LEGAL ETHICS OPINION 1786

DISCLOSURE AND USE OF CONFIDENTIAL DOCUMENTS OBTAINED BY A CLIENT WITHOUT AUTHORIZATION

You have presented hypothetical scenarios, each involving one attorney receiving documents regarding the opposing party. In each situation, you question whether the attorney must return the documents and whether he can read and use the information contained in the documents. Of the ten scenarios you present, one involves the conduct of government attorneys. Discussion of that scenario will occur at the end of this opinion. The other nine scenarios in your request involve legal disputes in the area of employment law with the lawyer representing an employee (or former employee) in receipt of documents. Based on the facts presented, the committee opines as follows.

The fundamental issue running through all the scenarios and questions in this request is what are the proper parameters of the general duty of confidentiality established in Rule 1.6. Rule 1.6 states as follows:

(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).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

Paragraph (b)(1) of Rule 1.6 is especially critical for resolution of the issues raised in this request. Where "law or a court order" requires an attorney to disclose confidential information, paragraph (b)(1) of Rule 1.6 permits the attorney to make the requisite disclosure. While the other law contemplated in Rule 1.6 (b)(1) could in many instances be legal authority other than the Rules of Professional Conduct, paragraph (b)(1) of Rule 1.6's reference to other law is not limited to law *outside* the Rules of Professional Conduct, but could also involve application of other provisions within the Rules. Particularly noteworthy in the present situation will be Rules 3.4(a) and 4.4. Rule 3.4(a) provides as follows:

A lawyer shall notobstruct another party's access to evidence or alter, destroy, or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to such act.

Similarly, Rule 4.4 directs, in pertinent part, that in representing a client, an attorney must not "use methods of obtaining evidence that violate the legal rights of a third person."

The deliberations required in each instance for this attorney must focus on discerning when the duty of confidentiality applies and when the attorney is within one of the exceptions outlined in the rule. The attorney must consider both confidences (i.e., information protected by the attorney/client privilege) and secrets (i.e., information the client has asked to be kept inviolate or that may embarrass or be detrimental to the

client) in deciding whether the situation presents an exception to the duty of confidentiality.

The balance between the general duty of confidentiality protection and other competing duties of disclosure will be the basis for resolution of many of the questions asked in this request.

1. An employee comes to the lawyer for representation in a whistleblower situation. The employee provides the attorney with documents from the employer that the employee considers to be confidential. The employee had legitimate access to the documents, but had not sought the employer's permission to remove the documents. The lawyer's review of the documents establishes that they contain no information protected by the attorney-client privilege or any other privilege recognized in Virginia. The only sense in which the documents are confidential is that the employer does not wish anyone outside the company to know of the contents of the documents. Were litigation pending, the documents would be subject to discovery. However, at this time, neither party has filed a lawsuit.

a. What are the attorney's obligations regarding the documents: must he notify the employer, must he return the documents, and may he use the information?

LEO 1702 addressed an attorney's receipt of attorney/client documents from the opposing counsel's file from an unauthorized source. However, the present hypothetical differs in two ways: the materials do not include attorney/client communications and the attorney received them not from some unauthorized source, but from his client. The principles established in LEO 1702 are, therefore, not dispositive in the present scenario.

While the materials in question do not contain attorney/client communications, the client does describe them to his attorney as "confidential". The facts of the hypothetical do not provide further detail as to the nature of the materials. The attorney in the present instance is in possession of someone else's property, though the facts do not suggest that the client actually *stole* the documents. In deciding whether he can keep confidential his receipt of the documents, the attorney needs to consider the application of Rule 1.6 and its exceptions. Rule 1.6(b)(1) would allow return of the documents where needed to comply with "law or a court order." Thus, the answer for this attorney would depend very much on the type of documents he received. The hypothetical facts presented do not provide sufficient detail for a dispositive application of paragraph (b)(1) of Rule 1.6. There could be any number of document types that may bring in other law. For example, if the documents were medical records, the attorney may need to look to the Health Insurance and Portability Accountability Act (HIPAA)[1], as medical records and those who receive them are carefully regulated. The application of Rule 1.6(b)(1) would rely both on the nature of the documents and whether any pertinent law attaches.[2]

Whether the general confidentiality duty the attorney owes his client must give way to applicable "law or court order," including Rules 3.4 and 4.4 will determine whether the attorney must notify the opposing party of the receipt of the documents and whether he must return them.

