STANDING COMMITTEE ON LEGAL ETHICS

James O. Broccoletti, chair

ETHICS OPINIONS

The 2004-2005 year started out with five opinion requests carried over from the prior fiscal year. The committees received thirty-nine requests in 2004-2005. Twenty of these requests were handled as legal ethics inquiries, where the request dealt with issues that have been addressed by previous opinions and do not require a new opinion. Nine opinions were issued; ten opinion requests remain open. Two of the ten opinions that remain open are pending final approval by the committee because a press release must be issued requesting public comment, pursuant to the new procedures for issuing opinions under Part 6, Section IV, Paragraph 10 of the Rules of the Supreme Court of Virginia, effective January 1, 2005. Two opinion requests were withdrawn. Summaries of each of the issued opinions are as follows:

LEO 1786—This opinion deals with the disclosure and use of confidential documents obtained by a client without authorization. The opinion discusses ten scenarios, each involving one attorney receiving documents regarding the opposing party. In each scenario, the question addressed whether the attorney must return the documents and whether he can read and use the information contained in the documents. The answer depends on the facts outlined in each scenario.

LEO 1800—This opinion asks whether nonattorney support staff is subject to the conflicts of interest prohibitions and whether an attorney's hiring of opposing counsel's secretary creates an impermissible conflict for the hiring attorney. The opinion looks to Rule 5.3 which governs an attorney's ethical responsibilities regarding nonlawyer assistants and presents suggested screening techniques that the supervising attorney can choose to follow. The opinion concludes that an attorney is not required to withdraw from the representation despite having hired his opponent's secretary so long as appropriate measures are taken.

LEO 1803—This opinion questions whether ethical obligations apply to an attorney who is serving as an institutional attorney in a state prison. The opinion concludes that whenever an attorney has assisted an inmate in drafting a pleading, the attorney must ensure that the inmate does not inform the court that he is just *pro se*; rather, the inmate must disclose that he was assisted by an institutional attorney who no longer represents him. The opinion expressly supersedes prior LEOs that carve out an exception to the ethics rules for attorneys working as scriveners.

LEO 1804—This opinion deals with the impartiality of a judge whom an attorney supported in an inquiry proceeding against the judge. The request specifically asks whether Rule 3.5(d) triggers a conflict of interest, requiring disclosure by the attorney to opposing counsel in this situation. The committee found that Rule 3.5(d) does not reach the sort of action taken by this attorney. Paragraph (d) expressly applies only to gifts and loans; therefore, the attorney is not required to make a disclosure to opposing counsel.

LEO 1806—This opinion deals with a potential conflict of interest in litigation involving real estate that is owned by trustees. The opinion finds that the opposing parties in the litigation are the three individuals who currently operate in the role of trustee, but are nonetheless the same individuals who originally purchased the real estate. The committee finds that the conversion to a trust does not change the application of the conflict rules to these former clients.

LEO 1807—This opinion deals with an attorney who issues a subpoena to garnish the retainer fee that was paid by the former client and is held in the new attorney's trust account. The opinion finds that it is not a per se violation for an attorney to garnish the funds of a former client that are in a new lawyer's trust account. 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.

LEO 1810—This opinion addresses a potential conflict of interest where the attorney is serving as guardian *ad litem* when opposing counsel in the divorce matter was a former partner. The opinion finds that a conflict does not exist because the connection is not strong enough to "materially limit" the ability to represent the child.

LEO 1811—This opinion deals with whether an attorney is required, or even allowed, to disclose documents to a third party from his file about a former client who has retained new counsel. The opinion finds that it is permissible for the attorney to decline to provide the requested documents to the third party and instead to refer the requester to the former client's new attorney.

