LEGAL ETHICS OPINION 1800

ARE NON-ATTORNEY STAFF SUPPORT SUBJECT TO THE CONFLICTS OF INTEREST PROHIBITION?

You have presented a hypothetical situation in which Attorneys A and B represent opposing parties in pending litigation. A's two-member firm used secretary X for all secretarial work for the office, including the present litigation. A's firm fired X. The following week, Attorney B's firm, also a two-lawyer office, hires X as a secretary.

With regard to the facts of your inquiry, you have asked the following questions:

1) Is there a conflict of interest requiring B's withdrawal from the litigation?

2) Would the answer to question one differ if X were a paralegal rather than a secretary?

3) Would the answer to question one differ if X met alone with A's client when the client reviewed and signed discovery responses?

4) Would the answer to question one differ if X's only duty for B on the litigation at issue was to answer the telephone?

The fundamental issue for this series of questions is whether an attorney's hiring of opposing counsel's secretary creates an impermissible conflict for the hiring attorney. The general conflict of interest provisions in the Rules of Professional Conduct are Rules 1.7 and 1.9, dealing with current and former clients, respectively. Those rules state as follows:

RULE 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Each paragraph of these rules begins with the clear phrasing, "a lawyer." There are no paragraphs in these rules directed at non-lawyer staff, nor are there any paragraphs addressing a lawyer hiring non-lawyer staff. Nothing in Rules 1.7 and 1.9 creates a conflict of interest for an attorney hiring non-lawyer staff. This committee declines to adopt the conclusion drawn in a minority of states that Rules 1.7 and 1.9 can be read, despite their clear language to the contrary, to apply to support staff as well as attorneys.[1]

This application of the current Rules of Professional Conduct is in line with a previous opinion finding that under the former Code of Professional Responsibility no conflict of interest arose for an attorney hiring non-lawyer staff of the opposing counsel's firm during the course of the representation. *See*, LEO 745. Nonetheless, the Committee cautioned in that opinion, and reiterates here, that the hiring attorney must be mindful of the ethical supervisory duties regarding support staff.

Rule 5.3 governs an attorney's ethical responsibilities regarding non-lawyer assistants. As explained in the Comment to the rule:

> A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client . . ."

FOOTNOTE

1 *See Zimmerman v. Mahaska Bottling Co.* 19 P.3d 784 (Kan. 2001); D.C. Ethics Op. 227 (1992); and Kansas Ethics Op. 90-5 (1990).

Thus, Attorney A and his partner should have made sure secretary X understood during his employment with the firm the critical importance of maintaining client confidentiality. Similarly, when X joined attorney B's firm, those attorneys should have made sure X understood that principle; any attempt by attorney B or his firm members to learn or use the confidential information acquired by X regarding a client of his former employer would be in violation of the requirements of Rule 5.3.[2] A minority of states have concluded that nothing more specific is required than a general nod to this Rule 5.3 supervisory duty.[3] However, this committee prefers the position taken in a majority of states, which is outlined in ABA Informal Op. 88-1526.[4] That position interprets Rule 5.3 such that the hiring firm must effectively screen the new employee with regard to the matter in question to ensure Rule 5.3 compliance.

Numerous factors will determine what is necessary for effective screening in any given instance; the size of the original firm, the size of the hiring firm, and the nature of the work performed by the employee at the first firm are only some examples of what a firm should consider in developing an appropriate screen. Thus, while there is no "one size fits all" screen, this committee presents the following list of possible elements that could support an effective screen:

1) educate the new staff member both about the general concept of client confidentiality and should be specific that he not discuss his work at the former firm on the matter in question;

2) confirm that the newly hired staff member brought no files or documents with him regarding the matter in question;

3) educate all of the attorneys and other staff members not to discuss the matter in question with that new staff member;

4) preclude in some practical way access to and/or involvement with the pertinent file by the staff member;

5) develop a written policy statement regarding confidentiality, which would include that the above steps are to be followed whenever staff members are hired from an opposing counsel's firm; and

6) note, on the cover of the file in question, the key information regarding confidentiality.

