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LEGAL ETHICS OPINION 1803

ETHICAL OBLIGATIONS THAT APPLY TO AN ATTORNEY WHO IS SERVING AS AN INSTITUTIONAL ATTORNEY AT A STATE PRISON

I am writing in response to your request for an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("committee").

You have presented a hypothetical situation in which an attorney serves at a state prison, pursuant to §53.1-40. That statute calls for the judge of a county or city circuit court to appoint an attorney for a state correctional facility upon motion of the Commonwealth's attorney for that locality, "to counsel and assist indigent prisoners . . . regarding any legal matter relating to their incarceration." That attorney does not, as part of this position, represent the inmates as counsel of record in court. However, he does provide various levels of assistance to them regarding whether and what to file with the court. Depending on the needs and the request of an inmate, the attorney may type a draft provided orally or in writing by the inmate, may provide legal advice about the inmate's case, and may actually draft the documents needed by an inmate. Most of the work involves state or federal habeas relief, and there are usually appropriate form documents to complete. A narrative is often required for that completion. While some of the inmates are illiterate, others appear to be capable, but prefer the attorney to do the work.

Under the facts you have presented, you have asked the committee to opine on the following questions:

- 1) Does an attorney-client relationship exist between the attorney and a prisoner receiving services and consultation from that attorney, and, if so, when does it start and end?**

When presented with this question in other requests, this committee has looked to the definition provided at the start of the Unauthorized Practice of Law Rules,¹ which states:

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.

Thus, in LEO 1592 this committee concluded that an attorney-client relationship had been established where the attorney hired to represent the uninsured motorist carrier had also provided legal advice and assistance to the *pro se* uninsured driver. See also LEO 1127 (finding an attorney-client relationship where attorney provided legal assistance on items such as discovery requests for *pro se* litigants). The "Scope" section introducing the Rules of Professional Conduct discusses the creation of an attorney-client relationship as follows:

Furthermore, for the purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do

so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

In line with the LEOs and Rules provision cited above, the committee considers the attorney to be in an attorney-client relationship with at least some of the inmates receiving assistance, based on the legal advice or services provided in those instances. In any particular instance, the lawyer would have to make fact-specific determinations for each inmate, case-by-case, regarding whether such a relationship exists, and, if it does, when it concludes.

- 2) If there is an attorney-client relationship, what duties, other than that of the duty of confidentiality, apply to this attorney?**

In recent LEO 1798, the committee answered whether Commonwealth's attorneys are held to the same ethical standards as other lawyers. In that opinion, the committee looked to the "Scope" section of the Rules of Professional Conduct to conclude that all attorneys licensed to practice law in Virginia, including Commonwealth's attorneys, were held to provisions in the Rules. The "Scope" section contains no exceptions, not for Commonwealth's attorneys and not for attorneys appointed pursuant to §54.1-30. Thus, whenever this attorney is in an attorney-client relationship with an inmate, the attorney must comply with all provisions in the Rules.

- 3) If the attorney is working solely as a scrivener for an inmate, with the actual text of a pleading having been decided upon by the prisoner, may the attorney produce a typed final draft for the prisoner without placing the attorney's name and identifying information on the pleading, or otherwise represent on the pleading that the attorney is the author?**

The term "scrivener" is defined in *Black's Law Dictionary* as, "a writer. Especially, a professional drafter of contracts or other documents." Here, in question 3, the attorney is doing nothing more than typing the exact words presented handwritten or orally by the inmate. A typist is neither an attorney nor a scrivener. Where the only service provided to a particular inmate is typing, the attorney has done nothing to trigger an attorney-client relationship. The committee opines that where an individual types a pleading for another person, no disclosure is needed when that person files his pleading as a *pro se* litigant, even where the individual serving as typist is a licensed attorney and is employed pursuant to §53.1-40. However, the committee cautions that the attorney must be cognizant of the impression created for any inmate having an attorney type a document; absent some clarifying disclaimer to the inmate, the inmate may well assume that the lawyer has not only typed the document but also vouched for its legal soundness. If the attorney in any particular instance intends merely to type and not to review and approve the content of a document, the attorney should make sure the inmate has the same understanding as to the work to be done.