Whether he can use the information will depend on the nature of the documents, the nature of the source of the information, the method used by the client to gather the information, and finally, whether the attorney directed the client to do so. The limited facts provided prevent the committee from opining on the issue other than to reiterate that the attorney can only use such information if doing so would not violate Rule 3.4(a) and Rule 4.4. The committee notes that Rule 8.4(a) precludes an attorney from violating the Rules of Professional Conduct "through the acts of another." Thus, the attorney should not direct the client to obtain evidence via a method the attorney himself is ethically prohibited from using.[3]

b. Would the answer change if the client brings the documents to the lawyer after the start of litigation?

The analysis provided in part "a" of this question still pertains. In addition, the attorney must confirm that his receipt of the materials would not violate a rule of court or a court order regarding discovery. The attorney may not keep quiet about the receipt of the materials if "law or court order" would require him to disclose its receipt.[4]

The committee notes one particular fact of importance in the hypothetical presented. The hypothetical describes the particular legal matter as involving the employee/client serving as a whistleblower. No further information identifies whether a particular whistleblower statue applies and, if so, which one. However, while the committee cannot definitively resolve the impact of a whistleblower statute given the limited facts provided, the committee does note that whistleblower statutes usually provide some sort of confidentiality period for the information in question. For example, the False Claims Act places a duty on the part of the lawyer and the plaintiff that the original suit be filed under seal.[5] During a specified period, the plaintiff and attorney must keep the information confidential, including from the defendant.[6] If this attorney determines that compliance with any such whistleblower statute precludes him from informing the opposing party during a specified time period. Rules 3.4(a) and 4.4 would not require the attorney to breach that legal duty.

2. The client in the above scenario does not provide the attorney any documents but does tell the attorney about information the client learned from documents prepared or read legitimately as part of his employment.

FOOTNOTES

1 42 U.S.C. §1301 *et seq. See also Virginia Code §32.1-127.1:03* for the related Virginia provision.

2 There are other exceptions to Rule 1.6, but they are not suggested by this scenario and its corresponding question.

3 *See, e.g.*, LEO 1738 and LE0 1765 (discussing evidence-gathering techniques such as tape-recording).

4 There are other exceptions to Rule 1.6, but they are not suggested by this scenario and its corresponding question.

5 *See* 31 U.S.C. §§3729-33.

6 *Id.*

a. May the attorney use the information in preparation for litigation against the employer, e.g., in preparing discovery requests?

The analysis developed in response to Question 1, above, is pertinent to the present question. This question is particularly related to the conclusion in Question 1 regarding the use of the information learned from reading the documents. Here, the client rather than the lawyer reads the materials, and the lawyer never reviews or takes possessions of the documents. The analysis remains the same; the attorney may use the information so long as doing so does not violate Rules 3.4(a) or 4.4. The scenario lacks sufficient detail for that determination.

b. Must he notify the opposing counsel of the receipt of the information?

Assuming the client does not wish the attorney to provide that information to the employer, the attorney should keep the client's conversation confidential pursuant to Rule 1.6, unless circumstances exist that bring the situation within one of the exceptions listed in the rule.

3. The scenario remains the same as in Question 1, above, except now the client is a former employee rather than a current employee.

The question raised is whether this change in employment status of the client alters the answers to the questions addressed above. The analysis outlined in Questions 1 and 2 would remain. However, termination of the employment may go to the application of Rule 1.6(b)(1), Rule 3.4(a), or Rule 4.4, depending on, as before, the nature of the documents, how they were procured, and whether any other law applies. To reiterate, the committee lacks sufficient information to answer this question beyond a general recitation of applicable provisions in the Rules.

4. In a whistleblower situation, the employee client presents to the attorney documents the client lawfully obtained from the employer that are subject to either the attorney/client privilege or the work product doctrine. No lawsuit is pending.

a. May the attorney review and use the documents in preparing his client's case, such as for developing discovery requests and must he notify the other side and/or return the documents?

