

VIRGINIA STATE BAR COUNCIL TO REVIEW LEGAL ETHICS OPINION 1765 CONCERNING WHETHER AN ATTORNEY WORKING FOR A FEDERAL INTELLIGENCE AGENCY CAN PERFORM WORK WITHOUT VIOLATING RULE 8.4

RICHMOND—Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on October 16–17, 2003, in Wintergreen, Virginia, is expected to consider for approval, disapproval, or modification, a proposed legal ethics opinion issued by the Standing Committee on Legal Ethics.

LEO 1765

Legal Ethics Opinion 1765 (“LEO”) was issued by the Standing Committee on Legal Ethics on June 13, 2003. The opinion request was forwarded to the bar from Chief Justice Harry L. Carrico on behalf of the requestor and advised that the bar upon rendering the opinion may ask the Court to approve the opinion. LEO 1765 generally addresses whether an attorney working for a federal intelligence agency may perform undercover work without running afoul of the prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation.

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

Inspection and Comment

The proposed LEO 1765 may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed LEO 1765 can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar’s Web page at <http://www.vsb.org>.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than September 19, 2003.

LEGAL ETHICS OPINION 1765

WHETHER AN ATTORNEY WORKING FOR A FEDERAL INTELLIGENCE AGENCY CAN PERFORM UNDERCOVER WORK WITHOUT VIOLATING RULE 8.4

You have presented a hypothetical involving whether an attorney working for a federal intelligence agency can perform undercover work without violating Rule 8.4

I am writing in response to your letter dated December 26, 2001, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics (“committee”). As you may recall, this committee stayed the issuance of an opinion in response to your request as a proposed amendment to the pertinent ethics rule, 8.4 (c), was pending before the Supreme Court of Virginia. On March 25, 2003, the Supreme Court of Virginia adopted a revised Rule 8.4. Accordingly, this committee is now providing you with the response to your request. For clarity, the former Rule 8.4 (c) was as follows:

It is professional misconduct for a lawyer to: . . .
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The newly adopted Rule 8.4(c) reads as follows:

It is professional misconduct for a lawyer to: . . .
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer’s fitness to practice law* (Emphasis added)

You have requested reconsideration of two prior legal ethics opinions 1217 and 1738. Each of those opinions involved the tape-recording of conversations by attorneys, or by those at their direction without consent of all parties to the conversations. In LEO 1738, this committee reviewed the bright line prohibition against the non-consensual tape-recording by attorneys presented in LEO 1217. The committee in LEO 1738 reviewed that conduct with regard to former Rule 8.4(c)’s prohibition against “conduct involving dishonesty, fraud, deceit, or misrepresentation” and with regard to *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). Prior legal ethics opinions have cited *Gunter* for the general proposition that “the mere fact that particular conduct is not illegal does not mean that such conduct is ethical,” as well as for the more specific proposition that just because an attorney may legally tape-record a particular conversation does not necessarily mean he is permitted to do so under the ethics rules. See LEO 1738. The committee opined that, in most instances, the prohibition established in 1217 should apply; however, the committee identified three necessary exceptions. The first exception is afforded to attorneys working in law enforcement. A second exception was specified for housing discrimination testers. The third exception would be triggered by either the threat or actual commission of criminal activity where the attorney is the victim. The committee makes a final clarifying point in LEO 1738 that this list of exceptions was not necessarily an exhaustive list; the opinion acknowledges that there may be “other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical.” The opinion suggested that the committee would await a subsequent specific inquiry before addressing any other possible scenarios.

Your request for reconsideration of these prior opinions specifically seeks extension of the 1738 list of exceptions to include the various lawful activities performed by federal attorneys as part of the federal government's intelligence and/or investigative work. The exception created in LEO 1738 for "law enforcement," does not apply to all of these federal intelligence activities as, for example, the CIA is by statute prohibited from engaging in law enforcement. *See* 50 U.S.C. §403(d)(3). In contrast, the activities you wish this committee to consider are those involved in authorized intelligence or counterintelligence activities as well as "special activities," also known as "covert actions."