To reiterate, the committee presents this list as a suggestion; the list is not meant to be mandatory or exhaustive.

FOOTNOTES

2 Note that Rule 8.4(a) prohibits an attorney from violating an ethics rule indirectly through the act of another.

3 *See Williams v. TransWorld Airlines, Inc.*, 588 F.Supp. 1037 (W.D.Mo. 1989); Alabama Ethics Op. 2002-01; and South Carolina Ethics Op. 93-29 (1993).

4 *See also Kapco Mfg. Co., Inc. v. C & O Enter., Inc.* 637 F. Supp. 1231 (N.D. Ill. 1985); *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000); *Herron v. Jones, Inc.*, 637 S.W.2d 569 (Ark. 1982); *Smart Industries Corp. Mfg. v. Yuma County Superior Court*, 876 P.2d 1176 (Ariz. Ct. App. 1994); *Liebowitz v. Eighth Judicial District*, 78 P.2d 515 (2003); *Hayes v. Central Orthopedic Specialists, Inc.* Okla. No. 96,663 (4/23/02); *In re American Home Products Corp.*, Tex. No. 97-0654 (1998); Maine Ethics Op. 186 (2004); Illinios-Chicago Ethics Op. 93-5; Tennessee Ethics Op. 2003-F-147; New Jersey Ethics Op. 665 (1992); and Vermont Ethics Op. 92-12.

In conclusion, in answer to your first question, Attorney B is not automatically required to withdraw from the representation merely for having hired his opponent's secretary. Absent consent from the opposing party, Attorney B could remain in the case only if his firm effectively screened the secretary with regard to the matter in question. As to questions two through four, the answer to question one applies regardless of the specific title or duties of the non-lawyer staff. Those duties could however determine what screening elements were needed.

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

Committee Opinion
October 8, 2004

LEGAL ETHICS OPINION 1804

IMPARTIALITY OF A JUDGE FOR WHOM AN ATTORNEY SUPPORTED AS A WITNESS IN AN INQUIRY PROCEEDING AGAINST THE JUDGE

You have presented a hypothetical involving a complaint brought against a judge before the Judicial Inquiry and Review Commission ("the Commission"). Lawyer A occasionally represents clients before Judge X. When Judge X has a complaint filed against him with the Commission, Lawyer A files a letter of support with the Commission on behalf of the judge. The subject matter of the complaint did not involve a case of Lawyer A.

Under the facts you have presented, you have asked the committee to opine whether whenever this attorney appears before the judge, must the attorney disclose to opposing counsel that the attorney sent the letter of support for the judge to the Commission?

Your request specifically asks whether Rule 3.5(d) triggers a conflict of interest, requiring disclosure by the attorney to opposing counsel in this situation. Rule 3.5(d) states as follows:

> A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

The concern raised for the lawyer in the hypothetical is that a letter of support provided as part of a Commission investigation of a judge must be kept confidential, under Virginia Code § 7.1-913, which would preclude the attorney from disclosing to opposing counsel that he sent the letter on behalf of the judge.

This committee does not consider Rule 3.5(d) as reaching the sort of action taken by this attorney. Paragraph (d) expressly applies only to gifts and loans. This letter to the Commission is neither. Rather, it represents participation as a citizen in a government process. Rule 3.5(d) does not preclude that participation and does not require its disclosure by this attorney when appearing before the judge.

This committee notes that the attorney in this hypothetical does have to be mindful of Rule 8.4(d), which precludes an attorney from stating or implying "an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." As the attorney in the hypothetical must by statute keep his letter to the Commission confidential, he should have no problem complying with Rule 8.4(d).

The committee notes that while your request only expressly asked about the attorney's proper conduct, your request did highlight provisions in the Canons of Judicial Ethics regarding the conduct of the judge. Interpretation of those rules is outside the purview of this committee and, therefore, the committee declines to opine on that issue.

