

LEGAL ETHICS OPINION 1783

IN CONTEXT OF (A) FORECLOSURE SALE OR (B) A COMMERCIAL CLOSING, MAY ATTORNEY DISBURSE TO LENDER COLLECTED ATTORNEYS FEES IN EXCESS OF THOSE NECESSARY TO REIMBURSE LENDER FOR PAYMENT MADE TO LENDER AT ATTORNEY’S HOURLY RATE?

You have presented a hypothetical situation in which Lender retained an attorney to assist it with the collection of a promissory note from Borrower to Lender, secured by a deed of trust. The note provides that, upon default, the Borrower shall pay attorney’s fees equal to 25% of the principal balance due on the Note as well as all of Lender’s other collection expenses, whether or not there is a lawsuit and including without limitation legal expenses for bankruptcy proceedings. Borrower has defaulted. On behalf of Lender, the attorney (also the trustee under the deed of trust) is about to initiate foreclosure proceedings. Borrower is attempting to sell the property subject to the deed of trust prior to foreclosure, for an amount in excess of that owed under the note.

At either the foreclosure or the commercial sale, the attorney expects to collect all amounts owed under the note, including the 25% attorney’s fees provided for under the note. The attorney expects that Lender, who has paid the attorney’s periodic interim bills, based on the attorney’s hourly rate, will then request that the attorney pay Lender all amounts collected for principal, interest, and attorney’s fees—including the portion of the attorney’s fees that exceeds the amount necessary to reimburse Lender for the interim payments it has made to the attorney. You have asked the committee to opine whether under the facts of this inquiry this attorney may disburse to Lender that portion of the collected attorney’s fees in excess of the amount necessary to reimburse Lender for the actual cost of the legal services.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 5.4(a), which directs that “a lawyer or law firm shall not share legal fees with a nonlawyer,” unless one of three exceptions apply,¹ none of which are at all applicable in the present situation. While many of the prior Legal Ethics Opinions (LEOs) of this committee that address fee-splitting with a nonattorney involve prior DR 3-102(A), those opinions

FOOTNOTES

1 Those exceptions are as follows:

- (1) an agreement by a lawyer with the lawyer’s firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client. (This exception is a recent addition to the Rules, to be effective January 1, 2004.)

remain pertinent, as that rule is substantially similar to the present Rule 5.4(a). In reviewing prior LEOs, the committee notes that there are several early opinions suggestive that an attorney may not distribute fees such as those in this hypothetical to clients. See LEO 534 (attorney may only distribute fees awarded to clients in collecting delinquent taxes where such fees do not exceed the actual cost of the legal services), LEO 835 (attorney doing collections work on installment contracts for his employer may not provide to employer any collected fees in excess of actual cost of legal services), and LEO 1025 (attorney collecting on notes that include percentage attorneys fees award must not distribute to client greater than actual cost of attorney’s services).

Despite the conclusions drawn in those prior opinions, in more recent opinions substantial analysis suggests that application of Rule 5.4(a) must move beyond a literal application of language of the provision to include also consideration of the foundational purpose for that provision. For example, in LEO 1563, the committee reviewed attorney’s fees awards in litigation under federal civil rights legislation. The opinion concludes that a court award of attorney fees in federal civil rights legislation does not constitute legal fees for purposes of this prohibition and, therefore, their distribution to the nonattorney client is not prohibited. Similarly, in LEO 1598, the committee reviewed a local license fee that was calculated as a percentage of the attorney’s fees. In concluding that the receipt by the locality of a portion of attorney’s fees did not involve an improper fee-split with a nonlawyer, the committee noted that:

The thrust of the proscription in DR 3-102(A) is that a lawyer and a nonlawyer enter into a consensual arrangement whereby fees received from one or more clients are divided between them. Payment of a gross receipts tax, in common understanding, is not a consensual arrangement.

Also, in LEO 1744, the committee reviewed an attorney’s plan to distribute awarded attorneys fees to the non-profit corporation that brings legal actions on behalf of clients. The opinion notes that:

The primary purpose of Rule 5.4 is to prohibit nonlawyer interference with a lawyer’s professional judgment and ensure lawyer independence.