The "law enforcement" exception identified in LEO 1738 was based on several points of analysis. First, the opinion points out that a total ban on non-consensual tape-recording ignores the fact that such recording is a "legitimate and effective investigative practice for law enforcement." Second, the opinion looks at the impact of banning such activity and predicts that such a ban would hinder access to reliable information. Third, the committee opined that the ban in *Gunter* should be limited to its facts as that case presented especially egregious activity by the attorney involved, with such activity bearing little resemblance to legitimate law enforcement conduct. Fourth, the committee expressed concern that if lawyers were not able to direct non-attorneys to do this sort of activity, then lawyers would be discouraged from supervising investigators and law enforcement officers; the committee did not want to produce a chilling effect on needed supervision. Weighing clarity of an outright prohibition as suggested in LEO 1271 against the benefit of allowing the tape-recording by law enforcement professionals, the committee concluded that non-consensual recording, and other similar undercover techniques, are "methods of gathering information in the course of investigating crimes or testing for discrimination [that] are legal, long-established, and widely used for socially desirable ends."

In applying the analysis found in LEO 1738 to your situation, the committee notes one pertinent legal development since the issuance of that opinion. Specifically, the American Bar Association (ABA) issued Formal Ethics Opinion 01-422, addressing non-consensual tape-recording by attorneys. In that opinion, the ABA reverses its prior position, taken in Formal Opinion 337, that such recording is unethical. In the new opinion, the ABA concludes that under the ABA Model Rules of Professional Conduct, there is no blanket prohibition against an attorney electronically recording a conversation without the knowledge of the other party or parties to the conversation. LEO 1738 cites the now withdrawn Formal Opinion 337 in finding support for the conclusion in LEO 1738 that the conduct is impermissible outside of certain specific contexts. However, the committee does not see the ABA's reversal as cause to supersede the conclusions drawn in LEO 1738. LEO 1738 cites *Gunter* as primary authority for the general tape-recording prohibition. The committee notes that while Formal Opinion 337, which is cited within *Gunter*, has been withdrawn, *Gunter* remains the current judicial authority regarding this issue in Virginia. Accordingly, with regard to the permissibility of tape-recording, this committee opines that the ABA's reversal on that question does not

undermine the basis for the committee's conclusion in LEO 1738. With regard to other conduct at issue (such as alias identities), the committee notes that Formal Ethics Opinion 01-422 delineates that it is addressing exclusively the issue of tape-recording, and "leave[s] for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical." Therefore, this committee will look primarily to the *Virginia Rules of Professional Conduct* and prior opinions of this committee rather than the position of the ABA in resolving your question.

While the majority of the discussion in LEO 1738 does focus on non-consensual tape-recording, the opinion also applies the same analysis to other investigative techniques that may involve deceit or misrepresentation, such as the undercover identities used by housing discrimination testers. Thus, in resolving your question regarding intelligence and other related activities, the committee believes that its analysis in that opinion is easily extended to the sort of activities outlined in your request. The lawful methods used by intelligence professionals serve a similarly "important and judicially-sanctioned social policy" as that served when those methods are used by law enforcement professionals. The committee sees no reason to distinguish, for purposes of permissibility of investigative techniques under the *Rules of Professional Conduct*, between the activities of these two groups of government attorneys. As suggested by the closing language of LEO 1738, the committee contemplated that there may be additional appropriate exceptions to the strict interpretation of former 8.4(c); the committee agrees with the requester that intelligence and covert activities of attorneys working for the federal government are an appropriate exception under the new language of Rule 8.4(c), with its additional language limiting prohibition only to such conduct that "reflects adversely on the lawyer's fitness to practice law." Accordingly, the committee opines that when an attorney employed by the federal government uses lawful methods, such as the use of "alias identities" and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).

To the extent that anything in this opinion is in contradiction to the language in LEO 1217, that opinion is overruled.

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

Committee Opinion
June 13, 2003

**LEGAL ETHICS OPINION 1776
POTENTIAL CONFLICT OF INTEREST AMONG
CAPITAL DEFENSE UNITS**

You have presented a hypothetical situation in which a Public Defender has represented, on unrelated matters, a vic-

tim or a witness in a capital murder case and received confidential information during the representation adverse to a capital defendant now represented by another Public Defender's office or a newly created Capital Defense Unit (CDU).¹ Your inquiry presents another situation involving two codefendants charged with capital murder who are represented by a Public Defender's office and a CDU in the same jurisdiction.