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

Committee Opinion
September 20, 2004

LEGAL ETHICS OPINION 1806
CONFLICT OF INTEREST IN LITIGATION INVOLVING REAL ESTATE THAT IS OWNED BY TRUSTEES

You have presented a hypothetical involving a potential conflict of interest arising out of a real estate sale in the past and a current dispute regarding a possible right of way crossing that same property. Nineteen years ago, Attorney A represented X, Y, and Z in purchasing the real estate. Since that time, Attorney B has joined A's firm. Attorney B now represents client C in establishing the right of way crossing the real estate. C is in litigation against X, Y and Z regarding the right of way. The land is now held not by X, Y and Z individually, but is held in trust, with the three of them serving as trustees. Attorney B wrote to the trustees' attorney to determine whether there is any objection to a possible conflict of interest on the part of B. Several months have passed, but the trustees' counsel has not responded.

Under the facts you have presented, you have asked the Committee to opine as to whether Attorney B has a conflict of interest here, even though:

1) The real estate sale was nineteen years ago;

2) Attorney A did not search or certify the title to the property as those tasks were performed by a title company;

3) The current adverse parties are the trustees of a trust whereas the prior representation was of the three purchasers as individuals;

4) Attorney B has not reviewed the file and was not at the firm at the time of A's representation of the purchasers; and

5) The trustees' attorney has failed to respond to Attorney B's inquiry about the matter.

Your request is concerned with whether Rule 1.9 triggers a conflict of interest for Attorney B. Rule 1.9 (a) states that:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

That provision applies not only to Attorney A but also to Attorney B because Rule 1.10(a) states that:

> 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).

Attorney A and Attorney B together would seem to be in a classic "former client" conflict situation in that Attorney A represented parties who are now adverse parties in B's case, which may be substantially related to that of Attorney A. However, the request, in effect, raises five potential reasons why no such conflict is in fact triggered here. The Committee will review each of these five factors individually.

1) The real estate sale was nineteen years ago.

This posited reason would suggest some sort of "statute of limitations" on the application of Rule 1.9. While of course, the long passage of time affects just how much a lawyer remembers about a former client, Rule 1.9 nonetheless does not have a statute of limitations period, nor is the presence of a conflict dependent upon a lawyer's memory of his former client's matter. The Committee does not find that this particular factor prevents the application of Rule 1.9 to this representation.

2) Attorney A did not search or certify the title as those tasks were performed by a title agency.

This factor goes to whether or not the two representations (the original purchase and the new right-of-way dispute) are "substantially related" under Rule 1.9. This Committee has on several occasions discussed what is meant by the term "substantially related." A summary of those opinions was outlined in LEO 1652 as follows:

> Whether current representation adverse to a former client is "substantially related" to the former representation is a fact-specific inquiry requiring a case-by-case determination. LEO #1613 addressed "substantial relatedness," as follows:
>
> > [T]he committee has not established a precise test for substantial relatedness under DR 5-105(D). The committee, however, has previously declined to find substantial relatedness in instances that did not involve either the same facts (LEO #1473), the same parties (LEOs #1279, #1516), or the same subject matter (LEOs #1399, #1456).
>
> Courts addressing the issue have stated that substantial relatedness exists where the matters or issues raised in the current and the former representation are essentially the same, arise from substantially the same facts, or are byproducts of the same transaction, *Tessier v. Plastic Surgery Specialists, Inc*., 731 F. Supp. 724 (E.D. Va. 1990), or entail virtually a congruence of issues or a patently clear relationship in subject matter. *In re Stokes*, 156 B.R. 181 (Bkr. E.D.Va. 1993). *See also Pasquale v. Colasanto*, 14 Va. Cir. 54 (1988).

Those prior Committee opinions all analyzed the question under the former DR 5-105(D). The Committee notes that the analysis remains appropriate as the newer Rule 1.9 (a) retains the pertinent language from former DR 5-105(D).