In that opinion, the committee found reassurance that as a court awards the fees, there is no risk of improper interference; accordingly, the opinion finds that the attorneys providing the fee awards to the nonprofit organization does not violate Rule 5.4(a)’s prohibition against fee-splitting with a nonattorney. Most recently, in LEO 1751, the committee reviewed a referral service run by a local bar organization that planned to fund the service by charging participating attorneys a percentage of their fees. That opinion identifies that the purpose of Rule 5.4(a), as stated in Comment 1 to that rule, is “to protect the lawyer’s independent judgment.” The opinion continues:

The concern in Comment One to Rule 5.4(a) is not triggered by the referral service in this inquiry; nothing about a lawyer referral program of the local bar association suggests that the participating attorney’s independent judgment would be in jeopardy.

The opinion permits the referral service payment plan despite that it involves attorneys providing a portion of their legal fees

to the service as, regardless of the literal language of the Rule 5.4(a), the spirit or purpose of the rule was not violated.

This committee repeatedly looked to the purpose of the prohibition against Rule 5.4(a) to avoid overly literal, overly broad applications of that provision. The committee opines that the same analysis is appropriate for the scenario raised in the present hypothetical. The present scenario involves a note calling for attorneys fees in excess of the actual fee calculated by attorney. The calculation method, i.e., 25% of any unpaid portion of the principal for which collections activities were required, is in the nature of an agreed upon contract term. Such a provision seeks to provide commercial certainty for all parties. For efficiency and ease, Lender and Borrower choose not to require an itemization from the Lender of the actual cost of legal services necessary for collection. If the attorney, in an effort to charge only a reasonable fee, determines that his actual fee is less than the agreed upon amount, that attorney may in good faith remit the excess to his client. Such adjustment of funds related to an attorney's fee are a matter to be determined by agreement between the attorney and the client, so long as the resulting fee actually received is reasonable, as required under Rule 1.5. The setting of an appropriate fee for particular work by an attorney with his client is *not* the sort of improper sharing of attorney's fees with a nonattorney addressed in Rule 5.4. The general purpose of the provision, to protect the independent judgment of an attorney from improper nonlawyer interference, is not at risk here. Lender already has the primary interest in the collections matter and already has the usual amount of influence that any client has with an attorney; such interest and influence are in the very nature of the attorney/client relationship. The parameters of that influence are governed by Rule 1.2, regarding the scope of the representation. Allowing this attorney to provide the client with the "extra" portion of this agreed upon attorney's fee provision seems an appropriate method for the attorney to ensure he receive nothing more than a reasonable fee for his work.

This committee opines that for this attorney to distribute to his client the excess of the fee paid by the Borrower over the actual cost of those services does not compromise the purpose of Rule 5.4(a); therefore, this committee opines that the contemplated fee distribution does not violate the rule.

To that extent that prior Legal Ethics Opinions 534, 835, and 1025 are inconsistent with this conclusion, those opinions are hereby overruled.

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

Committee Opinion
December 22, 2003

LEGAL ETHICS OPINION 1787

CAN ATTORNEY PREVENT A THIRD PARTY WHO HAS PRIVILEGED INFORMATION FROM DISCLOSING THAT INFORMATION TO AN OPPOSING PARTY AND CAN ATTORNEY ENTER INTO A PRIOR AGREEMENT WITH THIRD PARTY TO KEEP PRIVILEGED INFORMATION CONFIDENTIAL

You have presented a hypothetical situation in which an attorney prepares a document in anticipation of litigation that con-

tains his mental impression and thoughts about the case. The attorney sends the document to an expert witness, who is not represented by counsel. The hypothetical presented rests on an assumption that the transfer of the document to the witness does not waive the attorney-client privilege. After the litigation begins, the attorney claims the privilege for this document as attorney work product and, therefore, does not provide the document to the opposing counsel. Instead, the attorney provides a privilege log identifying the date, author, and recipient of the document. The attorney is concerned that the opposing counsel could use that information to either informally request that the witness provide the document or to obtain the document from the witness via subpoena. If such effort is made by the opposing counsel, the attorney may not learn about the request or the subpoena until after the document has already been provided by the witness to the opposing counsel. To prevent that disclosure, the attorney wishes to enter into a contract with the witness, whereby the witness would agree to inform the attorney of any such request or subpoena and to delay responding until a motion to quash or a motion for a protective order can be heard by the court.