- 4) If the attorney may act as scrivener, can he go beyond mere typing of the pleading and actually affect the text, content or argument contained in the pleading**

FOOTNOTE

¹ See VA. Sup. CT. R. pt. 6, 31

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itself, without having to represent himself as counsel of record on the document?

While the questions refer to the terms “typist” and “scrivener,” the committee opines that in no instance does the title alone determine the character of the work and the corresponding ethical responsibilities. If the attorney is doing no more than typing the draft as developed by the inmate, the attorney is within the analysis presented above. However, if the attorney actually provides legal advice, such as the advisability of particular language, or if the attorney actually is the author of the language, then the attorney has left behind the role of mere typist and created an attorney-client relationship.² Thus, this attorney, appointed pursuant to § 53.1-40, will need to determine with each inmate just where on the spectrum of service delivery he is before he can determine whether he must disclose his role to the court.

In LEO 1592, this committee addresses the question of when an attorney needs to identify his work for a *pro se* litigant to the court.³ In that opinion, the committee concluded:

It would be improper for Attorney A to permit Defendant Motorist to continue to represent to the court that he is appearing *pro se* if Attorney A has advised Defendant Motorist about the issues in the case or matters which will be presented to the court.

The committee opines that in line with LEO 1592 and the authorities cited therein, whenever this attorney in the present situation is more than a mere typist, i.e., actual drafting and/or providing any legal advice, he must make sure that the inmate does not present himself to the court as having developed the pleading *pro se*. This is not to say the attorney must sign the pleading as attorney of record; such a requirement would far exceed the intended parameters of the job created by § 53.1-40. While the precise form or language of the notation need not be dictated by this opinion, the committee does conclude that the attorney must see to the inclusion of such a notation to avoid a misrepresentation to the court.

FOOTNOTES

- ² The committee further notes that mere stylistic editorial language changes alone like typing, would not create an attorney-client relationship, so long as the language changes do not affect the meaning of the text.
- ³ In the discussion of this question, the committee is only addressing when the lawyer’s work needs to be disclosed to the court; the committee is not questioning the propriety of the actual provision of these limited services. This committee consistently has approved the provision of limited legal services so long as the limitation was provided in compliance with Rule 1.2 (“Scope of Representation”). In those opinions, this committee focused on two necessary elements for permissible limitations: client consent after full disclosure as well as assurance that the restriction would not materially impair the client’s rights. See LEO 1193 (allowing a legal aid office to limit divorce representation by delaying issues of support, custody, and marital property through reservation); LEO 1276 (allowing limitations on representation of students by university legal services program so long as only attorneys delineate the limitations with the clients); LEO 1523 (allowing attorney to abide by civil client’s wish to negotiate with, but not sue, defendant where defendant was a friend of the client); LEO 1723 (disallowing plan of limitations by third party payor that precluded informing client of the litigation restrictions); LEO 1737 (requiring attorney to abide by competent client’s choice to refrain from presenting mitigating evidence regarding the death penalty).

5) Do the answers to questions 3 and 4 depend on the situation of the inmate (i.e., whether he is illiterate, writes illegibly, etc.)?

The basis for the answers to questions 3 and 4, above, is the nature of the services provided, not the characteristics of the inmate to whom they are provided. Even if something about the abilities of the inmate placed the service delivery outside the scope of intended services under this assistance program, that would be an issue outside the purview of this committee and would not affect the answers or the conclusions drawn in this opinion.

To the extent that this opinion conflicts with prior LEO opinions 553, 824, 1126, 1352, 1368, 1464, 1726, and 1761 regarding the role of scrivener, those opinions are hereby superseded. This opinion is advisory only, based solely on the facts you presented, and is not binding on any court or tribunal.

