LEGAL ETHICS OPINION 1792
IS IT CONSIDERED ASSISTING IN THE UNAUTHORIZED PRACTICE OF LAW FOR AN ATTORNEY TO INSTRUCT A SOCIAL WORKER TO ASSIST PRO-SE LITIGANTS TO FILL OUT SMALL CLAIMS FORMS?

Your request presents a hypothetical involving an attorney providing training to non-lawyers. Specifically, this attorney would be training social workers to assist members of the public in filling out forms for use in small claims court, usually to obtain payment of back wages from employers. The questions raised regarding that hypothetical situation are as follows:

1. Is it the unauthorized practice of law for a social worker to assist a *pro se* litigant in completing forms, such as the Warrant in Debt, for small claims court?

2. Would it be aiding in the unauthorized practice of law for an attorney to teach the social workers how to provide this assistance?

The purview of this committee is to interpret exclusively the Rules of Professional Conduct. In contrast, it is the purview of the Standing Committee on the Unauthorized Practice of Law to interpret the Unauthorized Practice Rules to determine the parameters of the practice of law. This Committee referred your first question to the Standing Committee on the Unauthorized Practice of Law, as within the purview of that Committee. The Virginia Supreme Court recently adopted UPL Op. 207, which the Unauthorized Practice of Law Committee had issued in response to your request. That opinion concludes as follows:

> The preparation of warrants in debt and other forms necessary for *pro se* representation ("legal instruments of any character") in Small Claims Court by a non-attorney social worker would be the unauthorized practice of law if the non-attorney social worker selects the forms for the litigant or advises the litigant as to which forms are appropriate based on the litigant's particular case; or provide any legal advice to the litigant. The social worker may assist the litigant with completion of the form document using language specifically dictated by the litigant.
>
> The only assistance that a social worker, or any non-lawyer, may provide to a *pro se* litigant to complete form legal documents is direct translation of the document (if the litigant does not speak or read English) to the litigant's native language, direct transcription, or direct transcription and translation to English, of information necessary to complete forms as dictated by the litigant. The social worker may also provide general administrative instructions such as to how and where and when to file the forms with the appropriate court/tribunal.

With that resolution of your first question, this Committee can now address your second question. The second question of your hypothetical is whether an attorney may train those social workers to provide the assistance outlined above. Rule 5.5(a)(1) prohibits an attorney from assisting a nonlawyer in "the performance of activity that constitutes the practice of law." Thus, the answer to this second question flows directly from that of the first. The attorney may not train the social workers to perform any work constituting the unauthorized practice of law, as outlined in this context by UPL Op. 207.

The committee wishes to clarify a point included in your request materials. Comment One to Rule 5.5 states that the rule is not intended to prohibit lawyers "from providing professional advice and instruction to nonlawyers whose employment requires knowledge of the law." Examples cited in that comment are claims adjusters, employees of financial or commercial institutions, and social workers. The critical distinction here is between employment that "requires knowledge of the law" and employment that actually is the practice of law. A nonlawyer's employment may well entail a necessary understanding of pertinent law; that knowledge, however, does not provide authority to provide legal services based on that understanding. Comment One is intended to allow lawyers to provide training on the law needed for performance of a job; it does not provide the receivers of that training an exception to the Unauthorized Practice Rules. To reiterate, this attorney cannot instruct these social workers in the unauthorized practice of law.

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

LEGAL ETHICS OPINION 1815
CAN A LOCAL GOVERNMENT ATTORNEY REPRESENT A ZONING ADMINISTRATOR IN AN APPEAL AGAINST THE BZA WHILE REPRESENTING THE BZA IN AN UNRELATED APPEAL BEFORE THE CIRCUIT COURT?

You have presented a hypothetical situation involving an attorney representing a locality. In a prior year, a citizen applicant appeared before the Board of Zoning Appeals (BZA) to appeal a decision of the Zoning Administrator pursuant to Virginia Code §15.2-2309. The Zoning Administrator had enforced zoning ordinance requirements regarding the use of land in a business zoned district. The applicant had argued that the land use should be allowed even though directly prohibited by the ordinance. At the appeal, the BZA upheld the Zoning Administrator's decision. The applicant then appealed that BZA decision to the Circuit Court. The local government attorney appeared as attorney of record for the BZA, as defendant in the applicant's petition.