LEO 1813—This opinion is a joint opinion issued by the Standing Committee on Lawyer Advertising and Solicitation and this committee. This opinion generally addresses whether two law firms can use the term "affiliated" or "associated" to describe the relationship between the firms on their letterhead. This opinion finds that the communication that one firm is "affiliated" or "associated" with another is not prohibited so long as the relationship between the firms is such that the communication is not false or misleading. This opinion also assumes that if "associated" or "affiliated," the law firms adhere to applicable rules regulating disclosure of confidential information and conflicts of interest as if they were a single firm.

RULE AMENDMENTS

RULE 1.7—The Supreme Court of Virginia approved the committee's proposed amendment to Rule 1.7 of the Virginia *Rules of Professional Conduct*, which became effective June 30, 2005. This amendment was originally part of the committee's comprehensive review of the *Rules of Professional Conduct*, the majority of the amendments of which were approved by the Supreme Court of Virginia and went into effect on January 1, 2004. The amendment to Rule 1.7 replaces the rule in its entirety, and the new language is from the Ethics 2000 Initiative. The committee found persuasive the American Bar Association's contention that the current language of Rule 1.7 is ambiguous. The purpose of the new language is to provide a clearer test for lawyers to apply to potential conflicts of interest; nonetheless, the committee did not believe the new language represents a substantively different test, just a clearer articulation of the current one. The committee, however, chose not to include the ABA's requirement that consent be in writing, as that requirement would have been a substantive departure from the current rule. The proposed amendment does require that an attorney memorialize in writing that the attorney and client discussed a conflict and that the client consented to the lawyer continuing the representation. Further, the committee amendments to the comments of the rule clarify that, while any memorialization would be better than none at all, it would be best to obtain the client's consent in writing.

The committee took the language from Rule 2.2 (this rule was deleted by the amendments effective January 1, 2004) and put it into the comments of Rule 1.7. The elimination of Rule 2.2 was due to concern that there could be confusion between Rule 1.7's application to joint representations and former Rule 2.2's application to the lawyer's role as intermediary. As the two contexts are indistinguishable, all such situations would now be handled in one rule, i.e., Rule 1.7.

Recent Revision to Rule Regarding Promulgation of Advisory Opinions—The Supreme Court approved the committee's proposed amendments to Part 6, Section IV, Paragraph 10 of the Rules of the Supreme Court of Virginia, which became effective on January 1, 2005. The amendments require the standing committees to issue "draft" or "proposed" opinions to be published for comment while the opinions are still pending before the committee.

Two other areas of needed improvement in paragraph 10 were also approved. The first clarifies the application of paragraph 10. The rule-making process outlined in paragraph 10 applies only to changes to *Rules of Professional Conduct* and the Unauthorized Practice Rules, and not to changes to paragraph 13, which contains the rules of procedure for the discipline system. To reinforce that paragraph 13 changes are not subject to the paragraph 10 process, a definitional change limits this paragraph's application to rule changes proposed by the Legal Ethics Committee, the Unauthorized Practice of Law Committee, or the committee on Lawyer Advertising and Solicitation.

The final amendment approved regards the informal ethics advice that the bar's ethics counsel provides via the telephone. While it has always been the ethics counsel's policy that these calls are confidential, that policy is not currently incorporated in paragraph 10. Language has been added to confirm that the calls are confidential and that the ethics counsel may only testify regarding the content of such a call if the caller consents.

ETHICS TELEPHONE CALLS

From July 1, 2004, through June 30, 2005, the average number of ethics calls to VSB staff attorneys per month has been 339. This represents a slight decline from fiscal year 2004's average of 344 calls per month. This number, however, represents a steady increase of calls; FY 03's average was 305 calls per month; FY 02's average was 280 calls per month; and FY 01's average was 266 calls per month.

I wish to thank the members of the committee: Roger T. Creager, vice-chair; Jennifer A. Brust, Kathleen A. Dooley, John P. Fishwick, Leonard C. Heath Jr., David Ross Rosenfeld, Thomas E. Spahn and Steven T. Telfeyan for their dedication and contributions to the work of the committee during the past year.