Committee Opinion
March 16, 2005

LEGAL ETHICS OPINION 1813 LAWYER ADVERTISING—USE OF THE TERMS “AFFILIATED” OR “ASSOCIATED”

Inquiry:

Can two law firms use the terms “affiliated” or “associated” to describe the relationship between the firms on their letterhead?

Opinion:

The communication that one firm is “affiliated” or “associated” with another is not prohibited by the Rules of Professional Conduct, as long as the relationship between the firms is such that the communication is not false or misleading. The opinion also states that the “associated” or “affiliated” law firms must adhere to the applicable rules regulating disclosure of confidential information and conflicts of interest as if they were a single firm. See ABA Formal Op. 84-351. The questions in this opinion relating to lawyer advertising will be addressed by the Standing Committee on Lawyer Advertising and Solicitation (“SCOLAS”). The questions in this opinion relating to confidentiality and conflict will be addressed by the Standing Committee on Legal Ethics (“Ethics Committee”). This is a joint committee opinion.

Advertising

Rules 7.1 and 7.5 are the appropriate and controlling disciplinary rules. Rule 7.1 governs communications concerning a lawyer’s services. It prohibits the communication if it contains false, fraudulent, misleading or deceptive statements or claims. Rule 7.5 deals with firm names and designations that must be truthful and accurate and not otherwise in violation of Rules 7.1 and 7.2.

RULE 7.1 Communications Concerning A Lawyer’s Services

- (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

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Rule if it:

- (1) contains false or misleading information; or
- (2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or
- (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
- (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

* * *

- (b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3.

RULE 7.5 Firm Names And Letterheads

- (a) A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, website, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rules 7.1 and 7.2.
- (b) A law firm shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations of those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

SCOLAS has observed a trend for more lawyers and firms to practice in multiple states. When lawyers or firms practice together regularly, particularly in the multistate practice, but not as a single firm, communications describing these firms as "affiliated" or "associated" can, in appropriate circumstances, provide useful information to clients and potential clients in selecting a law firm. An absolute prohibition of such a description is not justified. SCOLAS agrees with the analysis employed by the American Bar Association in ABA Formal Op. 84-351 and finds many of the examples from that opinion instructive. The following serves as guidelines to explain where the use of these terms is permissible.

First and foremost, the use of terms like "affiliated" or "associated" are permitted under Rule 7.1 because they accurately describe the relationship that exists. This opinion then discusses the application of the provisions on conflict of interest and confidentiality under the Rules of Professional Conduct.

The basic requirement regarding lawyer advertising under Rule 7.1(a) is that communications by a lawyer concerning legal services must not be false or misleading. Thus, designation by a lawyer or law firm of another law firm on a letterhead or in any other communication, including private communication with a client or other person, as "affiliated" or "associated" with the lawyer or law firm must be consistent with the actual relationship. Communication that another law firm is "affiliated" or "associated" is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or if used only with other information necessary to adequately describe the relationship and avoid confusion. An "affiliated" or "associated" law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship.

Webster's Collegiate Dictionary (1997) defines "affiliate", a noun, as "an affiliated person or organization; specifically: a company effectively controlled by another or associated with others under common ownership or control." "Affiliated," an adjective, is defined as "closely associated with another typically in a dependent or subordinate position; closely connected (as in function or office) with another." The word "associate," a noun, is defined as "partner, colleague, friend."

The use of these terms currently in relation to the field of law seems quite clear. The term "associate" frequently is used to refer to an individual lawyer employee of a law firm. In another context, a lawyer or law firm is sometimes said to be "associated" with another lawyer or firm in a specific lawsuit or on a specific legal matter. In those instances, the meaning is clear. A different type of relationship is implied by the use of the term "affiliate" as a noun; therefore, SCOLAS believes that a lawyer or law firm must be mindful of this distinction. The proper use of the noun "affiliate" would only be in circumstances where organizations exist under common ownership and control but maintain separate identities, which is not common in the legal field.