In a second matter, the BZA granted a variance. The Zoning Administrator has decided to appeal the decision to the Circuit Court. The Zoning Administrator wants the local government attorney to represent him in filing that petition. The petition will name the BZA as defendant. This case involves a different piece of land and has no common issues of fact with the first matter.

The attorney attended both BZA hearings and commented on the merits of each case, but it does not appear to the attorney that the BZA considered the comments to be legal advice. His comments are normally limited to whether the variance satisfies the statutory requirements or whether an appeal has merit.

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

1. Would the local government attorney have an impermissible conflict if he represents the BZA in the first case and the Zoning Administrator against the BZA in the second case?

2. If so, can the local government attorney cure that conflict with consent from both the BZA and the Zoning Administrator?

In beginning the analysis of your questions, the committee initially distinguishes the present fact pattern from that in recent LEO 1785, also involving a local government attorney and a BZA. In LEO 1785, the local government attorney advised the BZA regarding the public notice for a particular zoning variance. Subsequently, that attorney represented the Board of Supervisors in a challenge to the variance and filed a petition on its behalf naming the BZA as a defendant. Accordingly, all discussion in that LEO involved one legal matter – the zoning variance. In contrast, the present hypothetical involves two different and unrelated legal matters (the land use case and the zoning variance case). The analysis in LEO 1785 does not, therefore, resolve the questions raised in the present hypothetical.

LEO 1785 considered whether an attorney could represent a party on one side of litigation having advised the opposing party regarding the same matter. Here, the analysis focuses on whether an attorney can represent a party in litigation where the attorney represents the opposing party in some other matter. The governing provision in the Rules of Professional Conduct is Rule 1.7, which states as follows:

> 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.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) the consent from the client is memorialized in writing.[1]

The structure of Rule 1.7 is a two-determination process: first, is there a concurrent conflict and, second, if so, may steps be taken to permit the representation? Thus, the first question is whether the local government attorney's representation of the BZA in the first matter while representing of the Zoning Administrator in the second triggers a concurrent conflict of interest.

FOOTNOTES

1 The Committee notes that this LEO references a new articulation of Rule 1.7, which the Virginia Supreme Court recently adopted with an effective date of June 30, 2005.

Under Rule 1.7(a), there are two sources of concurrent conflicts. If either is present, the attorney has a conflict. Paragraph (a)(2) explains that an attorney has a concurrent conflict where the representation of one client is directly adverse to the other. Comment 3 to the rule discusses direct adversity in the litigation context:

> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. *Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.* On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. (Emphasis added.)

In the present scenario, the attorney is representing the Zoning Administrator against the BZA, a current client represented in unrelated litigation. The representation of the Zoning Administrator is not merely "generally adverse" to the BZA, the attorney's client. Rather, as the BZA is the opposing party in the Zoning Administrator's litigation, the representation of the administrator is *directly* adverse to the other client of this attorney, the BZA. Under paragraph (a), a "direct adversity" conflict is triggered not only when representing opposing parties in the same case, but also when representing one client against another client, represented in some other matter. The attorney in this scenario has a concurrent conflict of interest in trying to represent these two clients in these two matters.

The determination of whether this attorney has a concurrent conflict of interest can be made under paragraph (a)(1) alone. A concurrent conflict of interest may exist under either paragraph (a)(1) or (a)(2). Nonetheless, the Committee notes that the critical concept in paragraph (a)(2), if applied to present scenario, would be whether the representation of one client would materially limit that of the other. That determination must always be decided on a case-by-case basis, with a context driven analysis rather than a bright line rule. The Committee need not make such a determination in the present instance as a concurrent conflict already exists under the first part of paragraph (a).

