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LEGAL ETHICS OPINION 1751

REFERRAL SERVICE OPERATED THROUGH LOCAL BAR AND RECEIVING A PERCENTAGE OF ATTORNEY'S FEE RATHER THAN A FLAT FEE

You have presented a hypothetical situation in which a local bar association operates a lawyer referral service. Both organizations are nonprofit. Lawyers who participate in the program pay a set fee once a year. Individuals referred to any attorney by the service pay a one-time fee which is used for expenses of the service. Recently, the referral service has operated with a deficit. Therefore, the local bar association has been re-evaluating the operation of the referral service. It is considering a "percentage fee" structure that would require participating attorneys to pay the service a specified percentage from funds collected from individuals referred to the participating attorney by the referral service.

Under the facts you have presented, you have asked the committee to opine as to whether the percentage fee system described is permissible in Virginia for a nonprofit organization. If such a system is permissible, you have asked the committee to address whether:

1. there are certain types of cases to which this structure should not be applied;
2. it is permissible to collect a percentage when the fee is a) contingent; b) flat; or c) hourly; and
3. there should be a maximum percentage or maximum dollar amount that can be collected.

The appropriate and controlling rules relative to your inquiry are:

RULE 5.4 Professional Independence Of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(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; and

(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.

RULE 7.3 Direct Contact With Prospective Clients And Recommendation Of Professional Employment

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1, as appropriate.

The central issue raised by your inquiry is whether a lawyer referral service run by a local bar association can charge participating attorneys a percentage of the funds collected by the attorneys from their clients. Analysis of this issue involves the interplay between two competing concerns addressed in Virginia's Rules of Professional Conduct: increasing the availability of legal services versus preserving the independence of legal judgement.

The first of these concerns, that of fostering the access of the public to legal services, is reflected in Comment 7 to Rule 7.3, which states:

> The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

A provision in the rules reflecting the spirit of that comment is Rule 7.3 (d). While creating a general prohibition against attorneys paying others for solicitation of clients, that provision specifically carves out an exception for "the usual and reasonable fees or dues charged by a lawyer referral service." In interpreting Rule 7.3's identical predecessor (former Disciplinary Rule 2-103), this committee has repeatedly confirmed the propriety of a lawyer referral service charging the participating attorneys a fee for receiving the referrals. *See*, LEOs 407, 738, 1348.

Competing with this principle is a second concern found in Virginia's Rules of Professional Conduct: preserving the independence of an attorney's judgement. A pertinent provision aimed at that preservation is Rule 5.4(a), which prohibits an attorney from sharing his fee with a nonlawyer, except in three enumerated instances that do not apply in the referral service context. Comment One to that rule states explicitly that the

purpose of this prohibition is to "protect the lawyer's professional independence of judgement." In line with that purpose, this committee has previously prohibited fee-splitting with nonattorneys in a number of contexts. *See, e.g.*, LEOs 1329 (prohibiting an attorney from sharing portion of fee with a title agency for document preparation), 1438 (prohibiting a firm from sharing firm profits with an advertising agency.)

The question becomes: which of these two important principles should determine the outcome of the analysis of the central issue in this inquiry; that is, should the payment by attorneys of a percentage of their legal fees to the legal referral service be viewed under Rule 7.3 (d) as a "usual and reasonable fee" of a legal referral service or as an impermissible fee-split with a nonattorney under Rule 5.4(a)? A number of other states and the ABA have considered this issue. The ABA and most of those states have concluded that a percentage fee is permissible as the usual fee of a legal referral service. *See e.g.*, ABA Formal Ethics Op. (1956), ABA Informal Ethics Op. 1076 (1968), Kentucky Ethics Op. E-288 (1984), Ohio Ethics Op. 92-1, Arkansas Bar Op. 95-01, Alabama Ethics Op. 95-08; *but see*, Illinois Ethics Op. 506 (1975). Review of that body of opinions indicates a strong support by the various bars for increasing public access to legal services. While a lawyer referral service may indeed benefit the participating attorneys as a source of potential clients, the service also provides a simple means for members of the public unfamiliar with particular attorneys to identify legal counsel suited to their needs. One court reviewing the above-described tension between support for legal referral services and preserving the independence of legal judgement noted that, "[a] bar association [operating a referral service] seeks not individual profit but the fulfillment of public and professional objectives. It has legitimate, nonprofit interest in making legal services more readily available to the public." *Emmons, Williams, Mires, and Lech v. State Bar of California*, 6 Cal. App. 3d. 565, 574 (1970). The *Emmons* court, in ruling that a percentage fee would be permissible in this context, highlighted that with a local bar association's referral service, there is "no risk of collision with the objectives of the [prohibition against] fee-splitting and lay interposition." *id.*

