

LEGAL ETHICS OPINION 1811
ATTORNEY'S OBLIGATION TO PROTECT CONFIDENCES AND
SECRETS OF A FORMER CLIENT

You have presented a hypothetical situation in which Attorney A represented Co-executor #1 of an estate. Co-executor #2 has separate counsel. Attorney A's representation of Co-executor #1 has recently terminated, and that co-executor now has new counsel. Attorney A has transferred his file to the new attorney, but has retained a copy of the materials. During the course of Attorney A's representation of Co-executor #1, the two co-executors entered into an agreement that each would fully disclose financial information for purposes of administering the estate. Counsel for Co-executor #2 has now contacted Attorney A and asked for certain financial information from Attorney A's former client's file as a tax filing is due at the end of the month. The requested documents come within the terms of the agreement. Co-executor #1 will not consent to Attorney A's release of the documents. Attorney A declined to provide his copy of the documents and instead referred Co-executor #2's counsel to Co-executor #1's new counsel.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney A is obligated to disclose the documents to the requesting attorney.

This committee has opined in numerous prior opinions that the contents of a client's file come under the confidentiality protections afforded under Rule 1.6. *See, e.g.*, LEOs 967, 1628, 1664. Rule 1.6 establishes an attorney's duty of confidentiality and outlines the parameters of that duty. Rule 1.6 states as follows:

- (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
- (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
 - (1) such information to comply with law or a court order;
 - (2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
 - (4) such information reasonably necessary to protect a client's interests in the event of the representing

lawyer's death, disability, incapacity or incompetence;

- (5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program; or
 - (6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.
- (c) A lawyer shall promptly reveal:
- (1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;
 - (2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or
 - (3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

Comment 22 to Rule 1.6 clarifies that the "duty of confidentiality continues after the client-lawyer relationship has terminated." *See also* LEOs 812, 1207, 1664. Thus, even though Attorney A no longer represents Co-executor #1, Attorney A must nevertheless maintain the confidentiality of his former client's information according to Rule 1.6.

If the disclosure of such information would be embarrassing or detrimental to the client, or if the client has requested that the information be kept confidential, Rule 1.6 prohibits a lawyer from disclosing the contents of a client's, or former client's, file unless one of the exceptions to Rule 1.6 applies. As the facts include that

LEGAL ETHICS OPINION

the client has withheld consent to the disclosure, these materials do come within the Rule 1.6's protection.

The hypothetical as presented highlights the existence of an agreement between the executors as calling into question whether the attorney can respect the former client's request to protect the documents or whether the attorney must provide them to Co-executor #2. Interpretation of the contract language itself and of its application to Attorney A is outside the purview of this committee. However, this committee does not find that such interpretation is necessary to resolve this issue. While the attorney in this hypothetical appears to be weighing possible contractual obligations against the duty of confidentiality, the committee considers such a balance inappropriate.

The exception at issue here is Rule 1.6(b)(1), which permits an attorney to make a disclosure of confidential information in order to comply with "law or a court order."¹ In the present case, the counsel for Co-executor #2 has not obtained a court order; therefore, the committee turns next to whether the attorney may disclose the materials in order to comply with "law".

Rule 1.6(b)(1) carves out an exception to the general ethical duty of confidentiality when needed to comply with "law." This committee opines that a contract is not "law." *Black's Law Dictionary* provides an extensive discussion of the concept encompassed by that term, with suggested definitions including, "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force," and "that which must be obeyed and followed by citizens subject to sanctions or legal consequences." The entry in Black's for "law" includes an extensive list of judicial authorities finding a laundry list of items within the reach of that term.² In sum, that list is limited to statutes, judicial rulings, and various types of administrative regulations and rulings. Contracts, such as the agreement in this hypothetical, are not within that list. Similarly, the committee agrees with the American Bar Association's discussion of the term, "law" in an ABA opinion regarding a different ethics rule. In ABA Formal Op. 95-396, the ABA shed light on what is meant by "law" for purposes of Model Rule 4.2, which states:

In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party³ 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*.

(Emphasis added.) With respect to the term "law" in that rule, the ABA explains as follows:

The "authorized by law" exception to the Rule is also satisfied by a constitutional provision, statute or court rule, having the force and effect of law . . .

FOOTNOTES

- 1 While there are of course other exceptions to Rule 1.6, the facts as presented do not suggest the applicability of any of the other exceptions to the rule.
- 2 See Black's Law Dictionary, "law" and opinions cited therein.
- 3 Note that Virginia's Rule 4.2 substitutes the term "person" for "party" — a difference that does not affect the present discussion.

The opinion goes on to include administrative agency positions where "adopted in accordance with the procedural requirements imposed by Congress." ABA Formal Op. 95-396. This committee adopts this construction of the term "law" as including statutory, judicial and administrative items, but not contracts or agreements between private parties for interpretation of Rule 1.6(b)(1)'s permissive disclosure for compliance with law.

According to the facts presented, Attorney A's former client has requested that the attorney not provide the tax materials to the other co-executor. The dispute between the co-executors regarding the agreement's application to the situation should be handled by Co-executor #1's current attorney, rather than for Attorney A to interpret the agreement and decide his former client's obligations deriving from that agreement. This approach is ethically permissible under Rule 1.6 as the exception for confidentiality found in (b)(1) is inapplicable here. In order to preserve his former client's confidentiality, the attorney must not disclose the documents requested by the co-executor, unless and until a court orders the attorney to do so.

In response to your inquiry, the committee notes another pertinent rule. Rule 1.15 addresses an attorney's handling of the property of others. Paragraph (c)(4) of that rule requires a lawyer to:

Promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

In applying this provision to the present situation, the committee distinguishes the situation in LEO 1747. The scenario in that opinion involved an attorney in receipt of settlement proceeds for his plaintiff client, who then requests the funds despite a lien in favor of the client's medical provider. The analysis in that LEO in no way involved the confidentiality issue underlying the present scenario. An application of Rule 1.15(c)(4) to Attorney A's handling of the financial information in his former client's file is tenuous at best. There remains the issue of whether Co-executor #2 is "entitled" to the very documents in Attorney A's possession, as opposed to other copies of the same documents in possession of the new attorney. That is a legal issue regarding contract interpretation and is, as such, outside the purview of this committee. However, the committee maintains it can nevertheless opine that the application of Rule 1.6 outlined above should prevail over this uncertain extension of Rule 1.15 because Comment 21 to Rule 1.6 establishes a presumption against any other provision superseding Rule 1.6. The committee sees no basis for a rebuttal of that presumption in the present instance. As the committee concludes that Rule 1.6 is the proper authority for resolving the present question, the committee opines that Attorney A properly declined to provide the requested documents and instead referred the requester to the former client's new attorney.

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

Committee Opinion
April 25, 2005