As the attorney in the present scenario does have a concurrent conflict under Rule 1.7(a), he may only proceed with these two representations if he fulfills the requirements of paragraph (b) of the rule. Paragraph (b) specifies that an attorney may proceed with a concurrent conflict of interest only if he obtains client consent after consultation *and* he meets four specified requirements. Note that the Preamble to the Rules of Professional Conduct defines "consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The first of the four requirements in paragraph (b) is that the lawyer must reasonably believe that he can competently and diligently represent each affected client.[2] The comments to the rule provide guidance for making this determination. Specifically, Comments 10 and 13 are pertinent in this context of litigation. Comment 10, in pertinent part, establishes a "disinterested attorney" standard:

> A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

Thus, the question becomes would a disinterested attorney reasonably believe that this local government attorney can provide competent and diligent representation to the BZA in the first case simultaneous with competent and diligent representation to the Zoning Administrator in the second case. As discussed in Comment 13:

> Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a

FOOTNOTES

2 The Committee notes that competent, diligent representation is, of course, required for all clients under Rules 1.1 and 1.3, respectively.

> degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

The final resolution of those issues in the present, and in any, instance, will of course rely on analysis of both the facts of the cases and the law involved in the matters at issue. The Committee notes that the above-referenced comments suggest that two especially critical factors are whether a disinterested attorney would approve of the dual representation and what sort of litigation is involved. The Committee further notes that in your request, you discuss the additional factors that the cases share no issues of fact and that one case's outcome will have no bearing on the other. Those are the sort of issues that the attorney should review in making the conflicts determinations. Other possible factors worth considering may include, but certainly are not limited to, the amount of public attention and acrimony generated by the matters, the risk of inadvertent disclosure of confidential information, and the risk that the attorney's loyalty will be divided or diluted.[3]

The second requirement from Rule 1.7(b) is that the representation is not prohibited by law. The interpretation of the legality of the actions of the local government attorney is outside the purview of this Committee. However, nothing presented in the materials accompanying this request suggests that illegality is a concern.[4]

The third requirement in paragraph (b) is that the representation not involve the lawyer asserting a claim by one client against another *represented in the same proceeding*. In the present instance, any assertions made on behalf of the Zoning Administrator against the BZA in that case will be made in a proceeding where the lawyer represents no other client. He only represents the BZA in some other matter. Thus, while this scenario of representing one client in a matter against a client represented in some other, unrelated matter does constitute a concurrent conflict under Rule 1.7(a), it does not run afoul of the distinguishable requirement set out in paragraph (b)(3).

The fourth requirement in paragraph (b) is that the consent provided by the client must be memorialized in writing. Comment 10, in pertinent part, explains this requirement:

> Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

The Committee agrees that obtaining a client's signature to acknowledge the consent is advisable in most instances; however, the requirement of (b)(4) would be met if the attorney merely makes a note to file regarding what transpired.

In sum, whether or not this attorney may represent these two clients in these two matters is not a bright-line determination. The Committee concludes that the attorney may proceed with the two representations under the following circumstances. As discussed previously, assuming no question of legality is present and as he would not be asserting a claim on behalf on one client in the matter he represents the other client, he may represent both clients in their respective matters so long as he consults with each client regarding the implications of consent, the clients each provide that consent, the attorney memorializes that in writing, and he reasonably believes that his representation in each instance will be both competent and diligent.

The Committee must make one qualification on those conclusions. The analysis of this opinion thus far has been based on the assumption provided with the request that the attorney did not represent the BZA in the second matter, in which it granted the zoning variance. The attorney did, however, "comment" on the merits of the variance application at the BZA hearing. If the BZA reasonably considered these "comments" to constitute legal advice provided by the attorney to the BZA, then an attorney-client relationship may have been created[5], and the conclusions of LEO 1785 would then apply. The committee cautions that the attorney was responsible to clarify his role as a representative of a party to the hearing, and to expressly communicate to the BZA that he was not appearing before them as their legal advisor, if necessary to dispel any confusion.

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

Committee Opinion
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FOOTNOTES

3 *See* ABA Formal Op. 05-435 (2004) (extended discussion of factors for concurrent conflicts determinations).