You have asked the committee to render an advisory opinion addressing the following issues:

- 1) May an attorney request an unrepresented person who has received information protected under the attorney work product privilege is to notify the attorney of any requests by an opposing party for that information to delay responding to that request to allow the attorney the time to either have the subpoena quashed or a protective order entered?
- 2) May an attorney ever enter into an agreement with a third party to keep privileged information confidential if the purpose of that agreement is to prevent the third party from disclosing that information to an opposing party?

The questions raised in your hypothetical involve the lawyer's duty of confidentiality as outlined by Rule 1.6.¹ Paragraph (a) of that rule carves out from the general duty of nondisclosure those disclosures "that are impliedly authorized in order to carry out the representation." Thus, Rule 1.6 contemplates that an attorney, while working within the parameters of the duty of confidentiality, may need to make disclosures to third parties, such as expert witness. The hypothetical attorney's disclosure of the work product from this case to the expert witness was a proper disclosure.

When an attorney makes disclosures necessary to carryout the representation, the attorney should be mindful of the continuing duty of confidentiality and, therefore, take necessary steps to prevent disclosure of client information beyond what is needed for the representation. Rule 5.3(a) directs that when an attorney employs, retains or is associ-

FOOTNOTE _____

1 The hypothetical uses the terms "attorney-client privilege" and "attorney work product privilege" interchangeably. While technically the two terms have separate meanings, the definition of "confidentiality" in Rule 1.6 specifically includes both the attorney-client privilege and the work product doctrine. See, Rule 1.6, Comment 5.

ated with a nonlawyer, certain precautions must be taken.² Comment One to that rule confirms that Rule 5.3(a) applies not only to the employees of the attorney but also to independent contractors. The attorney in the present hypothetical should therefore consider Rule 5.3 applicable to his contracting with the expert witness for the client's matter. That rule directs the attorney to "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." The attorney in the present instance has provided confidential client information to the nonlawyer expert witness. The attorney then needs to make "reasonable efforts" to ensure that the expert witness understands the attorney's duty of confidentiality and to ensure that the expert witness protects the confidentiality of the information received.

In determining what would be "reasonable measures" to ensure that the expert witness acts in a manner compatible with the attorney's duty of confidentiality, a parallel provision in the rules provides guidance. Rule 1.6's provisions regarding the general duty of confidentiality includes paragraph (b)(5), which allows for disclosure of:

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. (Emphasis added.)

While an expert witness is not hired for "office management purposes," the precautions outlined for such disclosures in Rule 1.6(b)(5), including advising the third party that the information must be kept confidential, would be appropriate "reasonable measures" for this attorney to take.

The specific questions raised with this hypothetical inquire whether the attorney could 1) request the witness to contact the attorney upon receipt of a request or subpoena for the client information and 2) obtain an agreement from the witness that he will keep the client information confidential, including not disclosing the information to opposing counsel. Each of those steps would be appropriate for this attorney to ensure, as required by Rule 5.3, that the expert witness does nothing to compromise the attorney's duty to protect the confidentiality of information. This committee has consistently declared that protection of client confidences is a "bedrock principle" of legal ethics. *See*, LEOs 1643, 1702, 1749.