This scenario is somewhat ambiguous. The committee interprets the facts to mean that the client properly had the documents as part of his employment, the documents contained communications between the employer and its attorney, and the employer did not authorize the client to provide the documents to the client's attorney. As discussed earlier, prior LEO 1702 dealt with attorney/client materials purposefully provided by an unauthorized source. Here, unlike in the earlier questions, the materials *do* include attorney/client communications. The committee opines that the conclusions drawn in LEO 1702 address the present attorney's conduct.[7] LEO 1702 presents a general procedure for an attorney who receives an unauthorized transmission of materials containing attorney/ client communications from the opposing side: he should notify the opposing counsel, return the materials, and follow that counsel's instructions, with any dispute to be settled by a court.

LEO 1702 does allow that there may be worthy exceptions to that procedure. One example given is where someone took the documents within the protection of a whistleblower statute. The committee reiterates that where an applicable whistleblower statute requires confidentiality during a preliminary stage, the attorney may properly refrain from notifying the opposing attorney during that period.[8]

The committee sees an additional "exceptional" situation to the general LEO 1702 procedure in the earlier LEO 1688. That opinion concludes that an attorney should not disclose to the client's former employer that the attorney had received a document copied without authority, but not stolen, which contained attorney/client communications because the attorney received the document from the *client* (as opposed to the unauthorized source in LEO 1702). The client had asked the attorney to keep receipt of the document confidential; the attorney permissibly maintained that confidentiality under Rule 1.6. Thus, the client as source of the document could in some instances qualify as an appropriate exception to the LEO 1702 procedures. However, that exception is not necessarily appropriate here. In LEO 1688, the documents in question were copies of originals still in the employer's possession so the employer was deprived of neither the information nor the documents. Accordingly, if the documents in the present scenario were copies, the fact that the source of the documents is the client distinguishes this scenario from that of LEO 1702 such that this attorney may permissibly refrain from notifying the employer about the documents. However, if the documents in the present scenario were originals, the exception suggested by LEO 1688 for client-provided documents to the usual LEO 1702 procedure would not be appropriate. The scenario as presented lacks sufficient detail for a determination on this point.

b. Would the answers to parts "a" and "b" of this question change if the client provided the documents after the start of litigation?

The possible significance of the start of litigation may include more from clearly defined parties and formal discovery. In the analysis for part "a" of this question, the committee treated the employer as the opposing party. A potential whistleblower action is the subject matter of the representation; nothing in the conclusions regarding part "a" in this fourth scenario requires the actual filing of a lawsuit to trigger the protection of an adverse party's confidentiality. As for the existence of formal discovery, in complying with the LEO 1702 procedure, including the possible exceptions to that procedure outlined above, the attorney should, of course, comply with applicable rules of court or court orders regarding discovery. However, the exact balance of normal discovery provisions with the confidentiality provisions of most whistleblower statutes is outside the purview of this committee.[9]

FOOTNOTE

7 LEO 1702 relies in part on ABA Formal Opinions 92-368 and 94-382. Since issuing those opinions, the ABA has revised Model Rule 4.4 to include express language requiring only notice to the other attorney when the attorney/client materials are inadvertently transmitted. Virginia has not made a corresponding change to its Rules of Professional Conduct; the analysis in LEO 1702 remains the pertinent authority on this issue in Virginia.

FOOTNOTES

8 See discussion of this issue under Question 1, above.

9 See discussion of Rule 1.6(b)(1) earlier in this opinion.

c. Do the answers to parts "a" and "b" change if the materials are not subject to the attorney/client privilege but are instead subject to an order prohibiting their discovery or otherwise limiting their use?

LEO 1702's conclusions expressly rest on the importance of the ethical principle of the confidentiality of attorney/client communications. If the documents do not contain materials subject to the attorney/client privilege or the work product doctrine, LEO 1702 is not applicable. Therefore, the appropriate analysis is, as presented earlier regarding Question 1, that the attorney's use of and obligations regarding these materials are governed by Rules 1.6, 3.4(a), and 4.4. The presence of a court order regarding disclosure of the materials is the sort of pertinent factor the attorney must consider in applying those rules to the present fact pattern. However, the presented hypothetical does not provide sufficient facts for the committee to make that determination.

d. When this attorney receives the materials from his client, do the markings on the document dictate whether the attorney must treat them as privileged, or in some other way confidential?

The kinds of markings on a document as well as other features of its appearance involve facts not before the committee in any of the provided scenarios. However, the committee notes that an attorney receiving documents triggering the sort of concerns raised in this request will have to determine the character both of the documents and their transmission. Such determinations will combine both relevant facts and pertinent law, as discussed throughout this opinion.