4 Specifically, discussion in the materials accompanying this request included highlights that a local charter provision requires the local government attorney to be the "chief legal advisor" to all boards, commissions, and agencies of the local government. A local government's charter is generally granted by The General Assembly. *See* Va. Code §§ 15.2-200 et. seq. (Local Government Charters). Nevertheless, the Rules of Professional Conduct establish the ethical responsibilities of any attorney serving in that position.

FOOTNOTES

5 *See* the Unauthorized Practice Rules, "Practice of Law in Virginia", stating in pertinent part:

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

LEGAL ETHICS OPINION 1820
CAN AN ATTORNEY EMPLOYEE OF A RAILROAD COMMUNICATE WITH INJURED RAILROAD WORKERS WHO ARE REPRESENTED BY COUNSEL?

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

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

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

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

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

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

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

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

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

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

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

Before addressing your specific questions, it would be helpful to clarify the ethical responsibilities of the individuals in the differing roles outlined in your scenario. In all instances, the Virginia Rules of Professional Conduct govern conduct only of licensed attorneys. The rules do not govern the conduct of nonlawyers. Regulation of nonlawyers is governed by the Virginia State Bar and the Unauthorized Practice Rules. Interpretation of the Unauthorized Practice Rules is not within the purview of this Committee.[1] Thus, in the discussion of this opinion request, this Committee can apply pertinent provisions of the Rules of Professional Conduct to the *lawyers* in the scenario, not to the nonlawyer employees, or to corporate departments. In answering the questions, this Committee will not be determining whether the conduct of the lawyers, if performed by nonlawyers, would constitute the unauthorized practice of law. Such an issue is outside the purview of this Committee. The remarks in this opinion will focus specifically on whether the outlined conduct of the attorneys employed by this railroad is permissible under the Rules of Professional Conduct.

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

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

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

FOOTNOTES

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

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

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

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

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

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

> Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another.

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

Also establishing ethical obligations regarding this department head's staff supervision are Rules 5.1 and 5.3, which govern the supervision of attorney staff and nonattorney staff respectively.[2]

FOOTNOTES

2 Those rules state as follows:

RULE 5.1 Responsibilities of Partners and Supervisory Lawyers

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

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

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

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

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

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

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

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

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

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

While the precise details of each rule differ, both rules direct the supervising attorney to supervise his staff in a manner consistent with his own ethical obligations. This attorney cannot establish and implement a procedure for his staff to routinely contact represented workers when the initiation of that contact as well as the content of the communications are incompatible with the attorney's responsibilities under Rule 4.2.

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

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

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

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

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

The answer to Question 1 also addresses this second question.

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

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

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

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

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

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

As with Questions 1 and 2, above, this question is outside the purview of this Committee as the Rules of Professional Conduct do not apply to the railroad's claims department. However, the analysis in Question 3 regarding the individual members of the

FOOTNOTES

3 *See* 1819 (lobbying firm);1764 (attorney fee sharing with finance company); 1754 (attorney selling life insurance products); 1658 (employment law firm/human resources consulting firm); 1647 (employee-owned title agency); 1634 (accounting firm); 1579 (serving as fiduciary such as guardian or executor);1584 (partnership with non-lawyer); 1368 (mediation/arbitration services); 1442 (lender's agent); 1345 (court reporting); 1318 (consulting firm); 1311 (insurance products); 1254 (bail bonds); 1198 (court reporting); 1163 (accountant; tax preparation); 1131 (realty corporation); l083 (non-legal services subsidiary); 1016 (billing services firm); 187 (title insurance).

claims department is equally applicable here. If the member of the department is a nonlawyer, the Rules do not regulate his or her conduct. If the member of the department is a lawyer, any contact with the represented worker is impermissible if in violation of Rule 4.2. That would include communications requesting medical records as well as offering job training and/or vocational services as such requests and offers are part of the negotiation of the particular claim for which the worker has legal counsel.

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

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

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

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

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

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

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

Committee Opinion
January 27, 2006

LEGAL ETHICS OPINION 1821
POTENTIAL CONFLICT OF INTEREST WHERE AN ATTORNEY IS SUING A CORPORATE BOARD WITH A MEMBER THAT IS A PARTNER OF THE ATTORNEY.