As an independent judicial branch agency, the Public Defender Commission oversees all the Public Defender offices in the state.² The Public Defender offices provide representation only in the specific jurisdictions where the individual offices are located. The Commission does not, however, involve itself in cases and allows the Public Defender offices to operate autonomously. The establishment of Capital Defense Units (CDUs) will provide representation throughout the state, including those served by a Public Defender office. The CDUs will be separately housed from the Public Defender offices, but both are connected by their individual relationships to the Commission (appointments, salaries, etc.).

Under the facts you have presented, you have asked the committee to opine as to whether this organizational structure creates conflicts of interest imputed to all offices under the oversight of the Public Defender Commission, thereby requiring either the CDU or the Public Defender Office to withdraw from representation.

The *Virginia Rules of Professional Conduct* that are relevant to your inquiry are the following: Rule 1.6(a) stating a lawyer must maintain confidentiality of information; Rule 1.7 (b)(1) and (2) prohibiting a lawyer from simultaneous representation of multiple parties, such as co-defendants unless the lawyer believes that neither client will be adversely affected from the representation and both clients consent after disclosure is made; Rule 1.8 (b) prohibiting a lawyer from using client information for one's own or a third party's advantage; Rule 1.9(a) prohibiting a lawyer from representing a client adverse to a former client in the same or substantially related matter; and Rule 1.10(a) prohibiting all lawyers in a firm from repre-

senting a client when any individual lawyer practicing alone, would be prohibited from doing so.

In regard to your first inquiry, the committee has previously opined that if an attorney represents a client adverse to a former client on a matter unrelated to the previous representation, then no conflict exists. The lawyer may represent a client, but he may not use in his defense, the confidences acquired while representing other former clients, unless disclosure and consent requirements are met. LEO 1666 (1996). *See also Mackall v. Commonwealth* 236 Va. 240, 372 S.E.2d 759 (1988), cert. denied 492 U.S. 925 (1989) (attorney for murder defendant was properly denied his motion to withdraw based on having previously represented one of the Commonwealth's witnesses on an unrelated matter). Therefore, in the first scenario of your inquiry, there is no conflict if a Public Defender is defending a client adverse to a former client represented by that office, unless the defense of the current client would require the use of information obtained in the representation of the former client that is protected under Rules 1.6 or 1.8 (b).

As to your second inquiry, the *Virginia Rules of Professional Conduct* do not impose a *per se* rule prohibiting one attorney or law firm from representing two or more co-defendants charged with the same crime. In some cases, representation of co-defendants charged with the same criminal offense may be appropriate, but in other cases problems involving loyalty, conflicts and confidentiality would make such representation improper. For example, the committee has previously opined that conflicts and confidences and secrets issues arise when an attorney undertakes to represent co-defendants in a criminal matter, especially when one of the co-defendants, pursuant to an agreement with a prosecutor, will testify against the other. In LEO 986, an attorney represented two co-defendants on charges arising out of the same criminal conduct. One of the co-defendants entered into a plea agreement with the Commonwealth agreeing to cooperate by testifying against the other in exchange for a suspended sentence. The plea bargaining defendant obtained new counsel, but the attorney continued to represent the other co-defendant. The Committee concluded that the testifying co-defendant was a former client and that the trial of the other co-defendant at which the former client was expected to testify was substantially related. DR:5-105(D) [now Rule 1.9]. Since the interests of the former client and the client standing trial were adverse, the attorney could not continue to represent the client standing trial without the consent of the former client after full disclosure. In addition, the Committee opined that there was a grave risk that DR4-101 [now Rule 1.6] would be violated if the attorney continued to represent the other client facing trial. Continued representation would also place the attorney in the untenable position of having to cross-examine and impeach his former client at trial in order to defend the existing client. *See e.g.*, LEO 1181.

The Committee notes that if counsel has been appointed by a court³ from a Public Defender's office and/or a CDU to repre-

1 By the end of fiscal year 2004, the Public Defender Commission is "to establish four regional capital defense units" (CDUs). Va. Code § 19.2-163.2 (10). The primary purpose of the CDU is to represent indigent capital defendants, but the CDU may also act as a resource for private attorneys appointed to represent capital defendants.