This committee finds the *Emmons* court's distinction between fee-splitting with a nonattorney as opposed to the fee charged by a nonprofit referral service to be a sound one. 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. Accordingly, this committee opines that the appropriate provision in the rules to apply to this lawyer referral service is Rule 7.3 rather than Rule 5.4. The language of Rule 7.3 does not prescribe the character of a referral service's fee beyond that it be "usual and reasonable." The committee sees no detail in the service outlined in this inquiry that would violate that standard. Therefore, the committee finds that the lawyer referral program of the local bar association may properly impose a percentage fee upon the participating attorneys.

Your inquiry also asks whether the use of a percentage fee would be inappropriate in particular kinds of cases, based on types of case or types of attorney/client fee arrangement. Resolution of that question should be based on the standard set by Rule 7.3 that the referral service's fee be "usual and reasonable." Without more detail, it is hard for this committee to make the factual determination entailed in applying that standard. However, this committee does opine that for any such fee to meet that standard, the attorneys must not pass on the service's fee to the clients as an addition to their usual fee in a sum that would exceed a reasonable fee charged to any client as such a practice would violate Rule 1.5(a)'s general requirement that all legal fees be reasonable.

Your inquiry also asks whether there are any other parameters, such as a maximum permissible percentage, that may be charged. As for a maximum percentage, Rule 7.3 provides no such bright line limit; the reasonableness of the fee charged would have to be determined on a totality of circumstances not available to this committee. The committee does note that a fee structure that covers no more than the expenses of administration of the service would likely be within the "reasonable" standard. As for other parameters, the committee declines to address parameters not specifically described in the inquiry.

To the limited extent that this opinion conflicts with LEO 1348, that opinion is, in pertinent part, superseded.

Committee Opinion
May 7, 2001

LEGAL ETHICS OPINION 1753

COLLECTIONS BY ATTORNEY: ADVISING DEBTOR THAT NONPAYMENT WILL RESULT IN ATTORNEY ADVISING CLIENT TO PURSUE CRIMINAL PROSECUTION

You have presented a hypothetical situation concerning language in correspondence between attorneys for the parties in a breach of contract action. The plaintiff had paid $4,000 to the defendant contractor for commercial refrigerator installation. The defendant's attorney advised the court that there was no viable defense to the breach of contract claim and stated that the account for the $4,000 now only contained a few hundred dollars. The plaintiff's attorney subsequently wrote the defendant's attorney regarding that account. In that letter, the plaintiff's attorney noted that, as only $1125 of the $4,000 had been spent on equipment, he assumes the defendant illegally diverted the remainder. The letter states that the plaintiff's attorney plans to advise his client to file criminal charges against the defendant for that diversion and that repayment of the diverted funds will not stop that course of action.

Under the facts you have presented, you have asked the committee to opine as to whether the provision in the plaintiff's attorney's letter regarding criminal charges constitutes an improper threat. You also ask whether, if that particular provision is not improper, would it then be proper for you to include in a form letter, to be sent to debtors who write bad checks to your clients, a provision indicating that you would advise your client at some future date that the client should institute criminal proceedings for larceny and that repayment will not cease that pursuit once initiated.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 3.4 (h), which states as follows: "A lawyer shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter."

