VIRGINIA BEACH BAR ASSOCIATION
ETHICS PRESENTATION
WITH
HON. EDWARD HANSON, JR.
FEBRUARY 2013

ANN K. CRENSHAW
Kaufman & Canoles

## HYPOTHETICAL #1

## USE OF RELEASE-DISMISSAL AGREEMENTS BY PROSECUTORS

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

## HYPOTHETICAL #2

## "OF COUNSEL" RELATIONSHIP

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

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

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

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

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

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

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

## HYPOTHETICAL #3

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

What are a lawyer's ethical responsibilities when, in the course of representing a client, the lawyer receives funds for the client that may be subject to a third party's claim to a portion of

the funds held by the lawyer. The applicable rule of conduct is Rule 1.15(b), which requires a lawyer to:

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

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

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

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

*Hypothetical One – Duty to Investigate Potential Lien*

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan").18 The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law. The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

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

*Hypothetical Two – Reasonable Effort to Determine Validity of Claim*

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

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

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

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

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

## HYPOTHETICAL #4

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

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

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

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

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

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

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

QUESTION PRESENTED

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

## HYPOTHETICAL #5

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

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

QUESTION PRESENTED

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

## HYPOTHETICAL #6

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

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

QUESTION PRESENTED

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

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

## HYPOTHETICAL #7

## MAY A LAWYER SERVING AS A BANKRUPTCY TRUSTEE COMMUNICATE WITH THE DEBTOR WITHOUT CONSENT BY THE DEBTOR'S LAWYER?

In this hypothetical, a Virginia lawyer is appointed to serve as trustee in a Chapter 7 bankruptcy case. The trustee's duties are established by 11 U.S.C. §704, and include investigating the debtor's financial affairs and, if advisable, opposing the discharge of the debtor. The trustee is authorized to retain counsel to represent the estate, but typically does not do so unless the proceeding becomes contested. The debtor in this case is represented by a lawyer who has not consented to the trustee communicating directly with the debtor.

QUESTION PRESENTED

Does Rule 4.2 prohibit a bankruptcy trustee, who is also a lawyer, from communicating directly with a debtor who is represented by counsel?

## HYPOTHETICAL #8

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

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

QUESTION PRESENTED

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

## HYPOTHETICAL #9

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

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

QUESTION PRESENTED

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

## HYPOTHETICAL #10

## 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 #11

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

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

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

## HYPOTHETICAL #12

## 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 #13

## 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 #14

## SETTLEMENT NEGOTIATIONS IN A CRIMINAL CASE

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

QUESTIONS PRESENTED

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

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

## HYPOTHETICAL #15

## 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 #16

## 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 #17

## 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 #18

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

The represented defendant just after sentencing had asked the court about his right of appeal. The Commonwealth Attorney then informed the court that if the defendant appeals, he will be tried by a jury and requests that the clerk of court note that on the warrant. In this

jurisdiction, it is commonly known that a jury will usually impose a longer sentence than the judge for this offense. The defendant subsequently chose not to exercise his right of appeal.

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

## 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

## 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:

1. 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?

2. 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 #21

## 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 #22

## 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 #23

## 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 1867

USE OF RELEASE-DISMISSAL AGREEMENTS BY PROSECUTORS

QUESTION PRESENTED

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

APPLICABLE RULES AND OPINIONS

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

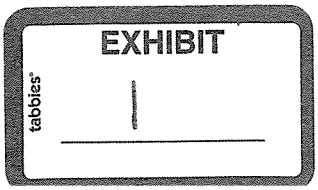
ANALYSIS

A release-dismissal agreement is an agreement between a prosecutor and a criminal defendant to dismiss criminal charges in return for a release of some entity from civil liability. The United States Supreme Court considered the permissibility of such agreements in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). The case involved a prosecutor entering into an agreement with a criminal defendant to dismiss criminal charges if the defendant signed a release for any claim he might have for false arrest. In a 5-4 plurality opinion, the Supreme Court found the agreement in *Town of Newton* valid without directly addressing the application of the Rules of Professional Conduct to the prosecutor's actions in offering or entering into such an agreement.