While it may be possible that the two matters are substantially related, the Committee does not have before it sufficient

facts to make that determination. For example, while the facts state that Attorney A did not search for or certify the title, the facts do not indicate whether the clients independently made arrangements themselves with the title agency, whether Attorney A recommended and vouched for the title agency, whether he handled the arrangements, or whether he simply referred the clients to the agency. The Committee can only note that Attorney B should consider all pertinent facts as indicated by the opinions outlined above in determining whether the matters are "substantially related" so as to trigger a conflict of interest.

3) The current adverse parties are the trustees of a trust whereas the prior representation was of the three purchasers as individuals.

This reason is put forth as removing the situation from the reach of Rule 1.9 under a theory that the two matters do not involve the same parties; that is, that Attorney A's former purchasing clients are not the same as Attorney B's land-owning adverse parties. In recent LEO 1788, the Committee addressed a situation in which an attorney currently represented a widow as administrator of the wife's estate who now wanted the attorney to represent him in electing his statutory share as surviving spouse because the will left him nothing. The question presented was whether this new representation triggered a Rule 1.7 conflict between two current clients-the administrator and the surviving spouse. The Committee concluded that it did not. The basis for that conclusion was that the attorney did *not* have two clients; he had one client with two needs: legal advice regarding his role as administrator and legal advice regarding his rights as a surviving spouse. The opinion provides authorities for the proposition that representing a fiduciary, such as an administrator or a trustee, is representation of that individual regarding that particular role. *See* LEO 1788 (and authorities referenced therein).

This same analysis applies for determining whether the three trustees count as "former clients" for Rule 1.9 purposes. Accordingly, just because the landowners now hold the land as trustees rather than outright does not in some way render them something other than "former clients" of Attorney A, which are then via Rule 1.10 imputed to Attorney B. That the purchasers/trustees were formerly clients of Attorney A and are now adverse parties in Attorney B's case means that Attorney B must determine whether the two matters are substantially related before proceeding. Thus, the element of the trust in this scenario does not remove Attorney B's new case from the reach of Rule 1.9.

4) Attorney B has not reviewed the file and was not at the firm at the time of A's representation of the purchasers.

The fact that Attorney B has not reviewed the file would be relevant if Rule 1.9 conflicts could be "cured" by development of a screen for Attorney B regarding this matter. However, Rule 1.9 does not permit a screen to "cure" a conflict triggered by the rule; only consent from the former client can provide that "cure" and allow the representation. Therefore, the Committee opines that Attorney B's lack of familiarity with the file is insufficient to remove this situation from the reach of Rule 1.9.

In this fourth factor is also the suggestion that because Attorney B was not at the firm at the time of Attorney A's representation of the purchasers, the potential conflict should not be imputed to Attorney B. That suggestion could only be based on a misreading of Rules 1.10(a), which, to review, operates in the present scenario as follows: Attorney A would have a potential conflict of interest were he to represent the landowner suing his three former clients; accordingly, if Attorney A cannot represent the new clients, neither could any other attorney associated in a firm with Attorney A, including Attorney B. Thus, whether Attorney B was present at the firm at the time of the first representation at issue is not part of the analysis; what is important is that Attorney A and Attorney B are in the same firm at the time of the new representation.

The Committee opines that this fourth posited factor does not remove this scenario from the reach of Rule 1.9

5) The trustees' attorney has failed to respond to Attorney B's inquiry about the matter.

The suggestion made with this reason is that, while recognizing that consent from the former party is required to "cure" a Rule 1.9 conflict, perhaps after some amount of time or some number of requests, an attorney may treat silence as consent. Rule 1.9 contains no language providing that a default alternative to actual consent would be constructive consent where the attorney has made a reasonable effort to seek consent from the former client. The only "cure" for a Rule 1.9 conflict of interest is for the former client to provide actual "consent after consultation." That the counsel for the three purchasers/trustees has not responded to the Attorney B's requests provides no safe harbor for Attorney B if the facts of this case constitute a conflict of interest.