The committee notes that Comment 5 to Rule 3.4(h) expressly allows a lawyer to advise his client of "the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution." Thus, the plaintiff's

attorney in this hypothetical may advise his client of his right to pursue criminal charges against the defendant without triggering the prohibition of Rule 3.4(h). However, in the hypothetical, the plaintiff's attorney does not merely advise his client of his rights; he also communicates to the defendant's attorney the intent to provide that advice. That communication warrants close scrutiny regarding whether it constitutes an improper threat as contemplated by Rule 3.4(h).

This committee has rendered several opinions establishing that it is improper, under 3.4(h)'s similar predecessor DR 7-104, for an attorney to allude to criminal prosecution in a letter to a debtor of the lawyer's client solely to obtain an advantage in the civil suit. *See* LEOs 715, 716, 1388, and 1569. The most recent review of that provision occurred in LEO 1582. In the hypothetical presented in that opinion, a part-time commonwealth's attorney wrote a letter to his civil client's sister regarding concerns about the mother's finances. In that letter, the attorney stated that if the sister does not take certain steps, the attorney "will have no choice but to seek assistance through legal enforcement and legal avenues." LEO 1582. In considering whether such a letter in that context violated the improper threat prohibition, the committee developed a two-part test for that analysis: "(1) is the letter a threat; and (2) if so, is the threat solely to obtain an advantage in a civil matter." *Id*.

While the test presented in LEO 1582 involved an application of DR 7-104, the newer Rule 3.4(h) is substantially similar enough to DR 7-104 that the committee opines that the test continues to be appropriate. In applying the two-part test to the present hypothetical, the committee does consider the communication to include a threat. Specifically, the provision informing the defendant's attorney of the plan to advise the plaintiff to pursue criminal charges does operate as a threat to present criminal charges. The harder part of the test to apply is the second part: was the threat made solely to obtain an advantage in a civil matter. Determination of whether a threat is made "solely" for that reason becomes a matter of determining the subjective motive on a factual case-by-case basis. LEO 1388. In LEO 1582, the hypothetical contained information that, despite the letter threatening criminal prosecution, the attorney had in fact stated elsewhere that he had no intention of ever pursuing a criminal complaint. Based on that information, the committee believed that the purpose of the reference to legal action by the commonwealth's attorney was to intimidate the sister into taking the actions requested by the attorney. Thus, the committee opined that the sole purpose of the threat was to obtain an advantage in a civil matter and, therefore, that the letter violated the prohibition. In contrast, in the present hypothetical the letter states that even if the defendant takes remedial action, the criminal prosecution will not cease. On its face, the language does not seem to be an attempt to affect the conduct of the defendant or to change the outcome of the breach of contract suit. Rather, it seems to be a giving of notice of the criminal prosecution. Unlike in LEO 1582, no other information is provided regarding motive to contradict the plain language of the letter: that regardless of any action taken by the defendant, the plaintiff's attorney was advising a course of criminal prosecution. As no advantage is sought in the breach of contract claim, the "threat" provision of this letter does not alone seem to constitute a Rule 3.4(h) violation. Absent some other information regarding the plaintiff's attorney's motive, the letter is not improper.[1]

Your request asks whether, if such language is found to be proper, could you insert similar language in a form letter you use for transmittal to people who write bad checks to your clients. Returning to the two-part test from LEO 1582, the committee does find that such use of a form letter in that context would constitute a "threat" of criminal prosecution. As for whether that threat would be made solely for the purpose of obtaining an advantage in a civil matter, your request provides no information as to whether you would indeed pursue criminal prosecution in each instance. Accordingly, the committee cannot make that determination from the information provided. Certainly, if you were to send such a letter with no intention of pursuing criminal charges and with the hope of encouraging payment for the bad check, then the letter would not be permissible.

Committee Opinion
May 17, 2001

1 The committee also observes that since the defendant's attorney advised the court that there was no viable defense to the breach of contract claim, the letter was not necessary to obtain an advantage in any event.

