

LEGAL ETHICS OPINIONS 1817

WHAT SHOULD A CRIMINAL  
DEFENSE ATTORNEY DO WHEN HE IS  
THE CAUSE OF A MISSED APPEAL  
DATE?

You have presented a hypothetical in which an attorney represents a criminal defense attorney whose client has been convicted of a crime and appealed the crime to the proper court. The attorney failed to perfect the appeal properly; therefore, the court dismissed the appeal.

With regard to that hypothetical, you have asked the committee to opine as to what advice and/or assistance the attorney is ethically permitted to provide to the client. Specifically, may the attorney do any or all of the following:

- 1) Advise the client that he may have a right to file a petition for a writ of *habeas corpus*;
- 2) Advise the client of the time limit for filing a petition for a writ of *habeas corpus*;
- 3) Advise the client how and where to file the petition for a writ of *habeas corpus*;
- 4) Advise the client of possible language to include in a petition for a writ of *habeas corpus*;
- 5) Send the client a blank form of a petition for a writ of *habeas corpus*;
- 6) Send the client a petition for a writ of *habeas corpus* that the lawyer has drafted;
- 7) Send the client an affidavit executed by the attorney stating the circumstances of the client's case and suggesting that the client might wish to attach the affidavit to any petition for a writ of *habeas corpus* the client might file;
- 8) Advise the client of the possible legal effect of filing a petition for a writ of *habeas corpus* on other legal remedies or on his right to file future petitions for a writ of *habeas corpus*; and
- 9) Offer to assist the client in securing a new attorney to assist the client in pursuing legal remedies.

Committee Opinion  
August 17, 2005

Conversely, you ask, would it be unethical as a dereliction of the attorney's duty to the client *not* to assist him in those ways in this situation.

The committee's analysis of these questions begins with the lawyer's duty to communicate with the client under Rule 1.4 of the Virginia Rules of Professional Conduct. Rule 1.4 requires the lawyer to keep the client reasonably informed of the status of a matter, to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and to inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

When counsel is notified by the court of a dismissal of the client's appeal of a criminal conviction, and the lawyer knows or is informed that the dismissal was caused by the lawyer's failure to timely file or perfect the appeal, there is an ethical duty under Rule 1.4 for the lawyer to notify the client of the dismissal of the appeal, the reasons for the dismissal and what rights or recourse the client has under those circumstances. This would include advising the client of the right to file a petition for a writ of habeas corpus alleging ineffective assistance of counsel; or a claim for legal malpractice based upon the lawyer's act or omission. If a lawyer fails to act on a client's case, the lawyer has a duty to promptly notify the client of this failure and of the possible claim the client may thus have against the lawyer, even if such advice is against the lawyer's own interests. *See Tallon v. Committee on Professional Standards*, 447 N.Y.S.2d 50 (1982); *In re Higginson*, 664 N.E.2d 732 (Ind. 1996); *Olds v. Donnelly*, 150 N.J. 424, 443, 696 A.2d 633, 643 (1997). For example, a lawyer who fails to file suit within the statute of limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw. Rest. (2d) of the Law Governing Lawyers § 20, cmt. (c). Even if the lawyer concludes that he must withdraw because of the conflict of interest, the lawyer must, under Rule 1.16 (d) take reasonable steps to protect the client's interests. This would include informing the client of possible actions that client might take and any deadlines within which such actions must be taken. Thus, in regard to your first three questions, the committee believes the lawyer has an ethical duty to:

- 1) Advise the client that he may have a right to file a petition for a writ of *habeas corpus*;
- 2) Advise the client of the time limit for filing a petition for a writ of *habeas corpus*; and
- 3) Advise the client how and where to file the petition for a writ of *habeas corpus*.

The resolution of the remaining issues you present trigger a tension between two competing and fundamental interests served in the Rules of Professional Conduct: an attorney's general ethical duties to protect his client's interests versus an attorney's specific duty to avoid impermissible conflicts of interest. There are limits on the nature and extent of the assistance an attorney can provide to a client whose interests may have been prejudiced by the attorney's own acts or omissions. An attorney cannot remain in a

Committee Opinion  
August 17, 2005

representation where doing so would involve an impermissible conflict of interest. Specifically, Rule 1.7(b), in pertinent part, prohibits the attorney from continuing with any representation where the lawyer's own interest may materially limit the representation unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