The sort of steps proposed in the hypothetical are both permissible and advisable in the hypothetical situation. The committee notes, however, that with regard to the subpoena provision, the attorney must be mindful of applicable court rules which may not in a particular instance provide for a hearing on a motion to quash in time to stay the witness' duty to comply with the subpoena. In such instances, the attorney may need to seek other means of client protection, such as provision of the materials by the witness to the court under seal. While such

FOOTNOTE

2 The committee notes that the revision to Rule 5.3 that will go into effect January 1, 2004 in no way changes the conclusions drawn in this opinion regarding the current Rule 5.3.

specific strategies are a matter of civil procedure outside the purview of this committee, the committee notes that it would not be permissible for the attorney to contract with or otherwise encourage the witness to violate a rule of court. A lawyer may not direct another person to violate a rule of court. *See*, Rules 3.4(d) and 8.4(a).

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

Committee Opinion
December 22, 2003

LEGAL ETHICS OPINION 1790

CLIENT FILES—REFUSAL OF ATTORNEY TO RELEASE A COPY OF THE DEFENDANT'S PRE-SENTENCE REPORT TO THE DEFENDANT

Your request presented a hypothetical situation involving a client requesting a copy of his file from an attorney. Specifically, the attorney had represented the client in a criminal matter. The client was convicted in a Virginia circuit court. The trial judge set a sentencing hearing and ordered a probation officer to prepare a pre-sentence report for use at that hearing. The officer forwards a copy of the report to the attorney, who reviews it with his client. One day after the sentencing hearing, the client informs the attorney that the client will be petitioning the Supreme Court of Virginia for a writ of *habeas corpus*. The client requests that the attorney provide the file to the client, including the pre-sentence report.

The question raised by your hypothetical is whether the attorney has a duty to provide the pre-sentence report to the client. The pertinent provision of the Rules of Professional Conduct is Rule 1.16(e), which specifically governs the lawyer's duty to transmit the client's file upon termination of the relationship and at the request of the client. Whether the attorney must provide a copy or an original of the contents depends on the nature of each document; however, paragraph (e) does require provision of the client's *entire* file, except for one narrow category:

Billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts, staffing considerations, or difficulties arising from the lawyer-client relationship.

A pre-sentence report is not the sort of internal document described by the exception. Therefore, the general requirement from this provision would apply: that the lawyer provide file contents or, in many instances, *copies* of those contents, to the client. Comment 11, however, sets forth an important limitation:

The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

Your request references Attorney General Jerry W. Kilgore's Advisory Opinion, dated March 31, 2003, which interprets Virginia Code § 19.2-299, as addressing the legal issue of whether disclosure of pre-sentencing reports by attorneys to their clients is prohibited by law. The exclusive purview of this committee is to interpret the Rules of Professional Conduct; it would be outside that purview for this committee to analyze

other legal authority regarding disclosure of pre-sentence reports. This committee, therefore, declines to do so.

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

Committee Opinion
January 5, 2004

LEGAL ETHICS OPINION 1791

IS IT ETHICAL NOT TO MEET FACE-TO-FACE WITH YOUR CLIENT IF YOU COMMUNICATE BY E-MAIL OR TELEPHONE INSTEAD?

You have presented a hypothetical in which an attorney has a bankruptcy practice. The attorney begins most representations with a telephone conversation, followed by actual meetings with the clients regarding the many issues associated with a bankruptcy filing. However, in a number of instances, clients may not be able to come into the attorney's office for a face-to-face meeting. In those instances, the attorney provides review and advice via various forms of electronic communication: fax, telephone, and e-mail. Such clients receive an information packet to review and complete. The client completes the packet; the attorney reviews the completed packet and supervises a paralegal in the preparation of the necessary documents. If the client can not come in for a meeting at that point, the attorney will send the client the prepared documents and then review them with the client over the telephone. The client is then directed to provide a notarized signature for the documents and then to forward them to the attorney. Additional client questions are handled in a similar manner. In these cases, the first face-to-face meeting between the attorney and the clients may be at the § 341 hearing.¹

Under the facts you have presented, you have asked the committee to opine as to whether electronic communication, without in-person meetings, can be sufficient to fulfill an attorney's duties of communication and competence. The applicable rules of professional conduct with regard to your request are as follows:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.4 Communication

- (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

FOOTNOTE

¹ A "§ 341 hearing" is a scheduled meeting of creditors pursuant to § 341 of the Bankruptcy Code. See, 11 U.S.C.A. §341.

that may significantly affect settlement or resolution of the matter.