5. A client comes to the attorney with documents that expose wrongdoing on the part of his employer. Specifically, the documents expose that the employer has been defrauding the government and would form the basis of an action under the False Claims Act. The company wants to keep those documents confidential to avoid criminal or civil liability for its wrongdoing. The client did have authorized access to the documents as part of his employment.

a. Can the attorney review the documents and use the information he learns from them?

The committee assumes that these materials do not contain information subject to the attorney/client privilege or the work product doctrine, as that was the subject matter of Question 4. Therefore, the attorney may review the documents and make use of the information so long as doing so would not violate Rule 4.4. In particular, that rule prohibits acquiring evidence in a manner that "violates the legal rights of others." The scenario does not provide sufficient facts for the committee to make that determination, but if the client and attorney's handling of the documents is in compliance with the False Claims Act, that would be a factor in the determination.[10]

b. Must the attorney notify the other attorney that he has the materials and must he return them?

As in Question 4 "c", the notification and document return duties outlined in LEO 1702 are inapplicable here as the materials do not contain information subject to the attorney/client privilege or the work product doctrine. Therefore, the attorney may refrain from informing the employer about the receipt of these documents (and from returning them), so long as that silence does not violate Rule 3.4(a), which prohibits a lawyer from concealing evidence with the "purpose of obstructing a party's access to evidence." As discussed with Question 1, part "b", compliance with the False Claims Act would be consistent with Rule 1.6 and not in violation of Rule 3.4(a). The committee notes that other jurisdictions have typically only found violations of that rules' provision in situations involving actual discovery violations or fraud.[11]

c. Would the answers to parts "a" and "b" of this question change if the employee provided the materials to the attorney after the start of litigation?

That the lawyer had already filed the lawsuit would be a pertinent fact in the analysis, but the foundation of that analysis would remain as outlined above. Comment 2 to Rule 3.4(a) discusses the applicability of that provision to a "pending proceeding or one whose commencement can be foreseen."

d. Would the answers to parts "a" and "b" of this question change if the employee took the materials without authorization?

As the term "without authorization" could apply to a range of conduct (such as merely photocopying documents without express consent to stealing the original documents), the committee can not provide a definitive answer to this question. However, the committee notes that the method of acquisition would be crucial in the application of Rule 4.4 discussed in part "a" of this question.

e. What if the attorney's failure to disclose the documents served to cover up the employer's illegal conduct and exposed the attorney to a charge of obstruction of justice?

Rule 8.4(b) deems it professional misconduct for a lawyer to commit a crime that reflects adversely on his honesty, trustworthiness or fitness to practice law. Whether the attorney's failure to disclose the documents constitutes "obstruction of justice" is a question of criminal law outside the purview of this committee. However, the committee notes that if failure to disclose the information would in some particular instance constitute a crime, the attorney's disclosure would be permissible under Rule 1.6(b)(1).

f. Does the requirement of the False Claims Act that requires that the plaintiff and plaintiff's counsel to refrain from notifying a defendant company of a lawsuit until the Department of Justice has had an opportunity to review the case override any possible ethical requirement for a lawyer to notify the employer about receipt of the documents?

FOOTNOTE

10 Also see the discussion of this issue in the analysis provided with the first three questions of this opinion.

FOOTNOTE

11 *See e.g., Florida Bar v. Burkich*, 659 So. 2d 1082 (Fla. 1995); *Mississippi Bar v. Land*, 653 So.2d 899 (Miss. 1993); *In re Herkenhoff*, (866 P.2d 350 (N.M. 1993); *In re Walker*, 828 F.Supp. 594 (C.D. Ill. 1992) (all involving discovery violations), and *see also*, 810 P.2d 1237 (N.M. 1991); Vermont Ethics Op. 89-2 (both involving fraud).

The discussion provided regarding part "b" above addresses this question.

6. The client comes to the attorney with documents that are not confidential, such as the employee's performance evaluation. The employee took the documents without the permission of the employer. The company's rule is that an employee may read his own evaluation but does not get to keep it. No litigation is pending.

a. May the attorney review the documents and use the information he learns from reading them?

As with earlier questions, this question comes down to the application of Rule 4.4 to the present scenario. While the committee cannot determine the issue conclusively on the limited facts provided, the committee notes that resolution of whether Rule 4.4 would prohibit this lawyer's use of the documents and the information depends on whether the documents are originals or copies, whether any litigation is foreseen, how the employee acquired the materials, and their relevancy to the potential litigation.

b. Must the attorney notify the employer and return the document?