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

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

The Court also rejected Rumery's arguments that release-dismissal agreements violate public policy by encouraging prosecutors to trump up charges in response to a civil rights claim and by creating incentives for individuals injured by police misconduct not to pursue claims for that misconduct. The Court dismissed the latter argument on the basis that no individual ever has a duty to pursue a claim for police misconduct, so the diffuse public interest in having police misconduct investigated and remedied should not be elevated above an individual's choice not to pursue a civil remedy. The Court also held that to invalidate all release-dismissal agreements based on the possible behavior of prosecutors neglects other public interests that may justify such an agreement and improperly assumes prosecutorial misconduct. Prosecutors have enormous discretion in charging decisions and courts are not competent to analyze the exercise of that discretion in the absence of other evidence of misconduct. The release-dismissal agreement in this case was particularly justified by the fact that the prosecution of Rumery would have required a traumatized sexual assault victim, who was already reluctant to testify in the sexual assault prosecution, to testify in a second, derivative prosecution.



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

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

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

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

Committee Opinion
November 15, 2012

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

[2] Rule 3.8 Additional Responsibilities Of A Prosecutor
A lawyer engaged in a prosecutorial function shall:

1. not file or maintain a charge that the prosecutor knows is not supported by probable cause.

LEGAL ETHICS OPINION 1865

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

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

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

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

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

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

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

Rule 1.15 (b) requires that a third party be "entitled" to funds in the lawyer's possession. Although Rule 1.15 (b) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a client.[1] As Comment 4 states, a third party must have a valid claim to an interest in the specific funds held by the lawyer. In the absence of a valid third party interest in the funds, the lawyer owes no duty to a creditor of the client and must act in the best interests of the client.[2] The mere assertion of an unsecured claim by a creditor does not create an "interest" in the funds held by the lawyer.[3] Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien.

All ethics opinions and legal authorities agree that an "interest" in the funds held by the lawyer include a statutory lien, a judgment lien and a court order or judgment affecting the funds.[4] Likewise, agreements, assignments, lien protection letters or other similar documents in which the client has given a third party an

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

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

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

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

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

Other authorities have likewise adopted the view that Rule 1.15(b)(4) and (5) requires that the lawyer have actual knowledge of a third party's lawful claim to an interest in the specific funds held by the lawyer. Arizona Ethics Op. 98-06; Conn. Bar. Op. 95-20. However, in some situations under federal and state law, the lawyer need only be aware that the client received medical treatment from a particular provider or pursuant to a health care Plan. In those instances, notice of lien or a lien letter may not be required in order for that third party to claim entitlement to funds held by lawyer.[13] The effect of such state and federal laws on a lawyer's obligation to a third party is a question of law beyond the purview of this Committee. The lawyer will need to know and understand the law in order to determine whether it creates a valid interest in the funds held by the lawyer.[14]

*Prior Opinions*

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

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

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

*Hypothetical One – Duty to Investigate Potential Lien*

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan").[18] The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law.[19] The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

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

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

client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed "or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . ."

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

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

*Hypothetical Two – Reasonable Effort to Determine Validity of Claim*

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

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

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

In this hypothetical, the lawyer has exercised reasonable diligence to determine whether the Plan has a valid subrogation claim or lien but the Plan has not responded to the lawyer's inquiries. The lawyer still does not know whether the Plan has a valid claim or lien. Comment [4] to Rule 1.15 provides further: "[a] lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the

validity of a third-party's claim or lien." As discussed in the Committee's analysis of Hypothetical 1, the lawyer must first consult with the client regarding the course of action to take, informing the client to the fullest extent possible of the risks and benefits of further communication with the Plan to determine the existence and extent of the Plan's claim; or, alternatively, disregarding the Plan's claim and releasing the funds to the client. Under the circumstances presented in hypothetical 2, the Committee believes that the lawyer has acted reasonably and in good faith to determine if the Plan has a claim to or interest in the funds in the lawyer's custody or control and may, after consultation with the client, disburse the settlement funds to the client without holding back funds to reimburse the Plan.

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

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

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

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

*Conclusion*

The mere assertion of a claim by a third party to funds held by the lawyer does not necessarily entitle the third party to such funds. A lawyer must exercise competence and reasonable diligence to determine whether a substantial basis exists for a claim asserted by a third party.[25] If no such basis exists, or if the third party has failed to take the steps required by law to perfect its entitlement to the funds, a lawyer may release those funds to the client, after appropriate consultation with the client regarding the consequences of disregarding the third party's claim.