You have presented a hypothetical situation in which Attorney A represents a Trust Company, governed by a board of directors. Attorney B sits on the board. Attorney C has now joined Attorney B's firm. Attorney C represents several remainder beneficiaries of a trust administered by Trust Company regarding their complaints regarding the administration of that trust. Attorneys B and C wrote a letter to the President of the Trust Company requesting that the President and other board members screen Attorney B from any information or discussion of the dispute between Attorney C's clients and the Trust Company. The letter proposed that the board excuse Attorney B from the board meetings when this agenda item would be discussed. Specifically, the letter stated:

> Completely screening Local Attorney [i.e., Attorney B] from all information and discussion, if any, to or by members of the board of directors of your company is consistent with the Rules of Professional Conduct imposed on him and at the same time enables him to continue to discharge his duties as a director of your company with respect to all other matters.

Attorney C then filed the law suit against the Trust Company on behalf of the remainder beneficiaries. Several members of the board have raised objections to this arrangement with Attorney A, the board's attorney.

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

1) Is it a conflict of interest for Attorney C to sue Trust Company if his partner, Attorney B, serves on the board of directors of Trust Company?

2) If so, can the conflict be rectified by screening Attorney B from discussion and information concerning the lawsuit?

3) If there is a conflict, can the conflict be eliminated by the resignation of Attorney B from the board, or must Attorney C withdraw from his representation of the beneficiaries?

The pertinent legal authority for resolving these questions is Rule 1.7, governing concurrent conflicts of interest. Rule 1.7 states as follows:

> (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.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) the consent from the client is memorialized in writing.

Your first question asks whether Attorney C has a conflict of interest in bringing this action on behalf of a client against the Trust Company, when C's partner, Attorney B, sits on the Trust Company's board.[1] Critical to evaluating this issue is the imputation effect of Rule 1.10. Specifically, Rule 1.10 (a) states as follows:

> 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 and 2.10(e).

Therefore, the starting point for analysis of this question is actually whether Attorney B could represent a party suing the Trust Company. If Rule 1.7 would preclude him from taking such a case against the company upon whose board he serves, then Rule 1.10 would preclude all members of his firm, including Attorney C, from representing that client in that matter. Accordingly, the Committee will first analyze whether

FOOTNOTES

1 The Committee stresses that the analysis in this opinion rests on the facts provided; the hypothetical presents Attorney B as serving on the board but not representing the Trust Company. However, the committee notes that even if B does not consider himself counsel for the Trust Company, if his actions and statements gave fellow board members a reasonable impression that he was providing them with legal advice and protecting the legal interests of the board and company, then Attorney B would find himself with the duties and conflicts associated with legal representation. *See* LEO 1819. Those duties and conflicts would include, among other things, the duty to maintain confidentiality as prescribed by Rule 1.6. That duty of confidentiality, if owed to the Trust Company, could constitute a conflict of interest as a "responsibility to a third person" under Rule 1.7, in addition to the other sources of conflict of interest discussed in this opinion. However, as the limited facts presented do not include such a scenario, the analysis in this opinion rested on the provided premise that Attorney B does not represent the board or the Trust Company.

Attorney B could represent the remainder beneficiaries against the Trust Company.

Rule 1.7(a) establishes concurrent conflicts of interest in two types of situations. The first is not applicable here; the representation of the beneficiaries would not be directly adverse to another client of Attorney B. *See* Rule 1.7(a)(1). While the party adverse to the remainder beneficiaries is the Trust Company, Attorney B serves only as a board member and not as counsel to the company. Thus, Attorney B would not have a direct adversity concurrent conflict.