The type of relationship that is implied in designating another firm as "affiliated" or "associated" is analogous to the ongoing relationship that is required by the designation of "Of Counsel," as clarified in LEO 1293. The relationship must be close and regular, continuing and semipermanent, and not merely that of forwarder-receiver of legal business. The "affiliated" or "associated" firm must be available to the other firm and its clients for consultation and advice.

Availability may be on a limited basis if, for instance, the "affiliated" or "associated" firm performs all of the tax, labor, patent or other specialized work for the firm. Availability may also be limited to performing legal services that have a relationship to, or must be performed in, another state. More descriptive language may be required to explain the precise relationship between the firms and to avoid misleading clients and others. For example, a firm might be described as "available for association on all tax matters," if that is true and tax work is the only work that its members will perform for clients of the other firm. An out-of-state firm might be described as "associated" or

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“affiliated” on all matters in the particular state or pertaining to its law. Whether this further description is, itself, false or misleading depends on the actual relationship. Care must be used to describe the relationship precisely and with sufficient information that no material facts are omitted that are necessary, to keep the description of the relationship from being misleading.

Conflicts of Interest and Confidentiality

When a law firm lists another as “affiliated” or “associated,” potential clients of the listing firm are led to believe that lawyers with the “affiliated” or “associated” firm are available to assist with representation, at least in matters that the designation may describe. The client ordinarily also expects that lawyers of the “affiliated” or “associated” firm will not simultaneously represent persons whose interests conflict with the client’s interests, just as would be true of lawyers who occupy an “Of Counsel” relationship with the firm. See LEO 1467 (affirming “Of Counsel” relationship designations between two law firms, provided the requisite close, regular, personal relationship exists between the two firms). Also, Rule 1.10(a) provides:

- (a) 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, or 2.10(e).

Comment [1] to Rule 1.10 points out that what constitutes a firm can depend on the specific facts. Two practitioners that share office space and occasionally consult each other may not ordinarily be recognized as constituting a firm; however, if they present themselves to the public in such a way that they suggest they are a firm, then they should be regarded as a firm under the Rules. Important factors to consider are the terms of any formal agreement between the lawyers and the fact that they may have mutual access to client information.

Generally, lawyers in the same law firm may not simultaneously represent two clients whose interests are adverse even when the representation is in unrelated matters. Rule 1.7 provides that “[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and . . . each client consents after consultation,” or if the lawyer’s “representation of that client may be materially limited by the lawyer’s responsibilities to another client . . . unless . . . the lawyer reasonably believes the representation will not be adversely affected, and the client consents after consultation.” Comment [1] to Rule 1.7 states further that a lawyer’s duty of loyalty to the client generally prohibits the lawyer from accepting employment directly adverse to the client without the client’s consent.

Rule 1.9 follows the vast majority of cases in creating an irrebuttable presumption that present affiliates will share a former client’s confidences where the adverse representations are in substantially related matters. The use of the “Chinese wall” approach to screen confidential information is not accepted, as the basis of the Rules of Professional Conduct is centered principally on the need to protect client confidences even after the lawyer-client relationship ceases.

The Ethics Committee believes that the same rationale applies where law firms hold themselves out as “affiliated” or “associ-

ated” with one another, as applies under the Rules of Professional Conduct and the foregoing examples, where conflicts arise within law firms. When a firm elects to affiliate or associate another with it and to communicate that fact to the public and clients, there is no practical distinction between the relationship of affiliates under that arrangement and the relationship of separate offices in a law firm. The Ethics Committee is of the opinion that ordinarily the same analysis would apply to both arrangements to determine when the firms have a disqualifying conflict of interest, treating the “affiliated” or “associated” firms for this purpose as a single firm.¹

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

Committee Opinion
Standing Committee on Lawyer Advertising and Solicitation
Standing Committee on Legal Ethics
March 16, 2005

FOOTNOTE

- 1 This opinion does not address the issues of liability exposure and insurance associated with firms who hold themselves out as “affiliated” or “associated.”