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

faces civil liability for failing to protect a third party lien or claim is a legal issue beyond the purview of this Committee.[28]

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

Committee Opinion

November 16, 2012

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

client regarding proceeds from settlement); South Carolina Ethics Op. 89-13 (1989) (lawyer not required to pay half of injury settlement to client's ex-wife under divorce decree where lawyer was not served with process as required by decree). See generally 1 G. Hazard & W. Hodes, *The Law of Lawyering* §19.6 (3d ed. 2001 & Supp. 2005-2) (lawyer not a "neutral observer" and "must favor the client when the other party's claims are not solid").

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

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

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

of subrogation or reimbursement. If the Plan is not self-funded, but fully insured, the Virginia anti-subrogation statute bars subrogation in contracts of health insurance.

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

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

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

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

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

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

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

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

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

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

[28] For a lawyer's civil liability under such circumstances, *see, e.g.*, *Kaiser Found. Health Plan, Inc. v. Aguiluz*, 54 Cal. Rptr. 2d 665 (Ct. App. 1996) (attorney who knew client had agreed to repay medical provider from settlement proceeds was liable for amount client owed provider*); Shelby Mut. Ins. Co. v. Della Ghelfa*, 513 A.2d 52 (Conn. 1986) (insurer could enforce lien against lawyer who disbursed proceeds to insured); *Unigard Ins. Co. v. Fremont*, 430 A.2d 30 (Conn. Super. Ct. 1981) (lawyer liable for conversion because of failure to honor a statutory insurer's lien); *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Idaho Ct. App. 1983) (law firm liable for failing to honor assignment that client, but not firm, had signed); *W. States Ins. Co. v. Louise E. Olivero & Assocs.*, 670 N.E.2d 333 (Ill. App. Ct. 1996) (firm's failure to honor subrogation lien constituted conversion); *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998) (liability based on lawyer's knowledge of statutory lien or valid assignment); *Leon v. Martinez,* 638 N.E.2d 511 (N.Y. 1994) (if enforceable assignment is proven, lawyer is liable to pay the creditor the assigned amount); *Prewitt v. City of Dallas*, 713 S.W. 2d 720 (Tex. App. 1986) (a lawyer's constructive notice of the city's right to the first money paid to the firm's client rendered the law firm liable after it paid those monies out to its client).

LEGAL ETHICS OPINION 1866 "OF COUNSEL" RELATIONSHIP

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

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

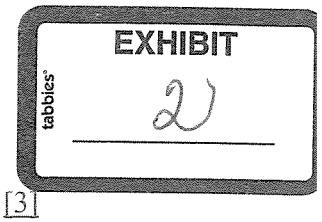
1. The firm and the lawyer will jointly market themselves and refer to the lawyer as either "Of Counsel" or "Affiliated Attorney;"
2. In accordance with ABA Formal Opinion No. 330 (1972), the lawyer will be individually designated as "Of Counsel" or "Affiliated Attorney," rather than his PLC, and the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

QUESTIONS PRESENTED

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

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

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




APPLICABLE RULES AND OPINIONS

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

ANALYSIS

In order to answer your specific inquiry, the Committee must first review and refine the principles

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

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

The term is also commonly used in a way that is not permissible: to describe the relationship between a lawyer or firm and a national law firm that solicits cases throughout the country and then makes geographically-based referrals to its designated lawyer or firm in each state. In this case, it is not appropriate for the lawyer to be designated as "of counsel" to the national law firm, because the relationship consists only of forwarding/receiving business and there is otherwise no relationship between the lawyer and the national firm.

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

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

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

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

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

Committee Opinion
July 26, 2012

---

[1]
Rule 1.5 Fees
***
(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the client is advised of and consents to the participation of all the lawyers involved;
(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
(3) the total fee is reasonable; and
(4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

[2]
Rule 1.10 Imputed Disqualification: General Rule
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).
***
Comment [1] explains, "Whether two or more lawyers constitute a firm as defined in the Terminology section can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other."