2 The Public Defender Commission was established in 1972 and is currently composed of nine members appointed by the Speaker of the House of Delegates for staggered terms of three years. The duties of the Commission are set forth in Virginia Code § 19.2-163.2 and include inter alia, the establishment of Public Defender offices in various locations of the Commonwealth, appointing a Public Defender for each office, and "fix[ing] the compensation for each Public Defender and all personnel in each Public Defender office." The Public Defenders serve at the pleasure of the Commission. Va. Code § 19.2-163.6 (authorizes the Commission to "appoint and employ and, at pleasure remove, an executive director, counsel and such other persons as it may deem necessary; and to determine their duties and fix their salaries or compensation within the amounts appropriated therefore."). The Commission currently has twenty-one Public Defender offices around the state. Pursuant to Va. Code § 19.2-163.2, the overall administrative management of Public Defender offices and Regional Capital Defense units is the responsibility of the Public Defender Commission. However, by written policy, each Public Defender Office and Capital Defense Unit operates independently of all other offices insofar as the representation of clients is concerned and cannot share or divulge information which might create conflicts of interest with regard to clients represented by other offices. See Public Defender Commission Policies and Procedure Manual, Chapter 1 at 1 (Revised January 1, 2003).

3 Currently, indigent criminal representation employs both local Public Defender offices and court-appointed private attorneys. Virginia Code § 19.2-163.7 requires the circuit court to appoint counsel for an indigent capital defendant from the list of attorneys prepared by the Commission. However, Virginia Code § 19.2-163.8 permits the court to appoint an attorney not on the list if the attorney possesses the qualifications set by the Commission for indigent capital defense.

sent one or more capital murder defendants, the Commission's policy would require that each office operate independently, and they could not share any information that might in any way create a conflict of interest. By written policy, while the Commission exercises overall administrative management of the Public Defender offices and Regional Capital Defense Units, each office acts independently of all other offices insofar as the representation of clients is concerned and refrains from sharing or divulging information that would in any way result in a conflict of interest. By maintaining discrete confidential files, the various units under the general oversight of the Commission can successfully avoid conflicts of interest. In the event of multiple defendant cases, two or more defendants cannot be represented by a single office. In particular, the CDU's ability to maintain independence from the Public Defenders offices will prevent vicarious disqualification for conflicts of interest.⁴ The CDU, therefore, must maintain a separate identity from the Public Defender offices in order to avoid imputed disqualification.

The first question to determine is whether a Public Defender Office is considered to be a law firm, for conflict purposes. Firms are defined in Rule 1.10, Comment [1] of the *Virginia Rules of Professional Conduct* as those practitioners that hold themselves out to the public as such, have a formal agreement with terms, and have mutual access to client information. This definition however, is fact specific and requires a case-by-case review. Previous opinions have not addressed this particular issue, but the North Carolina State Bar opined that a "Public defender's office should be considered as a single law firm, due to shared office space and clerical staff under the direction of the Public Defender." See NC Ethics Opinion RPC 65 (1989).

Characteristics of a law firm include, for example, sharing of resources and personnel, mutual access to confidential information, identification of themselves as a firm and practitioners that possess authority to provide counsel and share professional responsibility for each other. See State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. RI-249 (1996); California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1986-90 (1986). For purposes of this question, the committee opines that a Public Defender's Office is a firm based upon those listed shared characteristics and the perception that the Public Defender office is an entity devoted to the practice of indigent criminal defense.

The next question to be determined is whether each Public Defender Office and Capital Defense Unit may be considered as a separate law firm. Given the facts in your hypothetical, each Capital Defense Unit will be separately housed from the Public Defender offices and will maintain separate phone, fax, and filing systems. The committee further believes that the Capital Defense units must be perceived as separate and distinct entities from the Public Defender offices and have a secure computer system that prevents sharing of information, the establishment of a conflicts

checking policy and procedure and the enforcement of said policy. Under those circumstances, the committee believes that the Public Defender offices and Capital Defense units will be considered as separate firms.