In sum, this Committee opines that the scenario as presented is just the sort of new representation that a lawyer should analyze under Rule 1.9(a). The Committee declines to definitively conclude whether there is a conflict of interest under that provision because, as indicated with regard to item 2, above, the determination of whether the matters are "substantially related" must depend on both the factors identified in that discussion and facts regarding the matters that are not before the Committee.

Finally, the Committee notes that even if the facts support that no conflict of interest is triggered by Rule 1.9(a), Lawyers A and B also need to consider the possible application of Rule 1.9(c), which states as follows:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Thus, regardless of the outcome of the Rule 1.9(a) determination outlined above, if Attorney A received any confidential information during the representation of the purchasers/trustees at the time of purchase that would be pertinent in

Attorney B's representation against those parties in the new matter, then, as Rule 1.9 and Rule 1.10 together impute the effect of that information form Attorney A to Attorney B, Attorney B could not represent the neighboring landowner, absent consent from X, Y, and Z. Whether Attorney A received such information is a factual determination that the Committee cannot make based on the limited facts provided in the hypothetical.

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

Committee Opinion
September 20, 2004

LEGAL ETHICS OPINION 1807

GARNISHMENT OF A RETAINER FEE HELD IN THE ATTORNEY'S TRUST ACCOUNT

You have presented a hypothetical in which a client terminated his relationship with Attorney A during the course of litigation. The client then hired Attorney B. The client has an unpaid balance with Attorney A for attorney's fees. Attorney A obtained a judgment against the client for fees incurred in the course of the litigation. In an attempt to collect on the judgment, Attorney A caused a garnishment summons to be served on Attorney B as garnishee. The summons specifically is for "Custodian of client's retainer (unused)." Attorney A also had served on Attorney B a subpoena duces tecum for "all documents that disclose the amount of retainer paid to the custodian by client and that disclose all charges against said retainer."

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

1) Does the conduct of former counsel described in the hypothetical interfere with the client's right to terminate the attorney/client relationship and be represented by counsel of his own choosing?

2) Is the conduct of the former counsel described in the hypothetical ethically appropriate?

3) How should current counsel respond to the garnishment and subpoena?

Before analyzing the specific issues raised regarding this hypothetical, the committee notes one clarification. In the hypothetical, the client's funds in the trust account are referred to as a "retainer." As identified in LEO 1606, the use of the word " retainer" for an "advanced legal fee," while common, is inaccurate. As explained in that opinion, "advanced legal fees" are "fees paid in advance for particular services not yet performed." *Id.* In contrast, a "retainer" is a "payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future." *Id.* The difference is significant in that advanced legal fees remain the property of the client and must be placed in the trust account, whereas a retainer is earned immediately upon receipt, is property of the lawyer, and should not be in the trust account. *Id.* The label given a fee does not determine whether it is an advanced legal fee or a retainer; only the purpose of the payment is dispositive. LEO 510. The committee assumes that the client funds in this hypothetical were paid as advanced legal fees, despite the term "retainer" being used. Throughout this opinion, the committee will refer to and treat this money as advanced legal fees.

The committee will address the first two questions together as each question is essentially asking whether this attorney's garnishment is unethical as improperly interfering with the rights of the client.

The committee does respect the importance of the principle that a client must be free to select the attorney of his choice, including the right of termination. Comment 3 to Rule 1.16 ("Declining or Terminating Representation") states that a "client has a right to discharge a lawyer at any time, with or without cause." This principle is also reflected in Comment 1 to Rule 5.6, which states that an "agreement restricting the rights of lawyers to practice after leaving a firm not only limits their professional autonomy *but also limits the freedom of clients to choose a lawyer.*"(Emphasis added.) The question becomes is it an improper restriction on a client's freedom to choose a lawyer (and discharge a lawyer) for a former attorney to garnish the advanced legal fees in a subsequent attorney's trust account.