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

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

LEGAL ETHICS OPINION 1865

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

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

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

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

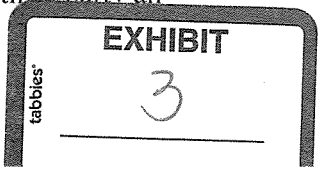
Comment 4 to Rule 1.15 provides helpful guidance on the lawyer's ethical duty when faced with third party claims asserted against the funds that the lawyer is handling:

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

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

Rule 1.15 (b) requires that a third party be "entitled" to funds in the lawyer's possession. Although Rule 1.15 (b) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a client.[1] As Comment 4 states, a third party must have a valid claim to an interest in the specific funds held by the lawyer. In the absence of a valid third party interest in the funds, the lawyer owes no duty to a creditor of the client and must act in the best interests of the client.[2] The mere assertion of an unsecured claim by a creditor does not create an "interest" in the funds held by the lawyer.[3] Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien.

All ethics opinions and legal authorities agree that an "interest" in the funds held by the lawyer include a statutory lien, a judgment lien and a court order or judgment affecting the funds.[4] Likewise, agreements, assignments, lien protection letters or other similar documents in which the client has given a third party an



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

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

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

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

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

Other authorities have likewise adopted the view that Rule 1.15(b)(4) and (5) requires that the lawyer have actual knowledge of a third party's lawful claim to an interest in the specific funds held by the lawyer. Arizona Ethics Op. 98-06; Conn. Bar. Op. 95-20. However, in some situations under federal and state law, the lawyer need only be aware that the client received medical treatment from a particular provider or pursuant to a health care Plan. In those instances, notice of lien or a lien letter may not be required in order for that third party to claim entitlement to funds held by lawyer.[13] The effect of such state and federal laws on a lawyer's obligation to a third party is a question of law beyond the purview of this Committee. The lawyer will need to know and understand the law in order to determine whether it creates a valid interest in the funds held by the lawyer.[14]

*Prior Opinions*

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

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

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

*Hypothetical One – Duty to Investigate Potential Lien*

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan").[18] The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law.[19] The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

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

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

client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed "or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . ."

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

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

*Hypothetical Two – Reasonable Effort to Determine Validity of Claim*

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

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

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

In this hypothetical, the lawyer has exercised reasonable diligence to determine whether the Plan has a valid subrogation claim or lien but the Plan has not responded to the lawyer's inquiries. The lawyer still does not know whether the Plan has a valid claim or lien. Comment [4] to Rule 1.15 provides further: "[a] lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the

validity of a third-party's claim or lien." As discussed in the Committee's analysis of Hypothetical 1, the lawyer must first consult with the client regarding the course of action to take, informing the client to the fullest extent possible of the risks and benefits of further communication with the Plan to determine the existence and extent of the Plan's claim; or, alternatively, disregarding the Plan's claim and releasing the funds to the client. Under the circumstances presented in hypothetical 2, the Committee believes that the lawyer has acted reasonably and in good faith to determine if the Plan has a claim to or interest in the funds in the lawyer's custody or control and may, after consultation with the client, disburse the settlement funds to the client without holding back funds to reimburse the Plan.

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

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

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

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

*Conclusion*

The mere assertion of a claim by a third party to funds held by the lawyer does not necessarily entitle the third party to such funds. A lawyer must exercise competence and reasonable diligence to determine whether a substantial basis exists for a claim asserted by a third party.[25] If no such basis exists, or if the third party has failed to take the steps required by law to perfect its entitlement to the funds, a lawyer may release those funds to the client, after appropriate consultation with the client regarding the consequences of disregarding the third party's claim.

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

faces civil liability for failing to protect a third party lien or claim is a legal issue beyond the purview of this Committee.[28]

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

Committee Opinion

November 16, 2012

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

client regarding proceeds from settlement); South Carolina Ethics Op. 89-13 (1989) (lawyer not required to pay half of injury settlement to client's ex-wife under divorce decree where lawyer was not served with process as required by decree). See generally 1 G. Hazard & W. Hodes, *The Law of Lawyering* §19.6 (3d ed. 2001 & Supp. 2005-2) (lawyer not a "neutral observer" and "must favor the client when the other party's claims are not solid").

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

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

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

of subrogation or reimbursement. If the Plan is not self-funded, but fully insured, the Virginia anti-subrogation statute bars subrogation in contracts of health insurance.