LEGAL ETHICS OPINION 1754

ATTORNEY AND LIFE INSURANCE AGENT SHARING COMMISSION GENERATED BY PURCHASE OF SURVIVORSHIP POLICY TO FUND CLIENT'S IRREVOCABLE LIFE INSURANCE TRUST

You have presented a hypothetical situation in which Attorney's practice is principally in the area of estate planning. Attorney also holds a life and health insurance license and is an agent for Insurance Company. When Attorney recommends that Client establish an irrevocable life insurance trust, Attorney also discloses that he is a licensed insurance agent and recommends that Attorney, Client and Insurance Agent (an employee of Insurance Company) collaborate to design a comprehensive insurance plan for client. Attorney advises client that Attorney will receive one-half of the commission on the survivorship policy used to fund the trust. After disclosure, Client approves placement of the insurance policy with Attorney and Insurance Agent. Upon issuance of the policy, Insurance Company issues a check to Attorney and a check to Insurance Agent for their shares of the insurance commission.

Under the facts you have presented, you have asked the committee to opine as to whether it is ethical for Attorney and Insurance Agent to share the commission generated by the purchase of a survivorship policy to fund Client's irrevocable life insurance trust.

The appropriate and controlling disciplinary rules relative to your inquiry are:

RULE 1.7 Conflict of Interest: General Rule

(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 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

This committee has opined in the past that an attorney may receive reasonable compensation from a title insurance agency in the form of legitimate fees based upon the attorney's having rendered services for the agency. *See* LEO 1564. This situation seems comparable in that the attorney is rendering a separate service to the client in the design of a comprehensive insurance plan. Since the basis of that payment is not related to legal services but based on premiums paid for specific insurance policies the committee believes this is not *per se* improper.

The underlying question deals with the attorney's legal practice and insurance agent status and the conflict that is created when providing legal advice to a client, as well as services as an insurance agent. Rule 1.7(b) seems to allow the lawyer to provide the representation to the client as long as it is not limited by the lawyer's own interests of promoting his insurance business. Comment [4] to Rule 1.7(b) seems particularly helpful in outlining that the loyalty to a client is impaired when a lawyer fails to consider or recommend an appropriate course of action for a client because of the lawyer's own interests. That sort of conflict in effect forecloses other alternatives that would be available to the client.

To avoid such a conflict in the present situation, the committee cautions that during the course of representing a party in estate planning where insurance related products are obtained from the attorney and insurance agent, it would be improper for the attorney to engage in the representation without full and adequate disclosure to the client. Comment [6] in Rule 1.7 specifically addresses the issues that a lawyer may not allow his business interests to affect his representation of a client. The lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest.

Furthermore, since the transaction will create a business relationship between the attorney and the client, Rule 1.8(a) requires that the transaction must be fair and reasonable and the terms fully disclosed to the client, in writing. In addition, the client must be given a reasonable opportunity to seek advice of independent counsel and consent in writing to the transaction. The written requirements of Rule 1.8(a) dictate that adequate disclosure and consent must be secured, since this committee has opined in the past that the sufficiency of the disclosure must be resolved in favor of the client, and against the attorney, since it is the attorney who seeks to profit in advising his client to utilize the services of the business in which the attorney has a pecuniary interest. *See* LEO 1564.

In conclusion, the committee opines that the attorney in your request may participate in the compensation arrangement so long as the dictates of Rules 1.7 and 1.8 are followed. The committee notes that the conclusions in this opinion are in line with those of a number of other jurisdictions. *See*, DC Op. No. 305 and the authorities cited therein.