The committee believes that the structure of the Public Defender Office and a Capital Defense Unit, over which the Commission has general oversight, can be distinguished from two physically distinct offices of a private law firm. Perhaps the most fundamental difference is the sharing of client information between different offices of a private law firm which is presumed under the *Rules of Professional Conduct* and the common law relating to partnerships. In contrast, the Public Defenders offices and the Capital Defense units do not share client information and do not have access to each other's files. Another distinguishing characteristic of a law firm with multiple offices is that a managing committee, board, partner or group within the firm may control what cases are accepted, how particular cases will be handled and which lawyers in the law firm will be responsible for the engagement. No such control is exercised by the Commission over the Public Defender offices or the Capital Defense units. Further, as a profit-making entity, a private law firm will often have fee sharing and profit sharing arrangements and use attorneys and staff from different offices to work on a particular engagement. These attributes also make it logical to treat a private law firm with multiple offices as a single entity because the employees or agents are united with a common goal or purpose to enhance the law firm's profits. These attributes are conspicuously absent from the structure under which the Public Defender offices and Capital Defense units operate.

While the Commission has the authority to set the compensation for the Public Defenders and personnel at each office, in actual practice, however, the Public Defender at each office establishes the compensation for subordinate personnel, including pay raises for such personnel. Also, matters involving discipline and performance evaluation of subordinate personnel are addressed by each Public Defender, not the Commission. The committee notes that conclusions reached in this opinion are premised upon this practice. Should the Commission depart from this practice, a new conflicts analysis would be necessary.

If the Capital Defense units and Public Defender offices are treated as separate autonomous units, the third question is whether conflicts may be imputed, under Rule 1.10, to the entire the entire Public Defender System when one Public Defender experiences a conflict. The Illinois Supreme Court held that a public defender office is not disqualified simply because one attorney experiences a conflict. See ISBA Advisory Opinion on Professional Conduct, Opinion 85-14 (1986); See *People v. Robinson* 79 Ill. 2d 147 (1980). (Court rejecting argument that Public Defenders should disqualify themselves in three consolidated cases involving representing former clients and clients with adverse interests.)

In the facts you present, the committee believes that the Capital Defense Units and the Public Defender Offices may represent defendants without violating Rule 1.6(a), Rule 1.7(b)(1) and (2), Rule 1.8 (b), or Rule 1.9(a), providing that the offices enact and enforce safeguards and review each case carefully. Since the Public Defender offices and the CDUs are separate and

⁴ The committee does not mean to suggest that attorney-to-attorney consultations are prohibited. Under Rule 1.6, Comment [7a], the committee realizes the need for attorneys to consult with one another for educational and training purposes and to competently represent a client's interests. A lawyer who wishes to consult with another lawyer should endeavor, whenever possible, to consult with another lawyer who likely has no conflict and should carefully disclose the information in generic or hypothetical terms.

autonomous “law firms,” a conflict of interest in one office under the two scenarios you have described should not be imputed to another office under Rule 1.10. Client information known by one office should not be presumed shared by other offices simply because they are subject to the Commission’s oversight. The committee’s analysis of the ethical considerations in conflict cases is limited, however, to the facts presented in your inquiry as there are additional procedural determinations concerning constitutional issues that can not be answered by the committee and would best be handled by the Attorney General’s office.

The committee cautions, however, that if a public defender or capital defense lawyer moves from one office to another, there may be conflicts issues under Rule 1.7 or Rule 1.9 that must be addressed. *See* Comments 3, 4 and 5 to Rule 1.9 concerning lawyers moving between firms.

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

Committee Opinion
May 19, 2003

**LEGAL ETHICS OPINION 1777
ATTORNEY-CLIENT PRIVILEGE—IS CONVERSATION PROTECTED
WHERE ATTORNEY DISCOVERS CLIENT’S MISTAKE
IN A BANKRUPTCY FILING**

I am writing in response to your letter dated November 25, 2002, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics (“committee”).