It is the second type of concurrent conflict that is at issue here. Rule 1.7(a)(2) establishes a concurrent conflict when certain kinds of interests of the attorney may materially limit the representation. Here, "responsibility to a third person or personal interest of the lawyer" results in this scenario from Attorney B's fiduciary duty to the Trust Company as a board member. Is there a "significant risk" that the fiduciary duty will materially limit the representation of the claimant? The Committee thinks so. The specifics of this fiduciary duty are determined by corporate law generally and the company's articles of incorporation specifically and thus those parameters are outside the purview of this Committee. Nevertheless, this Committee assumes a general duty of loyalty and protection would be part of that fiduciary duty, yet Attorney B would be bringing a suit to collect money damages from the Trust Company. In the simplest of terms, in one role, Attorney B would be seeking damages from the Trust Company, and in another role, Attorney B would be working to avoid paying such damages as part of a general goal of maximizing the assets/profits of the Trust Company. It is also possible that Attorney B's own personal interest could give rise to the conflict. If the subject matter of the litigation is related to decisions that Attorney B has made personally as a Board member, then he may have a natural inclination to defend the Board's (and his own) decision.

Courts have repeatedly found this tension between corporate fiduciary duty and the duty to a client as the source of a conflict of interest. *See, e.g., Berry v. Saline Memorial Hospital*, 322 Ark. 82, 907 S.W.2d 736 (Ark. 1995) (court disqualifies firm of former hospital board member from representing patient against the Board); *Allen v. Academic Games Leagues of America, Inc.*, 831 F.Supp. 785 (C.D. Calif. 1993)(court disqualifies firm of organization's advisory board member from representation of party suing that entity); *Graf v. Frame*, 177 W.Va. 282, 352 S.E.2d 31 (1986)(court disqualifies attorney who serves on a university's board of regents from representing persons with claims against faculty members); *William H. Raley Co. v. Superior Court*, 149 Cal.App.3d 1042, 197 Cal.Rptr. 232 (1983)(court disqualifies firm of bank trustee from representation of plaintiff adverse to the bank). In line with those authorities, and its own interpretation of Virginia's Rule 1.7, the Committee opines that it would be a concurrent conflict of interest for Attorney B to represent the remainder beneficiaries against the Trust Company.

As the Committee has determined that Attorney B would have a conflict of interest with this representation, the Committee must look to Rule 1.10 to determine the effect of that prohibition on Attorney C, his partner. As highlighted above, Rule 1.10(a) prohibits an attorney from accepting a representation if any other member of his firm is precluded from that representation. Therefore, as Attorney B would have conflict in representing this plaintiff, so would Attorney C.

The Committee notes that Rule 1.7 *does* have a curative provision, allowing for the "cure" of some conflicts. Rule 1.7(b) will allow a lawyer to continue with a representation that met the definition of a concurrent conflict of interest under paragraph (a) of the rule so long as each requirement of (b) is met. The second and third of your questions ask just what might cure a conflict in the present scenario.

The first requirement in Rule 1.7(b) is that the affected client must provide consent after consultation. In this instance, the "affected client" is the remainder beneficiaries, as the company is not a client. For Attorney B to be able to represent these plaintiffs, among other things, he must explain the consequences of the conflict to the plaintiffs and the plaintiffs must then consent. Rule 1.7(b)(4) requires that the attorney memorialize in writing that the consultation and consent occurred. Comment 10 to Rule 1.7 clarifies that while best practice is to actually have the client provide the consent in writing, any written memorialization (such as a note to the file) will suffice.

While consent is a requirement to cure this conflict, it is not alone sufficient. Assuming the plaintiffs provide the consent after consultation, the additional requirements of Rule 1.7(b) must be met. Rule 1.7(b)(1) requires that the lawyer must reasonably believe he can provide competent, diligent representation to the client.[2] Comment 1 to Rule 1.3 ("Diligence") elaborates upon what is required:

> 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.

As stated above, the Committee believes that Attorney B may not sue a company on whose board he serves. That conflict is imputed to Attorney C by operation of Rule 1.10. Question Two suggests Attorney B could recuse himself from all discussion and voting on the matter as a possible cure to the conflict. While such recusal is not mentioned in the rule itself, it certainly is a factor to consider in Rule 1.7(b)(1). In this instance, would recusal resolve the tension between the attorney's fiduciary duty to the board and his professional obligation to his clients? The Committee thinks that this is possible, if the board has approved of the recusal strategy, after consultation with its attorney.