Until recently, this committee addressed such situations with the following inquiry: which takes precedence for the attorney - the duty to protect his client or the duty to avoid conflicts of interest? However, that dilemma has recently changed. As of July 1, 2005, new legislation in a sense resolves that quandary for the attorney in this context of the missed appeal by taking the choice out of his hands. Under new Virginia Code §§19.2-321.1 and 19.2-321.2<sup>1</sup>, when due to an attorney's error his client's appeal has never been filed or has been dismissed for failure to adhere to requisite time requirements, that attorney must cooperate with that client by preparing an affidavit to be filed with the client's motion for leave to pursue a delayed appeal. That affidavit must certify that the attorney, and not the client, is responsible for the error. *Id.* The committee concludes that this requirement significantly alters the application of Rule 1.7(b) to these situations. Specifically, the attorney no longer must wrestle with protecting himself versus protecting the client. The natural extension of this first issue, regarding what the lawyer may do to assist his client, is the latter issue raised with your hypothetical. Namely, while an attorney is permitted to provide the assistance of the sort delineated in the hypothetical, is the attorney actually *required* to do so?

Assisting the client with the logistics of the motion to accompany the required affidavit does not create the impermissible conflict of interest suggested in prior LEOs 1122 and 1558.<sup>2</sup> In LEOs 1122 and 1558, this committee addressed the potential conflict of interest when an attorney's own conduct becomes at issue in his client's case. In LEO 1122, the committee concluded that generally an attorney should not represent his own client in raising a claim of ineffective assistance of counsel as "he would have to assert a position which would expose him to personal liability." Similarly, in LEO 1558, the committee concluded that an attorney could not argue on behalf of a client that the attorney himself had improperly pressured the client into accepting a guilty plea. The committee found that the conflict between the attorney's need to pursue the interest of the

---

<sup>1</sup> Effective July 1, 2005.

<sup>2</sup> Those opinions are in line with ethics opinions in many other jurisdictions around the country finding a conflict of interest where an attorney would need to question his own conduct to defend a client. *See, e.g.*, Oregon Ethics Op. 2000-160; Pennsylvania Ethics Op. 98-42; Missouri Ethics Op. 120 (1997); Arizona Ethics Op. 96-03; California-San Diego Ethics Op. 1995-1; Nebraska Ethics Op. 90-1; Kentucky Ethics Op. 321 (1987). A reading of those opinions, as well as LEOs 1122 and 1558, reveals the nature of the conflict of interest for the attorney—that he would be torn between admitting his mistakes to protect the client and denying those mistakes to protect himself. Such a dilemma may in certain instances fail to survive an application of Rule 1.7(b); the conflict of interest would be too substantial to cure with consent. Virginia Code §§19.2-321.1 and 19.2-321.2 remove the present scenario from that result.

Committee Opinion  
August 17, 2005

client yet also protect himself meant that consent could not properly “cure” the conflict of interest. To the extent that those prior opinions are inconsistent with the assistance the lawyer is permitted, if not required, to provide under the new statute, they are overruled.

The natural extension of this first issue, regarding what the lawyer may do to assist his client, is the latter issue raised with your hypothetical. Namely, while an attorney is permitted to provide the assistance of the sort delineated in the hypothetical, is the attorney actually *required* to do so? The answer to this issue returns to those general duties highlighted at the start of the opinion: the duty to diligently pursue the objectives of the client and the duty to terminate the representation in a way that protects the client. *See* Rules 1.3 and 1.16, respectively. For an attorney to decline to assist his current client’s need to seek leave to pursue a delayed appeal would be a derogation of the original agreement with the client to defend against the criminal charges faced by the client. Similarly, for an attorney to withdraw from the representation leaving the client unadvised and unassisted with respect to the need for and availability of leave to pursue the delayed appeal, would violate that attorney’s duty under Rule 1.16(d) to take practicable steps upon termination to protect a client’s interests. The committee opines that as the new statute now lays to rest the conflict of interest concerns in the context of your hypothetical, the assistance in the outlined list must be pursued by the attorney.

Whether the attorney considers the defendant a current or a former client, that attorney must assist the defendant with his right to file for leave to pursue a delayed appeal. The precise steps required for a particular client will depend on the particular circumstances of that representation, such as whether the defendant is a current or former client, the amount of time remaining available, and the resources and sophistication of the defendant. The committee opines that the attorney in the hypothetical should not allow concerns regarding a potential conflict of interest to interfere with taking those steps warranted under Rule 1.3 and/or Rule 1.16 to assist this client.

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