

REPORTS OF STANDING COMMITTEES

STANDING COMMITTEE ON LEGAL ETHICS

William G. Petty, Chair

The Legal Ethics Committee is charged with the responsibility for the issuance of advisory ethics opinions to Virginia State Bar members concerning contemplated or actual conduct. Requests for opinions are required to be stated in the hypothetical on committee-approved forms that are available from the state bar office. The committee is permitted to decline issuing an opinion on any matter that is currently the subject of any disciplinary proceeding or litigation.

During the fiscal year ending June 30, 2001, the committee docketed ten requests for opinions. Eleven LEOs were issued. The committee declined to issue an opinion on one request that was docketed since the inquiry involved pending litigation. Additionally, thirteen requests were answered by Legal Ethics Inquiry letters from staff Ethics Counsel by reference to prior LEOs.

The committee continues to note that, although there are fewer requests for opinions than in some prior years, the issues presented are usually more complex and controversial. This year, the committee was called upon to address the following issues:

1. LEO 1746—Conflicts Faced By Former Commonwealth's Attorney Now in Private Practice

In accepting clients to defend in criminal cases, what sort of cases trigger conflicts of interest for a former Commonwealth's Attorney?

As an attorney moves from public to private employment, that attorney must review each new case in light of Rules 1.6 and 1.11. This opinion applies these rules to a number of different fact patterns involving the private practice of a former prosecutor.

2. LEO 1748—Contingent Fee in Civil Forfeiture Matter

May an attorney charge a contingent fee where a criminal defendant seeks to obtain the return of property seized during a search incident to his arrest?

Yes. Rule 1.5(d) does prohibit the imposition of a contingent fee in a criminal case. In distinguishing civil forfeiture cases from criminal, the Ethics Committee notes that contingent fees are generally permissible where there is a reserve from which the fee can be paid together with an inherent risk of nonpayment. Civil forfeiture cases present both of those conditions.

3. LEO 1749—Asking Opposing Party's Former Employee about Communications with Employer's Attorney

May an attorney interview the former employee of the opposing party and, if so, may he ask about communications between that former employee and the employer's attorney?

The interview may occur, but no such questions may be asked. While Rule 4.2 does prohibit direct contact with an opposing party (without consent of that party's attorney), a series of prior ethics opinions had established that where that party is an entity, the contact ban does not extend to former employees. However, the opinion concludes that for an attorney to seek information regarding employee/attorney communications from the former employee would constitute a violation of Rule 4.4's prohibition against obtaining evidence in a manner that violates the rights of a third party.

4. LEO 1750—Advertising Compendium

This opinion summarizes the advertising opinions that had previously been issued by the Standing Committee on Lawyer Advertising so as to provide a more accessible source of guidance.

5. LEO 1751—Referral Service Charging Attorneys a Percentage Fee

May a nonprofit lawyer referral service run by a local bar association charge each participating attorney a percentage of the attorney's fee rather than a flat fee?

Yes. The opinion weighs two competing principles found in the ethics rules. The first principle, found in Rule 5.4, is that a lawyer should maintain professional independence by not sharing his fees with a non-lawyer. The second principle, found in Rule 7.3, is that to enhance access to legal services, a lawyer may pay the "usual and reasonable" fees charged by a lawyer referral service. Traditionally, lawyer referral services have charged attorneys a flat fee for participation, thereby avoiding any concern of "fee-sharing." The opinion determines that this nonprofit referral service run by a local bar association brings with it no risk regarding professional independence; thus, the ban of Rule 5.4 need not be applied to the percentage fee

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plan. Rather, the more specific reference in Rule 7.3 in support of lawyer referral services provides the basis for the opinion's conclusion that the plan is proper.

6. LEO 1752—Contact with Represented Parties

May an attorney, either by mail or in-person at a deposition, inform an opposing party that the attorney believes that party's attorney has a conflict of interest without getting consent of that party's attorney?

No. Rule 4.2 prohibits contact with an opposing party about the subject matter of the representation, absent the consent of that party's attorney. Achieving that contact through the mail is not permissible. Achieving that contact in the presence of the opposing attorney is also not sufficient as it does not afford that attorney the opportunity to withhold consent.

7. LEO 1753—Advising Debtor that Past Nonpayment will Result in Criminal Charges

May a creditor's attorney send a letter to the debtor stating that the creditor is pursuing criminal charges and that payment of the debt will not stop that pursuit?

Yes, absent other information regarding the intent of the creditor's attorney. Rule 3.4(h) prohibits a lawyer from presenting or threatening to present criminal charges "solely to obtain an advantage in a civil matter." The opinion establishes that while the creditor's attorney's letter certainly threatened criminal charges, that threat did not seem to be made to obtain any sort of advantage. As the "threat" made it clear that repayment would not affect the decision to pursue charges, the letter seems to be merely one of notice.

8. LEO 1754—Attorney Earning Commission for Sale of Life Insurance to Client

May an attorney earn a commission for selling life insurance to a client from the attorney's legal practice?

Yes. While the opinion determines that such a commission is permissible, the opinion requires that adequate disclosure and consent be obtained pursuant to Rules 1.7 and 1.8. Rule 1.7 specifically addresses that a lawyer may not allow his business interests to affect his representation of a client. Rule 1.8 (a) establishes the required parameters for an attorney creating a business relationship with a client.

9. LEO 1755—Advising that Contact with Client is Unethical

May an attorney threaten criminal charges against an opposing attorney whose client contacted the first attorney's client directly about the case?

Yes, so long as the purpose was to stop the contact. Rule 3.4 (h) prohibits an attorney from presenting or threatening to present criminal charges solely to obtain an advantage in a civil matter. LEO 1755 finds that, on its face, this particular threat was made to stop perceived, improper contact as opposed to obtaining an advantage in the outcome of the case; therefore, the threat is permissible absent other information regarding the attorney's motives.

10. LEO 1757—Disclosure of Client Information to Departing Attorneys

Should a law office provide client information to attorneys who have left the office so that the departing attorneys may do conflicts checks at their new office?

Yes. Rule 1.3 establishes that an attorney do nothing to prejudice a client during the course of the representation. Rule 1.16 (d) requires an attorney, upon termination of a client relationship, to take steps to protect the client's interests. The opinion finds that to fulfill those duties to all current and former clients of the law office, the attorneys in that office should provide client contact information to departing attorneys sufficient to enable those attorneys to perform conflicts checks in their new office.

The bar's ethics line continues to be an important resource for attorneys throughout the state. During the past year, bar staff handled approximately 3,200 calls.

I wish to thank the members of the committee—Susan Armstrong, Richard AtLee, Marni Byrum, Sandra Havrilak, Bob Hawthorne, Glenn Hodge, Patrick McConnell and Joseph Rapisarda—for their dedication and contributions to the work of the committee during the past year.