FOOTNOTES

2 The Committee notes that the duty of competent, diligent representation is present for all clients, regardless of the existence of a potential conflict. *See* Rules 1.1, 1.3.

Presumably the Board would consider such matters as whether the litigation is "routine" or "non-routine" in the course of the board's business; whether the claim goes to matters that have been determined by the board, or by lower level administrative staff; and whether the claim involves matters on which Attorney B has voted or has been involved in. Under the right circumstances, the risk of diluted loyalty to this client could be significantly reduced. Attorney B's recusal could be effective in two ways. First that recusal would substantially reduce the opportunity for improper influence between Attorney B and the board. Similarly, Attorney B's recusal lessens the risk that Attorney C would be improperly loyal to the corporation at the expense of his clients. Attorney B's recusal could facilitate the competent, diligent representation of the plaintiffs.

Rule 1.7(b) has two additional requirements for an effective conflict "cure": that the conduct is legal and that the representation not involve the assertion of a claim against another client in the same proceeding. *See* Rule 1.7(b)(2) and (3), respectively. Nothing in the facts suggests that Rule 1.7(b)(2) would in any way preclude curing this particular conflict; illegality does not seem to be an issue here. The requirement of Rule 1.7(b)(3) is similarly not a block to curing this conflict. The potential conflict of interest was not between two clients, but instead between client interest and duty to a third person, namely the board. Accordingly, the requirement of Rule 1.7(b)(3) does not impede a consent cure to this conflict. If Attorney B and his board create a proper screen for him, including recusal from all discussion of the matter, then Attorney C can properly seek consent from his clients to cure what would otherwise be a conflict of interest preventing that representation.

Question Three raises two other possible cures for Attorney C's conflict. First, would the resignation of Attorney B from the board cure the conflict for Attorney C? The Committee opines that such an action is likely, but not guaranteed, to cure this conflict. The end of Attorney B's role as a board member presumably would end his fiduciary duty to the Trust Company. As he never represented the company, Rule 1.9's requirements regarding duty of loyalty to former clients would not be triggered. However, if the corporate documents establishing the specifics of the duties of Trust Company board members included some duty to avoid adverse business actions regarding the Trust Company for some period after board membership, then Attorney B's resignation would not necessarily cure this conflict. That lingering duty could possibly create the sort of conflict already established for current board membership. Similarly, if the corporate documents establish a duty to keep certain corporate information confidential, that duty may also continue beyond the term of the attorney's service on the board. The factual scenario lacks sufficient detail to make that determination. The Committee notes that absent any such fiduciary duty, Attorney B and, in turn, Attorney C would not be precluded from this representation once Attorney B resigned. However, the presence of any such duties would render Attorney B's resignation alone ineffective in curing this conflict. Nevertheless, as with the recusal option discussed with Question 2, if this resignation were combined with proper consent from the plaintiffs, Attorneys B and C could effectively cure this conflict.

The final suggestion in Question Three is that Attorney C withdraw from the representation. If Attorney C withdraws from representing the plaintiffs, no conflict would remain in need of a cure. The firm of Attorneys B and C would no longer have any members representing a party against the Trust Company.

The Committee wants to respond to two points that, while not presented as a formal question, were discussed in the materials provided with this request. The first issue is whether the income beneficiaries would have cause to object to Attorney B's firm representing the remainder beneficiaries, whose interest are adverse to the income beneficiaries. The implication is that Attorney B's firm has a special connection to the Trust Company, via Attorney B's board membership, that could give Attorney B and C's firm an unfair advantage over the income beneficiaries. The Committee notes that neither Attorney B nor Attorney C represents, nor has ever represented, the income beneficiaries in this matter. Therefore, neither attorney has ethical obligations of loyalty, competence or diligence with regard to the income beneficiaries. Accordingly, the interest of those parties is not a factor in the analysis of the potential conflicts of interest for Attorneys B and C.