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

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

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

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

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

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

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

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

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

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

[28] For a lawyer's civil liability under such circumstances, *see, e.g.*, *Kaiser Found. Health Plan, Inc. v. Aguiluz*, 54 Cal. Rptr. 2d 665 (Ct. App. 1996) (attorney who knew client had agreed to repay medical provider from settlement proceeds was liable for amount client owed provider*); Shelby Mut. Ins. Co. v. Della Ghelfa*, 513 A.2d 52 (Conn. 1986) (insurer could enforce lien against lawyer who disbursed proceeds to insured); *Unigard Ins. Co. v. Fremont*, 430 A.2d 30 (Conn. Super. Ct. 1981) (lawyer liable for conversion because of failure to honor a statutory insurer's lien); *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Idaho Ct. App. 1983) (law firm liable for failing to honor assignment that client, but not firm, had signed); *W. States Ins. Co. v. Louise E. Olivero & Assocs.*, 670 N.E.2d 333 (Ill. App. Ct. 1996) (firm's failure to honor subrogation lien constituted conversion); *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998) (liability based on lawyer's knowledge of statutory lien or valid assignment); *Leon v. Martinez,* 638 N.E.2d 511 (N.Y. 1994) (if enforceable assignment is proven, lawyer is liable to pay the creditor the assigned amount); *Prewitt v. City of Dallas*, 713 S.W. 2d 720 (Tex. App. 1986) (a lawyer's constructive notice of the city's right to the first money paid to the firm's client rendered the law firm liable after it paid those monies out to its client).

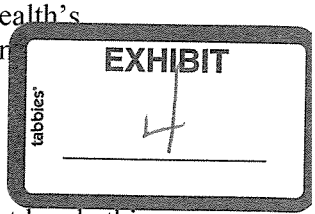
LEGAL ETHICS OPINION 1864 MAY A CRIMINAL DEFENSE LAWYER AGREE THAT HE WILL NOT GIVE CERTAIN DISCOVERY MATERIALS TO HIS CLIENT DURING THE COURSE OF THE REPRESENTATION, AND THAT HE WILL REMOVE CERTAIN MATERIALS FROM HIS FILE PRIOR TO THE END OF THE REPRESENTATION?

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

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

QUESTION PRESENTED

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




APPLICABLE RULES AND OPINIONS

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

ANALYSIS

A lawyer's obligation to share information with his client during the course of the representation is governed by Rule 1.4, which requires the lawyer to inform the client of "facts pertinent to the matter" and to comply with "reasonable requests for information." Unlike Rule 1.16(e), which applies upon termination of

the representation, Rule 1.4 does not specify the means by which these obligations must be carried out. LEO 1789, addressing the issue of a client who has asked for a copy of his medical records that the lawyer obtained in the course of the representation, explains that any request for a copy of a particular document in the file "must be considered" in light of the duty to promptly comply with reasonable requests for information, but does not conclude that a lawyer must provide a document because the client has requested it.

In this case, the discovery agreement specifically authorizes the defense lawyer to show his client the contents of the discovery materials and to discuss those contents with the client; the defense lawyer is only barred from providing the document or a copy to the client. Under the circumstances, the lawyer does not violate Rule 1.4 by entering into and complying with this discovery agreement. The lawyer can explain all pertinent facts to his client and comply with a reasonable request for information by meeting with the client to view and discuss the discovery materials; accordingly, Rule 1.4 does not require that the lawyer provide copies of any of these materials, even upon request of the client.

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

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

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

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

Committee Opinion
October 24, 2012

---

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

significantly affect settlement or resolution of the matter.

[2]

Rule 1.16 Declining or Terminating Representation

***

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

[3]

