawyer, the supervisor should make reasonable efforts to ensure the other lawyer complies with the Rules of Professional Conduct. The rule continues in paragraph (c) to hold responsible a supervising attorney for the ethical violations of an attorney he supervises if the supervisor orders or knowingly ratifies the conduct involved. In elaborating upon those duties, Comment [2] to the rule presents a list of procedures a supervising attorney should have in place; one example is a procedure to "identify dates by which actions must be taken in pending matters."

Those provisions do place responsibility on the shoulders of a Commonwealth's Attorney for having in place policies and procedures to establish an office that practices within the parameters of the Rules of Professional Conduct and that the Commonwealth's Attorney properly supervise the Assistant Commonwealth's Attorneys reporting to him to assure ethical compliance. Attorney Smith in struggling with his caseload and missing important deadlines was under the supervision of the Commonwealth's Attorney. That lead attorney in deciding the case load to be borne by Attorney Smith is in a position to render impossible Attorney Smith's ability to work competently and diligently. Where a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney's ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1.

As in question one above, whether a particular attorney's caseload is in fact of such a detrimental size is so context-specific as to be a determination proper only for a fact-finder and is, therefore, outside the purview of this Committee. Nonetheless, if a Commonwealth's Attorney has in fact assigned such an impermissibly large caseload to an Assistant Commonwealth's Attorney, the facts that the client is the amorphous Commonwealth and that the Commonwealth's Attorney has himself a large caseload provide no safe harbor from the requirements of Rule 5.1.

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

Committee Opinion
June 30, 2004
As Revised
August 3, 2004

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[1] Virginia Code §19.2-270.5.

[2] Although this opinion addresses workloads for prosecutors, excessive caseloads for public defenders and court-appointed counsel raise the same ethical problems if each client's case cannot be attended to with reasonable diligence and competence.

[3] In addition, Comment 1 to Rule 3.8 provides:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice *and that guilt is decided on the basis of sufficient evidence.* (emphasis added).

Rule 3.8 (a) prohibits a prosecutor from initiating or maintaining a charge once the prosecutor *knows* that the charge is not supportable by probable cause. The term "knows" as used in this rule denotes *actual* knowledge on the part of the prosecutor. While the cited rule may not be violated under the circumstances presented in your hypothetical, the inability of the prosecutor, due to his or her crushing caseload, to prepare his or her case and evaluate the strength of the Commonwealth's case frustrates these principles.

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

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

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

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

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

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

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

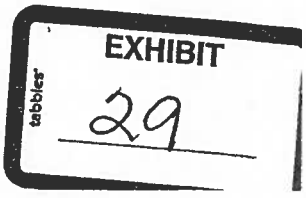
3) The defense lawyer told the victim/father that he had checked the court's file and that as there was no subpoena, the father was free to leave; and

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

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

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:



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

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

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

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

RULE 4.3 Dealing With Unrepresented Persons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Opinion
June 30, 2004

LEGAL ETHICS OPINION 1790

CLIENT FILES - REFUSAL OF ATTORNEY TO RELEASE A COPY OF THE DEFENDANT'S PRE-SENTENCE REPORT TO THE DEFENDANT

Your request presented a hypothetical situation involving a client requesting a copy of his file from an attorney. Specifically, the attorney had represented the client in a criminal matter. The client was convicted in a Virginia circuit court. The trial judge set a sentencing hearing and ordered a probation officer to prepare a pre-sentence report for use at that hearing. The officer forwards a copy of the report to the attorney, who reviews it with his client. One day after the sentencing hearing, the client informs the attorney that the client will be petitioning the Supreme Court of Virginia for a writ of *habeas corpus*. The client requests that the attorney provide the file to the client, including the pre-sentence report.

The question raised by your hypothetical is whether the attorney has a duty to provide the pre-sentence report to the client. The pertinent provision of the Rules of Professional Conduct is Rule 1.16(e), which specifically governs the lawyer's duty to transmit the client's file upon termination of the relationship and at the request of the client. Whether the attorney must provide a copy or an original of the contents depends on the nature of each document; however, paragraph (e) does require provision of the client's *entire* file, except for one narrow category:

> Billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts, staffing considerations, or difficulties arising from the lawyer-client relationship.

A pre-sentence report is not the sort of internal document described by the exception. Therefore, the general requirement from this provision would apply: that the lawyer provide file contents or, in many instances, *copies* of those contents, to the client. Comment 11, however, sets forth an important limitation:

> The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

Your request references Attorney General Jerry W. Kilgore's Advisory Opinion, dated March 31, 2003, which interprets Virginia Code §19.2-299, as addressing the legal issue of whether disclosure of pre-sentencing reports by attorneys to their clients is prohibited by law. The exclusive purview of this committee is to interpret the Rules of Professional Conduct; it would be outside that purview for this committee to analyze other legal authority regarding disclosure of pre-sentence reports. This committee, therefore, declines to do so.

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

Committee Opinion
January 5, 2004

LEGAL ETHICS OPINION 1794 CONFIDENTIALITY OF INITIAL CONSULTATION

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

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

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

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

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

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

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

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

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

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

EXHIBIT 31

established.

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

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

[1]

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

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

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

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

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

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

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

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

Committee Opinion
June 30, 2004

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

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

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

See, Kansas Legal Ethics Opinion 91-04

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

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