Finally, the Committee wishes to note that there is an Attorney A in this scenario. Attorney A represents the Trust Company. The facts suggest that Attorney B and C together sent a letter to the company president and each board member regarding the potential conflict of interest providing advice as to what would cure the conflict. The facts do not include any contact by Attorney C with Attorney A, the company's attorney, prior to sending that letter regarding the litigation. Rule 4.2 requires that:

> 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.

With an entity client, like this company, a lawyer should treat anyone within the entity's "control group" as within the protection afforded by Rule 4.2. *See* Rule 4.2, Comment 4. The company president and board members are without question within that group. Attorney C should have only sent this letter regarding his client's litigation against the company if Attorney A had consented in advance to the communication.

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

Committee Opinion
January 11, 2006

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

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

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

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

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

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

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

1. Whether it was unethical for the associate to refuse to provide the first firm with copies of the letters to the clients and the list of clients to whom the letters were sent, and

2. Whether the letter sent by the associate was misleading, or otherwise violated Rule 7.1 ("Communications Concerning a Lawyer's Services").

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

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

ABA Formal Op. 99-414.

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

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

Rule 1.16, in pertinent part, provides as follows:

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

FOOTNOTES

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

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

(1) identifies the withdrawing attorneys;

(2) identifies the field in which the withdrawing attorneys will be practicing law, gives their addresses and telephone numbers;

(3) provides information as to whether the former firm will continue to handle similar legal matters, and;

(4) explains who will be handling ongoing legal work during the transition.

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

(1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);

(2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;

(3) the departing attorney must make clear that the client has the ultimate right to decide who will complete or continue the matters; and

(4) the departing lawyer must not disparage the lawyer's former firm.

FOOTNOTES

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

The Committee endorses this advice from the ABA.

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

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

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

In considering whether this attorney was required to provide to the firm the list of clients to whom he sent the letter as well as the content of the letter, the standard of Rule 1.16(d) governs. That standard is not one of courtesy to colleagues, but rather avoiding prejudice to clients. While certainly the departing attorney's secretive manner regarding these letters may sour his relationship with the firm, that manner is not *per se* prohibited. The issue for ethical permissibility is whether that secretiveness hurt the clients in some way. Rule 1.16(d) requires that

FOOTNOTES

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

termination of representation includes "steps to the extent reasonably necessary to protect a client's interest." Thus, an attorney may not simply disappear; he must depart a firm and clients in a way that protects the clients. However, the Committee does not see any facts in the present scenario indicating that notice to the clients was insufficient protection such that providing the firm with a mailing list and a copy of the letters was in some way essential for client protection. So long as the letters contained the appropriate notice language, as discussed above and in LEO 1332, then the requisite protection had already occurred with no further action required, including this sharing of information with the firm.[4]

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

Your second question asks whether the letters themselves were misleading. The facts do not provide the content of most of the letters but do provide language from one letter. The Committee can only answer this question with regard to that language; consideration of any other letters would only be speculative.

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

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

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

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

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

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

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

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

Committee Opinion
January 10, 2006

FOOTNOTES

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

LEGAL ETHICS OPINION 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."

FOOTNOTES

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.

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
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FOOTNOTES

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 1824
CONFLICT OF INTEREST – ATTORNEY TO SERVE AS COMMISSIONER IN CHANCERY IN LIGHT OF PRIOR REPRESENTATIONS.

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

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

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

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

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

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

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

The hypothetical presents two possible sources of conflict under Rule 1.11(b). First is Incident #1, which involves work done by a partner of the Commissioner on behalf of one of the defendants in the assessment case. The partner assisted that defendant in bringing a complaint against a realtor, who was associated with the development where the lot in the assessment case is located. Rule 1.11(b) only creates a conflict where the attorney in the public role himself had worked on the matter in question; hence, the descriptor "personally." This is not a provision imputing work done by other members of the government officer's firm to that officer; the conflict is personal to him. As this Commissioner did not at any time work on this assessment collections matter either personally or substantially, Incident #1 does not create a conflict for his service as Commissioner.

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

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

Committee Opinion
January 10, 2006

FOOTNOTES ————————————

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

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

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

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