STANDING COMMITTEE ON LEGAL ETHICS

Marni E. Byrum, 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, 2003, the committee reviewed the Virginia Rules of Professional Conduct and submitted proposed amendments to the VSB council for consideration at its October 2002 and February 2003 meetings. The proposed amendments were approved and submitted to the Virginia Supreme Court for consideration. The committee also had on its docket twenty-four requests for opinions. Two opinions that were issued were carried over from FY 2002. Nine LEOs requested in FY 2003, were issued and five opinions were withdrawn. Eight requests will be carried over to FY 2004. Additionally, staff ethics counsel answered 16 requests by legal ethics inquiry letters, by reference, to prior LEOs. The bar's ethics line continued, as an important resource. During the past year, bar staff handled 3,663 calls—an annual increase of 300 calls.

The committee addressed the following:

LEGAL ETHICS OPINIONS

A. LEO 1765—Permissibility of Misrepresentations in Attorney's Federal Intelligence Activities

May an attorney working for a federal intelligence agency perform undercover work without running afoul of the prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation?

This request was received more than a year ago. The request noted that while Rule 8.4 prohibits any conduct involving dishonesty, fraud, deceit or misrepresentation, attorneys working for federal intelligence agencies routinely need to misrepresent their identity or purpose as part of standard undercover work. The committee found the lack of room for reasonable exception in the Rule 8.4 prohibition to be troubling. Therefore, the committee stayed the issuance of an opinion on this question so that a rule change could be made to address this issue. That rule change has now been effectuated; the Supreme Court of Virginia adopted a revised Rule 8.4 that now prohibits dishonesty, fraud, deceit, or misrepresentation that *reflects adversely on the lawyer's fitness to practice law.* The committee then developed this opinion, which concludes that where an attorney is performing his lawful job duties as a staff member of a federal intelligence agency, that lawful performance does not reflect adversely on the lawyer's fitness to practice law, even where dishonesty, fraud, deceit, or misrepresentation may be involved.

B. LEO 1766—Mixed Fees

May an attorney charge a contingent fee that calls not only for a percentage of the settlement, but also an hourly fee?

This type of contingent fee, involving some combination of a percentage and an hourly rate, is commonly referred to as a "mixed," "combined," or "blended" fee. The opinion concludes that while there is no *per se* prohibition against a mixed fee, the total amount must be reasonable. Rule 1.5 lists a number of factors for the determination of whether a particular fee arrangement is reasonable.

C. LEO 1767—Conflict of Interest: Prosecutor as Client of Defense Attorney

May a Commonwealth's Attorney contract with a private law firm whose attorneys represent defendants in criminal cases in the same jurisdiction?

The request for this opinion specifically asked for a reconsideration of LEO 1203 in light of the adoption of new ethics rules. LEO 1203 concludes that a prosecutor may not contract with a defense attorney—or anyone in his firm—to provide legal services where that private attorney represents clients in the prosecutor's jurisdiction. That opinion found an impermissible conflict of interest for the prosecutor and defense attorney to be in this business relationship together. LEO 1767 concludes that nothing in the newer Rules of Professional Conduct changes the basic conflicts of interest analysis for this situation. The opinion interprets Rule 1.7 and Rule 1.9 as creating impermissible conflicts of interest for the attorneys participating in this arrangement. Specifically, the opinion notes that a defense attorney should not be beholden to a prosecutor for income.

D. LEO 1768—Prosecutor Threats Re: Trial Strategy

May a prosecutor threaten in open court that, should the defendant appeal his conviction, the prosecutor will request a trial by jury where the prosecutor knows that local perception is that juries will give harsher sentences?

The request raised the concern that the prosecutor was attempting to intimidate the defendant out of making a lawful appeal. The opinion highlights the fact that the defendant was represented by counsel. That fact brought the hypothetical outside the scope of Rule 3.8's protection of unrepresented parties. The committee found that no provision in the ethics rules prohibits this comment by the prosecutor.

E. LEO 1769—Seeking Guardian for a Client

May a lawyer be hired by a client's daughter to petition that the daughter be appointed as guardian for the mother?

This opinion involved an attorney representing a mother in a legal matter. That mother had at no time been determined incompetent and in need of a guardian. During the course of the representation, the adult daughter of the client approaches the attorney seeking representation to petition to be appointed guardian for her mother. The attorney agrees that the petition would be in the best interest of the mother. The committee makes a distinction based on an interpretation of both Rule 1.7, regarding conflicts of interest, and Rule 1.14, regarding clients with a disability. That distinction is between representing a third party, here the daughter, in declaring a client incompetent, and filing the petition with the attorney himself, as the petitioner. In representing a third party, the attorney would have a conflict of interest under Rule 1.7, in pursuing the differing goals of the two clients. In contrast, Rule 1.14 permits an attorney to take protective action where a client cannot adequately act in his or her own interest. Filing a petition seeking a guardian for a client is just the sort of protective action contemplated by the rule. The opinion notes that in deciding whether to take that step, the attorney could speak with the daughter to obtain further information about the mother. Such a conversation would be a permissible protective action and, therefore, would not be precluded by the general duty of confidentiality.

F. LEO 1773—Legislator Representing Clients Before Local Boards

Is it an impermissible conflict of interest for an attorney who is in the General Assembly, and for members of his firm, to represent private clients before local government boards?

