LEGAL ETHICS OPINION 1642

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

A bar association of Virginia attorneys wishes to maintain a question referral network for its members, through which any member may seek legal advice, from other volunteer members, about a client's legal matter without disclosing the names or identities of any parties involved.

Under the hypothetical, the attorney rendering advice will not be a member of the requesting attorney's firm and will be given only as much information about the underlying facts as the requesting attorney deems appropriate. The attorney rendering advice will not receive confidential or secret information without his or her advance consent. Also, attorneys requesting advice will be admonished not to disclose any confidence or secret of a client without the client's informed and express consent given in advance of the consultation.

I. Revealing Confidences and Secrets During Consultation.

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

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

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

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

The anonymous hypothetical is regarded as an ethically acceptable form of consultation because the consulting attorney is discreet in asking for guidance and discussions about abstract questions of law do not compromise client confidences or secrets. See, G. Hazard

& W. Hodes, The Law of Lawyering, §§ 1.6:202 and 1.6:203 (2d ed. 1990). However, the anonymous hypothetical approach to consultation encounters difficulties as more details are revealed during the consultation, and seemingly innocuous information may be harmful to the client if revealed to others. *See, Kershen, The Ethics of Ethics Consultation, 6 Professional Lawyer, Vol.* 3 at 3 (May 1995). Thus, the committee opines that Attorney B should obtain client consent before seeking advice from Attorney A, where particular details or facts about the client or his or her case must be revealed in order to obtain such advice.

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

The relationship between Attorney A and Attorney B is best described as a simple consultation of an attorney in his professional capacity by another attorney which, under the circumstances given in the hypothetical, would give rise to a reasonable expectation of confidentiality. The committee has previously opined that an ethical duty to keep the confidences of another person can arise even before the actual beginning of an attorney-client relationship. (See LE Op. 1453 and LE Op. 1546.) In those opinions the hypothetical presented concerned prospective clients who were consulting attorneys before hiring them and the committee found the consultations created expectations of confidentiality. Similarly, in LE Op. 629 the committee opined that an attorney who was consulted in a professional capacity at a social engagement was obligated to keep confidential the contents of the consultation. Again in LE Op. 1601 the committee found that a professor who was also an attorney would violate DR:4-101 if she were to disclose to the administration of her school the confidences and secrets of academic colleagues or students who requested her legal advice. The expectation of confidentiality that the committee has previously recognized can be attributed to the widespread understanding that attorneys provide confidential advice and counsel. Thus, the committee recognizes a duty to keep confidential those consultations that occur outside formal attorney-client relationships which nonetheless create an expectation of confidentiality. Attorneys can avoid this situation by making it clear through a disclaimer given to the inquirer, that the attorney cannot keep the information confidential. The committee believes this applies with equal force when attorneys consult attorneys and cites the concept with favor in LE Op. 1601. Thus, the committee believes it would be improper under DR:4-I01(B) for Attorney A to reveal the contents of Attorney B's inquiry. Attorney A may not reveal the fact that Attorney B consulted him, the nature of the consultation, what was asked and what was discussed.

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

You also ask the committee to consider whether, if Attorney A has rendered advice to Attorney B, an independently practicing attorney, about a hypothetical question based on facts underlying a real dispute involving Attorney B's client, and Attorney A did not know the identities of the parties to the dispute at the time Attorney A rendered such advice to Attorney B, may Attorney A ethically represent a party adverse to Attorney B's client?

The Disciplinary Rule that is controlling is again DR:4-101(B) which requires that a lawyer shall not knowingly (2) use a confidence or secret of his client to the disadvantage of his client; and (3) use a confidence or secret of his client for the advantage of himself

or a third party Also appropriate is DR:5-105(D) which prohibits an attorney who has represented a client from representing another client in the same or a substantially related matter if the interest of that person is in any way adverse in any material respect to the interest of the former client unless the former client consents.

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

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

Committee Opinion
June 9, 1995

Legal Ethics Committee Notes. – Editor's Note: See Rule 1.6, Comment 7 [a] concerning the ethical considerations of lawyer-to-lawyer consultations and "mentoring".