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

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

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

QUESTION PRESENTED

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

APPLICABLE RULES AND OPINIONS

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

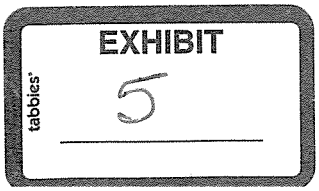
ANALYSIS

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

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

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

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



Committee Opinion
September 26, 2012

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

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

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

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

QUESTION PRESENTED

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

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

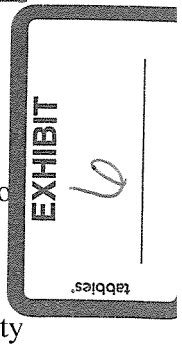
APPLICABLE RULES AND OPINIONS

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

ANALYSIS

Pursuant to *Brady v. Maryland* and subsequent cases, a prosecutor has the *legal* obligation to disclose material exculpatory evidence to a defendant in time for the defendant to make use of it at trial. A number of cases interpreting this legal obligation have noted that the prosecutor's *ethical* duty to disclose exculpatory evidence is broader than the legal duty arising from the Due Process clause, although they have not explored the contours of that ethical duty. [5]

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




Although the Committee has never definitively addressed the question, it opines today that the duty

of timely disclosure of exculpatory evidence requires earlier disclosure than the *Brady* standard, which is necessarily retrospective, requires. This conclusion is largely based on the response to *Read v. Virginia State Bar*, in which the Supreme Court of Virginia reversed the Virginia State Bar Disciplinary Board's order revoking a prosecutor's license, finding that the prosecutor had complied with his legal obligations under *Brady* and therefore had complied with the correlative ethics rule in force at that time. The disciplinary rule in effect at that time was DR 8-102 of the Virginia Code of Professional Responsibility which read, "The prosecutor in a criminal case or a government lawyer shall . . . [d]isclose to a defendant all information required by law."

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

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

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

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

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

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

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

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

Committee Opinion
July 23, 2012

---

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

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

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

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

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

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

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

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

LEGAL ETHICS OPINION 1861 MAY A LAWYER SERVING AS A BANKRUPTCY TRUSTEE COMMUNICATE WITH THE DEBTOR WITHOUT CONSENT BY THE DEBTOR'S LAWYER?

In this hypothetical, a Virginia lawyer is appointed to serve as trustee in a Chapter 7 bankruptcy case. The trustee's duties are established by 11 U.S.C. §704, and include investigating the debtor's financial affairs and, if advisable, opposing the discharge of the debtor. The trustee is authorized to retain counsel to represent the estate, but typically does not do so unless the proceeding becomes contested. The debtor in this case is represented by a lawyer who has not consented to the trustee communicating directly with the debtor.

QUESTION PRESENTED

Does Rule 4.2 prohibit a bankruptcy trustee, who is also a lawyer, from communicating directly with a debtor who is represented by counsel?

APPLICABLE RULES AND OPINIONS

The applicable *Rule of Professional Conduct* is Rule 4.2.[1]

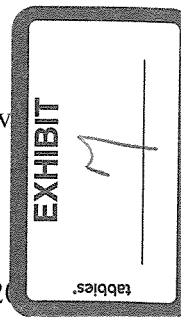
ANALYSIS

The lawyer/trustee in this situation is neither a party to the case nor representing a client. His function is to "collect and reduce to money the property of the estate for which he serves, and to close up the estate as expeditiously as is compatible with the best interests of parties in interest."[2] He acts as the representative of the bankruptcy estate and has the capacity to sue and be sued.[3] Thus, he acts as a fiduciary[4], although he will be named as a party to the action if he is sued as representative of the estate.

A lawyer acting as a fiduciary may be disciplined for actions taken in that role if the same actions would have warranted discipline if the relationship had been a traditional attorney-client relationship.[5] In LEO 1585, the Committee applied this standard to a lawyer/trustee who faced a conflict of interest between two bankruptcy estates/debtors for which he was serving as trustee. The Committee applied the conflict of interest rules, despite the fact that the lawyer was serving only as trustee to both parties, and opined that the trustee must resign as trustee in both cases in order to comply with his ethical responsibilities.

In light of the purposes of Rule 4.2[6], and especially because of the fact that a lawyer/trustee may be in a position to take advantage of a debtor if he is permitted to communicate with the debtor without the presence of the debtor's counsel, the Committee opines that a lawyer who serves as a bankruptcy trustee in a Chapter 7 proceeding may not communicate with a represented debtor unless the debtor's lawyer consents or the communication is authorized by law. Examples of communications that are authorized by law are notices that, by statute or court rule, must be sent to the debtor personally, or a scheduled and noticed proceeding such as a meeting of creditors pursuant to 11 U.S.C. §341.