As with similar questions above, this question comes down to the application of Rules 1.6(b)(1) and 3.4(a), regarding improper concealment of evidence. From the limited facts provided, this committee is not in a position to determine whether the materials constitute evidence. Also, even if the committee were to assume that the documents were evidence, it would be outside the purview of this committee to determine whether the materials were obtained in a manner that violates the legal rights of another (i.e., the employer).[12]

c. Would the answers to parts "a" and "b" of this question change if the client provided the materials to the lawyer after the start of litigation?

In resolving those questions, any attorney receiving the items after the start of litigation would need to consider applicable rules of court and discovery orders in making the determinations outlined with respect to the documents.

7. A client tells the lawyer about information the client learned by reading the documents of a co-worker. The client did not have the employer's permission to review the documents. The information does not concern materials subject to either the attorney/client privilege or the work product doctrine.

a. May the attorney use the information provided?

The analysis here is equivalent to that in the documents questions earlier; use of information would be permissible so long as Rule 4.4 is not violated by that attorney's use.

FOOTNOTE

12 Of course, Rule 4.4 only prohibits conduct of the attorney, not the client; however, as noted earlier in the discussion, Rule 8.4(a) prohibits an attorney from violating an ethical rule via the conduct of another.

b. Must the attorney notify the employer of the employee's review of the documents?

Normally, information a client tells a lawyer during the course of the representation would come under the protection of the general duty of confidentiality. Therefore, this attorney should not disclose the information unless his situation comes within one of the exceptions to Rule 1.6, such as paragraph (b)(1), discussed throughout this opinion. The scenario lacks sufficient detail for the committee to make a final determination of this issue.

c. Would the answers to parts "a" and "b" change if the client provided the information to the attorney after the start of litigation?

Again, this committee lacks sufficient information to draw a conclusion on the issue; however, rules of court and court orders regarding discovery may apply differently to the analysis of this scenario involving an attorney/client conversation than in the prior scenarios involving documents.

d. Would the answers to parts "a" and "b" change if the client reviewed a co-worker's document that contained communications between the employer and its attorney and told that confidential information to the client's attorney?

LEO 1702, as discussed above, directs procedures for the unauthorized receipt of documents containing information subject to the attorney/client privilege or the work product doctrine of an adverse party. The basic principle of the importance of preserving attorney/client communications would be present here as well, yet the context is different. In LEO 1702 there are actual documents that had been in the possession of the opposing party's counsel, and are now in the possession of the other attorney. Here, the adverse party has not lost access to the documents or the information. Regarding the attorney's use of this oral information, the committee finds analogous to this scenario the situation in LEO 1749. In that opinion, the committee opined that while a lawyer may interview a former employee of an adverse party, that interview should not include questions about communications between the employer and its attorney. Similarly, in the present scenario, when the attorney learns that his client has read a document containing attorney/client communications of its employer (the adverse party), the attorney should direct the client not to share the information with the lawyer, explaining that his ethical responsibilities include refraining from soliciting such information.

Regarding a duty to notify the employer or its counsel of the situation, this attorney can protect his own client's confidentiality and not inform the employer of the client's conversation. The requirement of notice in LEO 1702 is distinguished as inapplicable to this conversation between a client and his attorney.

8. What if the client provides the attorney with documents that are not confidential and would be unquestionably subject to discovery were litigation to ensue, yet the client did take the documents without authorization?

As discussed in Question 5, part "d", because the term "without authorization" could apply to a range of conduct

(such as merely photocopying documents without express consent to stealing the original documents), the committee cannot provide a definitive answer to this question. However, the committee again notes that the method of acquisition would be crucial in the application of Rule 3.4(a) discussed in part "b" of Question 5.

9. If a client provides documents to the attorney that the client wrongfully procured, must the attorney inform the Commonwealth's Attorney?