The duty of competence is triggered in every attorney/client relationship. The comments discussing the duty created by Rule 1.1 focus on three areas: legal knowledge and skill, thoroughness and preparation, and maintaining competence (i.e., continuing legal education). See Rule 1.1, Comments 1-6. At issue here is whether the attorney in this hypothetical is being sufficiently thorough and is properly prepared with respect to the "electronic communication" portion of his practice. Comment 5, in pertinent part, states the following:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

The focus of this language is on the content of the lawyer's efforts: has the lawyer sufficiently reviewed and analyzed the information and become sufficiently familiar with the pertinent law so as to be able to pursue the legal objectives of the client. Neither the rule, nor the comments, prescribes precise means for the provision of legal services.

The lawyer in this hypothetical operates under procedures that include review of the client's information and interaction with the client regarding the responsibilities and consequences of filing a bankruptcy petition. Whether that procedure involves the provision of competent legal services depends on the content, not the method of communication; what does determine competency in this situation is whether the attorney reviews the proper materials and law, imparts to the client all necessary information, receives necessary direction from the client as to the client's objectives, and provides appropriate legal advice as a result. Although there is no *per se* requirement, the committee concludes that nothing in Rule 1.1 requires those items be accomplished via in person contact. Moreover, Rule 1.2 provides that the attorney should consult with the client as to the means to be used during the representation. So long as the requisite information is given, received, analyzed and acted upon, the attorney has met his duty of competency. There is no *per se* requirement that an attorney actually be in the physical presence of his client to provide competent legal services.

A second ethical duty at issue in this request is the duty of communication. In every attorney/client relationship, the attorney has a duty to communicate with his client during the course of the representation. To fulfill that duty, the attorney must ensure that the client has "sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be imputed." Rule 1.4, Comment 1. Each of the three paragraphs of Rule 1.4 outlines *content* areas of communication, rather than the method of communication. The rule focuses on communicating the status of the matter, information necessary for informed decision-making, and pertinent facts in the matter. The rule in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*.

The committee finds no *per se* requirement in the rules that information be provided to a client in person. Accordingly, the

procedures outlined in this hypothetical do not on their face create an ethics violation for this attorney. The attorney may ethically use electronic forms of communication in working with clients so long as all necessary information is transmitted between the attorney and the client.²

This committee opines that the attorney in the hypothetical is not precluded by the ethics rules from providing legal services to his clients via electronic communication so long as the content and caliber of those services otherwise comport with the duties of competence and communication.

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

Committee Opinion
December 22, 2003

FOOTNOTE _____

- 2 The committee notes that a source of concern in the materials provided with this request is a line of authorities finding that particular bankruptcy attorneys provided less than adequate representation due to lack of client contact. *See, e.g., In re Pinkins*, 213 B.R. 818 (Bankr. E.D. Mich. 1997); *In re Jerrels*, 133 B.R. 161 (Bankr. M.D. Florida 1991). The committee notes that those cases are distinguishable from the present situation. Factually, the focus of the discussion in those opinions is that there was almost no contact of any sort between attorney and client. For example, in *Pinkins*, client contact was with a legal assistant rather than with the supervising attorney and in *Jerrels*, there was no contact with the client. This line of authority does not change the committee's conclusions in this opinion.

CORRECTION

The title of Legal Ethics Opinion 1785, published in the January 2004 *Virginia Lawyer Register*, should have read "**Conflict—Can a County's Attorney Represent a County Board of Supervisors in a Suit Against the Board of Zoning Appeals (BZA) When the County's Attorney Advises in Matters Before It?**" This opinion deals with conflicts of interest and finds that a conflict exists when a county attorney represents a county board of supervisors in a suit against the zoning board of appeals when the commonwealth's attorney advises the zoning board in matters before it.