You have presented a hypothetical situation involving an attorney representing a debtor in bankruptcy proceedings. An order was entered discharging the client’s debts. The lawyer closed his file and terminated his relationship with this client at that time. The Bankruptcy Code requires a debtor to disclose acquisition of property occurring within 180 days of filing the bankruptcy petition. The client inherited valuable real estate 167 days after the filing of his petition. The inheritance occurred after the discharge date, but nevertheless within the 180-day disclosure period. The acquisition was not disclosed to the court or to the attorney. Over a year later, the court entered a final order closing the proceeding. A few weeks later, the attorney was informed by a third party of the real estate inheritance the prior year. The attorney called his former client and asked if he wanted to disclose the real estate ownership to the court; he did not. The attorney explained the risk of being charged with and convicted of bankruptcy fraud. This did not persuade the client to make the disclosure. The attorney asked the client whether he understood at the time he inherited the property his duty to disclose it to the court. The client said he did not definitely remember when he first learned of that duty, but that it may not have been until this most recent call from the attorney, well after the close of the 180-day disclosure period.

Your request asks whether the attorney should inform the Bankruptcy Court of the inheritance or must he keep this client information confidential.

The pertinent provisions in the Rules of Professional Conduct applicable to this situation are Rules 1.6 and 3.3(a)(4). Rule 1.6 establishes the basic parameters of an attorney’s duty to maintain the confidentiality of client information. Rule 3.3(a)(4) directs that an attorney may not, “offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”

This hypothetical situation should be distinguished from a straightforward instance of client fraud. Rule 3.3(a)(2) prohibits an attorney from knowingly failing “to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6.” Rule 1.6 (c)(2) directs an attorney to disclose information “which clearly establishes that the client has, in the course of the representation, perpetrated fraud related to the subject matter of the representation upon a tribunal.” That provision further clarifies that information clearly establishes fraud when “the client acknowledges to the attorney that the client has perpetrated a fraud.”

That is not the situation outlined in your hypothetical. The crux of the conundrum raised in your request is that the client in fact does not admit he knowingly failed to disclose the real estate. Thus, regardless of what hunch or assumption this attorney may have or wish to make, the attorney does not have information clearly establishing client fraud on the court. Therefore, this attorney must treat this failure to disclose as a client mistake. What is the attorney’s duty when faced with information provided to a court that turns out to be false?

This attorney, in considering the repercussions of the former client’s failure to disclose his changed assets, is faced with competing duties: that of protecting client confidentiality and that of assuring candor to the court. The tension between those duties, established by Rules 1.6 and 3.3 respectively, is addressed in Comment 5 to Rule 3.3:

When false evidence is offered by the client, however, a conflict may arise between the lawyer’s duty to keep the client’s revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

If the failure to disclose had occurred during the course of the attorney/client relationship, then this attorney would need to pursue that duty analysis. However, this attorney closed his file upon the discharge of the client’s bankruptcy. At that point, the attorney/client relationship terminated, transforming the current client into a former client. Subsequent to the conclusion of that relationship, the former client learned of his inheritance and failed to inform the court of the new property. Also, subsequent to the end of the relationship, the attorney learned of the inheritance and lack of disclosure. At both moments, that of the inheritance and that of the attorney’s discovery of it, the client was a former, not a current, client. Accordingly, Rule 3.3’s duty to disclose false evidence is not triggered. This attorney has no duty to disclose this new information regarding his former client to the court.

Not only is this attorney not required to make that disclosure, he is prohibited from doing so. This attorney only knows about this individual's bankruptcy matter and the significance of this inheritance because of confidential information learned as a result of the attorney/client relationship. The attorney's duty of confidentiality survives the termination of that relationship. *See* LEOs 1207, 1305, 1307, 1347, 1407, 1613, 1643 and 1664. Neither Rule 1.6 nor Rule 3.3 provide an exception for that duty for mistakes made by former clients after termination of the attorney/client relationship, even where the mistake relates to the subject matter of the prior representation. Only consent from this former client would permit the disclosure. This attorney has already learned from his former client that he does not want the information disclosed. In such an instance, the duty of confidentiality prevails over a duty of candor to the court. This attorney is neither required nor permitted to reveal the information regarding the failure to disclose the inherited property to the court.