No. The committee reviewed prior LEO 1763, which concludes that an attorney may never represent a client before a board upon which a member of the attorney's firm sits because recusal for that matter is an insufficient cure of the intrinsic conflict. The committee contrasted that situation from the present in that here, while a firm member is in the General Assembly, no firm member serves on any of the local boards before which firm members will appear. The fact that the General Assembly could pass legislation that may affect a board was seen as too speculative an influence; the committee found no conflict of interest in this scenario. The opinion expressly declines to extend the conclusions from LEO 1763 this far.

G. LEO 1774—Conflicts of Interest in Patents Practice

May one member of a firm write a validity opinion for one client where the patent in question is currently held by a client represented by another member of the firm in an unrelated patent matter?

Applying Rule 1.7 to the facts, the opinion concludes that there is a conflict of interest that precludes the firm from continuing with these two matters unless consent is obtained from each client. Even though the firm represents the second client on patents involving a different technology than that involved in the patent in question, for an attorney to assist the first client in invalidating a patent held by the second client, would place that attorney in a position directly adverse to the existing client. Further, under Rule 1.10, since an attorney representing the second client would not be able to represent the first client due to this Rule 1.7 conflict, everyone else in the firm would be disqualified, unless consent is obtained from each client. The opinion also draws attention to the fact that one of these attorneys presented the matter to a supervising attorney, who directed him to ignore the problem. Rule 5.1 makes partners and supervisors responsible for ethical violations committed by attorneys under their supervision. Based on the facts presented, the supervising attorney breached his responsibility of ethical supervision in his dismissive response to the associate's concerns regarding this conflict of interest. The opinion also notes that a subordinate attorney cannot rely on a supervisory attorney to escape ethical liability.

H. LEO 1776—Potential Conflict of Interest Among Capital Defense Units

May an attorney in one capital defense unit represent a defendant where an attorney in another unit is either representing a codefendant or where a witness in first matter is the former client of an attorney in another unit?

This opinion is looking at conflicts of interest for attorneys working in the various capital defense units around the state. Rule 1.10 imputes all conflicts involving two current clients, or between a current client and a former

client, to every member of the lawyer's firm. The basic question in this opinion is whether, for conflicts of interest imputation, each capital defense unit counts as a separate firm, or whether the whole system of units counts as one large firm. The opinion reviews the organizational structure of these units and concludes that each unit is a discrete entity. Any conflict of interest under Rules 1.7 and 1.9 for a particular attorney would be imputed to all members of his unit, but not to members of other units. Accordingly, an attorney in one unit can represent a defendant, where an attorney in another unit represents a co-defendant, and also where a witness in the case is a former client of an attorney in another unit.

I. LEO 1777—Duty to Disclose Omission in Bankruptcy Filing

Should an attorney disclose to the bankruptcy court that his former client failed to inform the court of an asset acquired during the 180-day disclosure period?

No. In this scenario, the attorney learns from an outside source that a former client inherited real estate during the 180-day period during which a bankrupt petitioner must disclose all assets to the court. The information learned by the attorney includes the fact that this former client did not disclose the real estate as required. The committee found two facts critical to the conclusion drawn in this opinion: The bankrupt petitioner inherited the asset after the termination of the attorney/client relationship, and the attorney learned of the problem after the termination of the attorney/client relationship. As these events did not occur during the course of the representation, Rule 1.6's general duty of confidentiality prevents this attorney from disclosing any information about the petition and its propriety.

J. LEO 1778—Representing Administrator Who is Taking His Elective Share as Spouse of the Decedent

May an attorney represent a client, both in his capacity as administrator of his wife's estate, and in his individual capacity as spouse of the decedent in electing against the will?

Yes. This opinion rests on the conclusion drawn in prior opinions, that when an attorney represents an "estate," he is really representing the administrator personally, and does not represent the decedent or the beneficiaries (unless specifically retained by them to do so). Accordingly, this opinion concludes that in representing the administrator and the spouse in the election, this attorney has one client with conflicting matters. That is not the same as two clients with conflicting matters, which could be prohibited by Rule 1.7. An attorney may assist an individual with conflicting legal needs, such as estate administration and the taking of an elective share. The opinion does note that the attorney, of course, cannot assist the administrator in unlawfully breaching his fiduciary duty.

REVISIONS TO THE RULES OF PROFESSIONAL CONDUCT

The Legal Ethics Committee submitted on November 7, 2002, a request that the Court review proposed amendments to the *Rules of Professional Conduct*. The proposed amendments had two primary goals: (1) The committee reviewed the American Bar Association's Ethics 2000 initiative, which involved revising the *Model Rules of Professional Conduct*; and (2) the committee reviewed Virginia's current rules to determine, now that they have been in place since January 2000, whether any provisions need clarification. The proposed amendments were approved by the council of the Virginia State Bar at its meeting on October 18, 2002.

Most of the proposed revisions were presented in one comprehensive package, which is currently pending with the Virginia Supreme Court. However, the court approved on September 26, 2002, the proposed revisions to Rule 8.3, which would create a duty for attorneys to report to the Virginia State Bar whenever they are disciplined by a state bar, and whenever they are convicted of certain crimes. The court also approved, on March 25, 2003, the proposed revision to Rule 8.4 that would clarify that the general prohibitions against dishonesty, fraud, deceit or misrepresentation are not intended to prohibit proper activities in such fields as intelligence and law enforcement. (Note: further information about the impetus for that change is found in the discussion of LEO 1765, above.)

I wish to thank the members of the committee—William G. Petty, past committee chair; Susan Armstrong, James Broccoletti, Robert T. Creager, Leonard C. Heath, Jr., Professor John M. Levy, Ida McPherson and Stephen Telfeyan—for their dedication and contributions to the work of the committee during the past year.