Committee Opinion
May 17, 2001

LEGAL ETHICS OPINION 1755
THREATENING CRIMINAL ACTION IN A CIVIL MATTER; CONTACT BETWEEN OPPOSING PARTIES

You have presented a hypothetical situation in which Owner entered into a contract with Contractor, who employed Subcontractor F. Litigation ensued between Owner, Contractor and subcontractors on issues of breach of contract, fraud claims at law and mechanic's liens actions in equity. In one lawsuit, a mechanic's lien was filed in the name of Subcontractor F against Owner, who settled the mechanic's lien suit and was subrogated in whole or part to Subcontractor F's claim for the payment against Contractor. Subsequently, a suit was filed in Subcontractor F's name against Contractor ("the suit"). Owner's lawyer is counsel of record for Subcontractor F. After becoming aware of the suit, but prior to service of process, Contractor contacted Subcontractor F to discuss a possible monetary settlement of the suit. Thereafter, counsel of record for Subcontractor F wrote a letter to Contractor's lawyer, stating: "I just learned that after Monday's hearing [in another case not related to the suit] Contractor contacted F and requested that F or F's counsel in the mechanic's lien action call Contractor's lawyer 'to work something out.' **If these *ex parte* communications continue and if Contractor/Contractor's lawyer are attempting to bribe F or influence his action against Contractor or his testimony in any way, we will take the matter up with Judge and the Commonwealth's Attorney.** Contractor/Contractor's lawyer are to have no further communications with F. Any and all communications regarding the F action should be directed to me."

Under the facts you have presented, you have asked the committee to opine as to whether the portion of the attorney's letter highlighted herein constitutes a threat of criminal or disciplinary charges solely to obtain an advantage in a civil matter.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 3.4(h), which states that a lawyer "shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter," and Rule 4.2, which directs a lawyer not to "communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The committee has previously opined that, under Rule 3.4(h), a lawyer should not allude to criminal prosecution in correspondence to an opposing party or their attorney if the allusion is made solely to obtain an advantage in a civil matter. *See*, LEOs 715, 716, 1388, 1569, 1582, and 1753. The committee has developed a two-part test for analyzing communications regarding Rule 3.4(h)'s prohibition: is the communication a threat and, if so, was the threat made solely to obtain an advantage in a civil matter.

In applying this two-part test to the letter sent in the present hypothetical, the first prong of the test is clearly established. The provision in the subcontractor's letter presents a definite threat of criminal prosecution. The thornier question in this instance is whether that threat was made solely to obtain an advantage in a civil matter. The letter does not make the usual demand for payment/settlement by threatening prosecution; rather, the letter seeks to stop the opposing party and/or his attorney from contacting the subcontractor directly. The letter demands that all contact be made with the attorney himself. Instructive in the present instance is LEO 1063, in which an attorney sends a letter to a "stalker" of his client demanding that the "stalking" cease or else criminal and civil actions would be pursued. The committee in LEO 1063 opined that while a threat had been made, that threat was not *solely* made to obtain an advantage in a civil matter but in whole, or at least in part, to stop the harassing actions of the stalker. Accordingly, the committee opined that the attorney's letter was proper, stating that "when it appears that a letter was sent to stop a certain action rather than to gain an advantage in a civil matter, there is no violation." The attorney in the present hypothetical would seem, from the face of this letter, at least in part, to be trying to stop the opposing party from contacting his own client directly. Thus, under the reasoning of LEO 1063, as this letter is meant to stop a certain action (i.e., contact), then there would seem to be no violation of Rule 3.4(h).

The committee does note that in LEO 1063, the conduct that the lawyer sought to extinguish was clearly prohibited by law. In the present hypothetical, the conduct is contact by one party with the opposing party. Rule 4.2 does prohibit a party's lawyer from contacting the opposing party if represented by counsel (absent that counsel's consent); nonetheless, Comment One to that rule expressly provides that "parties to a matter may communicate directly with each other." The committee notes that Comment One should be reviewed in tandem with the prohibition in Rule 8.4(a) against violating a rule through the acts of others. Thus, while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party. In the present hypothetical, the content of the contact by the contractor was that the subcontractor or its counsel should contact the contractor's lawyer to reach a settlement. Further information is not available as to whether the contractor's lawyer was behind this conversation. The subcontractor's lawyer, from the face of his letter, appears concerned that the contractor's lawyer did direct this contact. It is further contact of this sort that the letter seeks to prevent. Applying the analysis from LEO 1063 to this hypothetical, the committee opines that on its face, the letter seeks to prevent further contact with his client and is therefore not solely for the purpose of obtaining an advantage in the civil matter. Thus, under the two-prong test, this letter does not by itself violate Rule 3.4(h). The committee's opinion on this point rests on an absence of any further information regarding the motive of the subcontractor's attorney.