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

Committee Opinion
June 13, 2003
LEO 1777

**LEGAL ETHICS OPINION 1778
REPRESENTING ADMINISTRATOR WHO IS TAKING HIS
ELECTIVE SHARE AS SPOUSE OF THE DECEDENT**

You have presented a hypothetical situation in which an attorney represents the administrator of an estate. That administrator is the husband of the deceased. He presented to the attorney that there was no will. However, other family members locate a will, which is then admitted to probate. The will did not specify an executor, and the husband remains administrator of the estate. The will leaves nothing to the husband. He chooses to take his statutory elective share of the estate. Litigation ensues between the husband and the beneficiaries regarding whether certain real estate belongs in the augmented estate.

Under the facts you have presented, you have asked the committee to opine as to whether the attorney has an impermissible conflict of interest in representing a party as administrator and in his individual capacity in claiming the elective share of the estate.

Specifically, your request expresses concern as to whether Rule 1.7, which governs current conflicts of interest, prohibits this representation. Paragraph (a) of that rule outlines conflicts involving adversity between two clients and paragraph (b) of that rule outlines conflicts involving the competing duties between representation of a client and an attorney's "responsibilities to another client or to a third person, or by the lawyer's own interests."

This committee has established in prior opinions that the client of a lawyer who represents an estate is the executor/

administrator and not the beneficiaries. *See*, LEOs 1452, 1599 (approved by Bar Council 1995), 1720. Similarly, the ABA has opined that "the fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's [ethical] responsibilities." ABA Formal Op. 94-380. *See also* Kentucky Eth. Op. 401 (1997) (concluding that a lawyer's representation of a fiduciary imposes no special duties to the beneficiaries of the trust or estate). Furthermore, this committee has explained that it is not a conflict to represent the individual serving as executor/administrator both in that role and individually. *See* LEO 1599 (approved by Bar Council 1995).

This committee considered whether Rule 1.7's provisions regarding conflicts of interest among clients has any application to the present situation. This committee concludes that the Oregon Bar's analysis on this point is persuasive. The Oregon Bar opined:

An attorney for a personal representative represents the personal representative and not the estate or the beneficiaries as such. It follows that when Attorney A represents Widow as an individual and Widow in her capacity as personal representative, Attorney A has only one client. Alternatively stated, the fact that Widow may have personal interests that may conflict with her fiduciary obligations does not mean that Attorney A has more than one client. For purposes of the rules regarding multiple client conflicts of interest, representing one individual in several different capacities is not the same thing as representing different individuals.

Oregon Formal Ethics Op. 1991-119. Similarly, in denying a motion to disqualify an attorney from representing an individual both in her capacity as executor and as an individual, a New York court notes that, "it would be unnecessary and wasteful to require yet another firm be hired to represent her in her individual capacity." *Matter of Birnbaum*, 118 Misc.2d 267, 460 N.Y.S.2d 706, 709 (N.Y. Sur. Ct. 1983). Agreeing with those opinions, this committee concludes that the attorney in the present hypothetical has only one client: the deceased's husband. While that client may have two legal needs, his role as administrator and his choice to elect against the will, he remains only one client. Therefore, representation of this husband on these matters cannot trigger the prohibition of Rule 1.7(a)'s provisions regarding adversity between two or more clients.

Paragraph (b) of Rule 1.7 similarly is not triggered by this attorney's representation of the husband. That provision would only be triggered if the attorney had some additional, competing duty to another client or a third person or a competing personal interest of his own. No such personal interest has been suggested. As for a competing duty to anyone else, this attorney's duty in representing this estate is solely that of representing the husband individually in his role as executor, with no concomitant duties to the beneficiaries. That representation itself creates no

competing duties. Rule 1.7(b) does not prohibit this representation. This committee does not find a conflict of interest for this attorney under Rule 1.7 as he has only one client.

In opining that there is no conflict of interest in representing the husband in his various legal needs, this committee cautions the attorney, nonetheless, to be mindful of the client's fiduciary duty to the beneficiaries. Were the attorney to advise or assist his client in actions that breach the husband's fiduciary duty, he could be in violation of Rule 1.2's prohibition against assisting a

client in criminal activity or fraud. Whether the administrator in this hypothetical has in any way breached his fiduciary duty is a legal question outside the purview of this committee.

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

Committee Opinion
May 19, 2003 