A wide variety of communications between Chapter 13 trustees and debtors are authorized by law pursuant to 11 U.S.C. §1302(b)(4)[7]. Accordingly, Rule 4.2 does not bar a Chapter 13 trustee from



communicating with a represented debtor to the extent that the communications are authorized or mandated by the statute.

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

Committee Opinion
February 21, 2012

---

[1] Rule 4.2 Communication With Persons Represented By Counsel

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

[2] 11 U.S.C. §704(a)(1).

[3] 11 U.S.C. §323(a), (b).

[4] *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 355 (1985).

[5] *See* LEOs 1301, 1325, 1335, 1442, 1449, 1487, 1585.

[6] As Comment [8] explains, the rule is designed to protect uncounselled persons from being taken advantage of by opposing counsel and to preserve the attorney-client relationship.

[7] The trustee shall –

***

(4) advise, other than on legal matters, and assist the debtor in performance under the plan…

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

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

QUESTION PRESENTED

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

APPLICABLE RULES AND OPINIONS

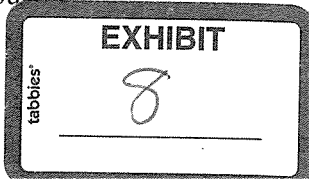
The applicable *Rule of Professional Conduct* is Rule 1.6 (a) and (b)(2) [2] .

ANALYSIS

Pursuant to Rule 1.6(a), a lawyer has a general duty to maintain the confidentiality of information learned during the representation of a client, even after the representation has concluded. [3] That duty is subject to the limited exceptions specified in Rule 1.6(b) and (c), including the exception that is relevant to this question, found in Rule 1.6(b)(2). Thus, a lawyer may not reveal confidential information without either obtaining client consent or determining that one of the exceptions to the rule applies.

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

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



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

Finally, Rule 1.6(b) provides that a lawyer *may* reveal information as permitted by the Rule; but a lawyer does not violate the Rule under these circumstances by refusing to reveal information upon request.

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

June 6, 2012

---

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

[2]
Rule 1.6 Confidentiality of Information

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

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

***

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

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

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

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

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

## QUESTION PRESENTED

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

## APPLICABLE RULES AND OPINIONS

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

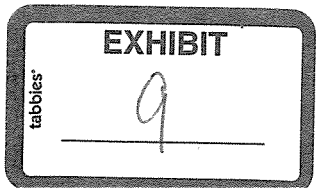
## ANALYSIS

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

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

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

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



Committee Opinion
September 26, 2012

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

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

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.

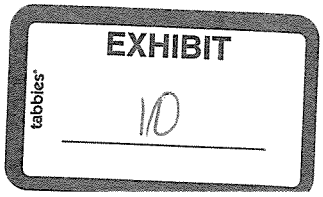
Under the facts as you have presented them in your inquiry, the Committee opines that there would not be a violation of Disciplinary Rule 5-103(B) as long as the attorney does not guarantee or cosign for the loan.

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.

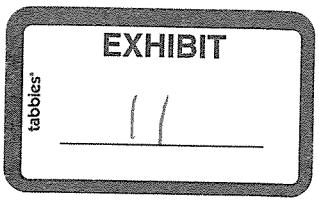
Under the facts you have presented, you have asked the committee to opine as to whether a guardian ad litem (GAL) can represent the client and testify as a witness to disputed issues of material fact, or whether a new GAL must be appointed.

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

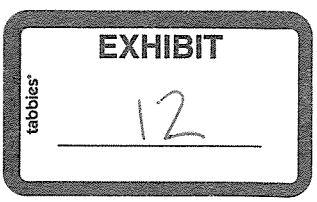
You have presented a situation in which attorney C represents the natural father, who is seeking full custody, in a child custody case in juvenile and domestic relations court. The other parties to the suit are the maternal grandparents (represented by attorney A), who presently have custody of the child 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



Legal Ethics Opinion No. 1480

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

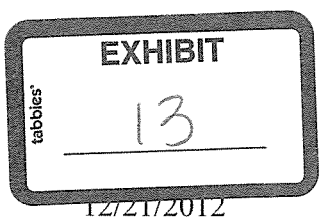
You have presented a hypothetical situation in which a law firm represents many medical providers regularly in their business and personal affairs. The firm also handles personal injury cases involving clients who are treated for their injuries by many of the same medical providers. You state that, in 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?