The importance of the client's freedom to choose a lawyer must be weighed against the attorney's right to be paid for his services. *See Allen v. United States*, 606 F.2d 432 (4th Cir. 1979)(a client who authorizes litigation on his behalf must expect to pay a reasonable fee for services performed by his lawyer). This committee has weighed that balance in prior opinions and found permissible an attorney's suing a former client for unpaid legal fees. LEOs 1325, 974. Other jurisdictions have similarly approved the referral of a former client's overdue legal bill to a collection agency. *See* Arizona Ethics Op. 2000-07; D.C. Ethics Op. 298 (2000); West Virginia Ethics Op. 94-1; Ohio Ethics Op. 91-6; New York Ethics Op. 608 (1990); Georgia Ethics Op. 49 (1985). Of course, any such collection effort by an attorney against a former client must be pursued in compliance with Rule 1.6. Paragraph (b) does allow the disclosure of confidential information "to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client." While the need to take collection action against a former client does allow the attorney to disclose confidential information necessary to collect the fee; the attorney must *not* disclose any confidential information beyond that needed for collection of the fee.

With regard to collecting fees from a former client, this committee sees no reason to distinguish between litigation and collection agencies as acceptable but garnishment as not acceptable. Of course, the garnishment at issue is of the funds paid in advance to the client's new attorney. That attorney may think of those funds, once deposited into his trust account, as somehow belonging to him, or at least reserved exclusively for him, but that is not the case. As outlined above, the funds in a lawyer's trust account remain property of the client. At any time, the client could request return of the funds to pay some other creditor, such as for a mortgage. The lawyer in possession of trust account funds lacks the authority to place himself ahead of any other creditor of the client, should the client choose to pay another creditor or if, as in this case, the creditor (i.e., the former attorney) legally garnishes the funds. As the new attorney has not yet earned the legal fees, he has no legal claim to them and holds them only on behalf of the client. The committee opines that it is not a per se violation for an attor-

ney to garnish the funds of a former client that are in a new lawyer's trust account.

That the funds through garnishment deplete the client's suggested payment source for a new lawyer does not render the garnishment unethical. While it may or may not make it harder for the client to obtain new counsel, it is not unreasonable to this committee for the right to be paid of a lawyer who has already performed legal services to have priority over the right to be of a lawyer who has not yet performed legal services. It was ethically permissible for the former attorney in this hypothetical to garnish the trust account funds so long as he lawfully was entitled to the funds.

As part of the garnishment procedure, the former attorney also had issued a subpoena duces tecum requesting detailed information regarding the size of the retainer and the billing records. As identified above, in collecting an overdue fee from a client, Rule 1.6 permits the attorney to disclose only that confidential information necessary for collection of the fee. Similarly, an attorney, in collecting his fee in this particular situation, should not seek more confidential information from the new attorney than is necessary for collection. That limitation is in line both with the importance of the attorney/client privilege and with the attorney's duty to terminate the attorney/client relationship in such a way as to "protect the client's interest." Rule 1.16(d). Whether the terms of this subpoena comport with that standard is a fact-specific determination. The hypothetical lacks sufficient facts for the committee to make that determination.

In addressing the third question, this is a question of both fact and law, exact resolution of which is outside the purview of this committee. However, the committee can highlight principles that should be considered for making that determination. As just mentioned above, the subpoena would be improper if it seeks greater detail about the client's new representation than is necessary for the purposes of garnishment. The new attorney should consider that in determining whether to challenge the summons, through legal means, or whether to recommend to the client that the garnishment should be accepted. This committee has repeatedly concluded that where an attorney thinks complying with a subpoena request violates his client's confidentiality protection under Rule 1.6, that attorney may rightfully challenge the request. *See* LEOs ##1628, 1352, 967, 645, 334, 300. A similar determination should be made as to the merit and amount of the underlying debt. Again, the attorney would need to determine whether to recommend to the client that the garnishment should be challenged or accepted. Resolution of those issues remains 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
September 20, 2004