Committee Opinion
May 7, 2001

LEGAL ETHICS OPINION 1757

CONFLICTS: PROVISION OF CLIENT LIST FROM LEGAL AID OFFICE TO ANOTHER LEGAL AID OFFICE WHEN ATTORNEYS CHANGE OFFICES

You have presented a hypothetical situation in which Legal Aid Society A employed attorneys W, X, Y and Z and served a seven-county area. Legal Aid Society B served an adjoining six-county area. Funding has been diverted to Legal Aid Society B to allow them to also provide services to the seven-county area served by Legal Aid Society A. While employed at Legal Aid Society A, attorneys Y and Z managed the intake system and thereby gave advice to or approved the advice given to thousands of low income people. Subsequently, attorneys X, Y and Z become employees of Legal Aid Society B, providing services to individuals in the seven-county area.

Under the facts you have presented, you have asked the committee to opine as to whether Legal Aid Society A must provide confidential client information to Legal Aid Society B to assist Legal Aid Society B in avoiding conflicts of interest. Also, if Legal Aid Society A must provide the client information to Legal Aid Society B, you ask whether Legal Aid Society A must specifically provide: a) client name; b) client address; c) client social security number; d) client date of birth; e) date of initial client contact; f) date case was closed; g) type of case; and h) disposition of case; and whether information provided must be on paper or can be an electronic data base of client records.

The appropriate and controlling disciplinary rules relative to your inquiry are:

RULE 1.3 Diligence

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

RULE 1.16 Declining or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

The underlying relevant issue deals with the core value of protecting client interests. When a lawyer ceases to practice at a law firm, both the departing lawyer and the members of the firm who remain have ethical responsibilities to clients. The two main responsibilities deal with maintaining and protecting client confidentiality and avoiding conflicts of interest in their new affiliation.

This committee is of the opinion that the possession of confidential information gained in either the representation of or the intake process of the thousands of low income clients is imputed to attorneys X, Y or Z, based upon their having reviewed intake files, and having either personally imparted legal advice or approved the legal advice given. This committee has previously opined that it is irrelevant whether or not the attorneys actually remember such information; the information is imputed to them and was dispensed by the client with an expectation of confidentiality. Furthermore, it is irrelevant whether or not an attorney-client relationship ensued. When a person imparts information to a lawyer or law firm with the possibility of employing them, this creates an expectation of confidentiality and that information is therefore protected under Rule 1.6. This confidential information is important in the present instance in that it must be considered by attorneys X, Y and Z for client protection when evaluating subsequent conflicts. *See* LEOs 1146, 1453, and 1546.

As to Legal Aid Society A disclosing such information to attorneys X, Y and Z, this committee has previously opined that if access to office and files of clients was being denied, this may indeed be a violation of DR 2-108(D) (now Rule 1.16(d)) if a finder of fact were to determine that the intention was to preclude access to client files or information by the withdrawing attorney. *See* LEO 1506. Since the information is already imputed to attorneys X, Y and Z, and they are now in Legal Aid Society B, Legal Aid Society A may properly provide attorneys X, Y and Z with confidential information sufficient to enable attorneys X,

Y, and Z to perform conflicts checks. It is only through the sharing of the actual information by Legal Aid Society A to attorneys X, Y and Z that client interests and confidences can, through conflicts avoidance, ultimately be protected.

The question of the form in which such information should be provided is one of convenience and should be resolved between Legal Aid Society A and Legal Aid Society B based upon the easiest transmission of this information and protection of the ultimate core value of clients' interests.

Committee Opinion
May 17, 2001