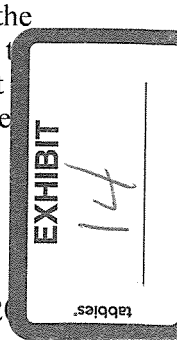
APPLICABLE RULES AND ANALYSIS

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 t 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

[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 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

---

[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.

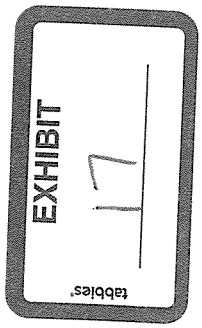
The fundamental ethics rule involved in this analysis is Rule 1.6 [1], which deals with the lawyer's duty of confidentiality of information. While Rule 1.6 safeguards information that the lawyer gains in a professional relationship, Rule 1.6(b)(1) specifically allows a lawyer to reveal information to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

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

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

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

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

---

[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 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.

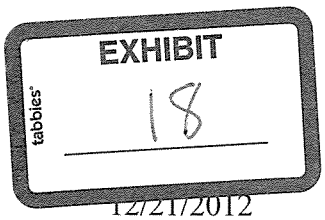
The Rule that specifically addresses conduct of a prosecuting attorney is Rule 3.8. That provision places special restrictions on the activities of a prosecutor; however, none of those apply here. Those provisions deal with probable cause, unrepresented defendants, communication with witnesses, disclosure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

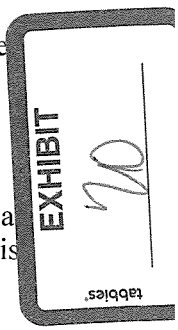
Also, your question raises a second question. Under the *Virginia Rules of Professional Conduct,* must a Criminal Defense Lawyer participating in, or employing an agent participating in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the 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 involve 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



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

---

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

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

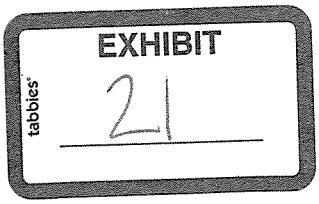
Regarding this hypothetical, you have asked the following questions:

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

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

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

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



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

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

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

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

1) Rule 1.2, as discussed above;

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

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

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

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

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

Committee Opinion
January 10, 2006

---

[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 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.

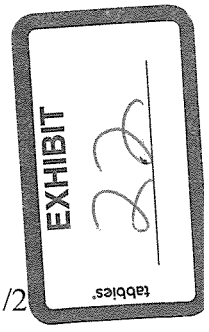
The committee notes, however, that the court in *Heinzman* did not have before it a termination or conversion clause of the type presented in your inquiry. Thus, the *Heinzman* court did not have an opportunity to consider whether an attorney and client may properly agree upon alternative fee arrangements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



> he must invest in the undertaking. Once fairly negotiated, the contract creates a relationship unique in the law. The attorney-client relationship is founded upon trust and confidence, and when the foundation fails, the relationship may be, indeed should be, terminated.

*Heinzman* at 963.

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

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

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

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

Second Sentence of the Proposed Language

The second sentence states as follows:

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

In the committee's view, this provision is unclear. The committee cannot determine whether the language is attempting to establish an alternative contractual hourly fee arrangement or is attempting to establish an agreed upon

hourly rate to be used in employing a quantum meruit calculation. Rule 1.5(b) requires that the fee arrangement be adequately explained to the client, preferably in writing. The committee opines that the second sentence of the proposed language fails to meet this requirement of Rule 1.5(b).

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

[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 1794 CONFIDENTIALITY OF INITIAL CONSULTATION

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

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

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

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

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

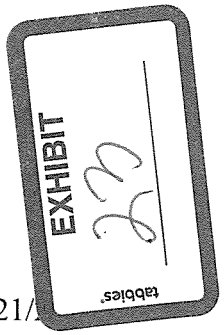
Rule 1.6(a) establishes the basic duty of client confidentiality:

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

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

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

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



established.

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

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

[1]

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

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

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

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

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

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

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

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

Committee Opinion
June 30, 2004

---

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

-

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

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

See, Kansas Legal Ethics Opinion 91-04

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

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