The phrase, "wrongfully procured," lacks specificity needed for this determination. The committee assumes the question contemplates original documents stolen by the client. If the documents were not stolen, the attorney is in the situation already addressed elsewhere in this opinion. With regard to stolen documents, the attorney may well have additional legal obligations beyond the provisions in the ethics rules. Interpretation of criminal law and procedure is outside the purview of this committee. Nevertheless, the committee does suggest the attorney should be mindful of the leading case in Virginia regarding an attorney's receipt of the fruits or instrumentalities of a crime from a client, *In re Ryder*, 263 F.Supp. 360 (E.D.Va. 1967).[13] If the attorney properly determines that applicable judicial authority requires disclosure of the documents to the Commonwealth's Attorney, then the attorney may properly make the disclosure pursuant to Rule 1.6(b)(1), discussed throughout this opinion.

10. A U.S. Attorney receives documents from a government informant. The informant procured the documents from an organization without that organization's consent or knowledge. Can the attorney use the information and must he disclose to the organization that he received the documents?

Rules 3.4(a) and 4.4 as discussed throughout this opinion can operate as restrictions on an attorney's collection of information and use of the information. In applying these provisions to the U.S. Attorney in this scenario, the committee opines that the provisions do not create *per se* bans on this form of data collection. Specifically, Rule 3.4(a)'s prohibitions concerning concealment of evidence are limited in scope to those instances in which the attorney is doing so "for the purpose of obstructing a party's access to evidence." In contrast, the U.S. Attorney, where operating properly within the scope of that office, collects the documents for the purposes of law enforcement and crime prevention. Similarly, Rule 4.4's prohibition regarding improper collection of evidence precludes only those methods that violate the legal rights of another. Whether such rights are violated in a particular incidence of a federal investigation is outside the purview of this committee, as involving the interpretation of the law regarding criminal procedure and the corresponding constitutional protections. The committee can only generally conclude that where the collection of documents is part of the lawful operation of the U.S. Attorney's investigations, that attorney is ethically permitted to use the information accordingly. *See* LEO 1765.

FOOTNOTE ————————

13 This committee considers documents to be within the scope of Ryder and its progeny. See LEOs 709, 551.

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

Committee Opinion
December 10, 2004

LEGAL ETHICS OPNION 1810

CONFLICT OF INTEREST—ATTORNEY SERVING AS GUARDIAN AD LITEM WHEN OPPOSING COUNSEL IN THE DIVORCE MATTER WAS A FORMER PARTNER

You have presented a hypothetical involving a potential conflict of interest in a custody dispute. Previously, Attorney A and Attorney B were in the same firm. During that time, Attorney B represented the husband in a divorce. Attorney A did no work on the matter and learned no information about it. Attorney B left the firm, continued to represent that husband, and the divorce became final. That client and his ex-wife then had a custody dispute. Attorney B represents this father in that dispute. Originally, Attorney C represented the mother. The court appointed Attorney A as the guardian ad litem for the child. Attorney A presented to the court that he had been in a firm with Attorney B at the start of the divorce, but never worked on the case and learned no information. The mother orally waived any conflict before the judge. The judge permitted Attorney A to remain as guardian. The mother has subsequently changed attorneys, hiring Attorney D. Attorney D raises an objection to Attorney A's service as guardian as Attorney D maintains that it presents an impermissible conflict of interest.

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

1) Does Attorney A have a conflict in continuing as guardian *ad litem*?

2) Does the mother waive any potential conflict by her prior actions?

The appropriate and controlling ethical rules applicable to this scenario are Rules 1.7, 1.9 and 1.10(a), which provide 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.

Rule 1.10 (Imputed Disqualification: General Rule)

(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).

There is no express provision in the Rules of Professional Conduct addressing the unique circumstances of the role of guardian ad litem. In LEO 1729[1], this committee opined that

> Where fulfilling a specific duty of the guardian ad litem conflicts with the traditional duties required of an attorney under the Code of Professional Responsibility, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the GAL should follow the traditional course of action required under the Code of Professional Responsibility.

The committee opines that the present scenario is of the latter sort. The usual rules provisions regarding conflicts of interest do not conflict with this guardian ad litem's duties.

Resolution of this conflicts issue depends upon an application of Rules 1.7, 1.9, and 1.10(a) to Attorney A's representation (as guardian) of the child.

Attorney D charges that Attorney A has an impermissible conflict of interest in representing the child as guardian ad litem. The committee opines that Rule 1.7, when applied to Attorney A's representation, does not establish a conflict of interest. Attorney A does not represent the husband; thus, Attorney A does not have a conflict under paragraph (a) of the rule, regarding direct adversity between current clients. Also, the committee opines that Attorney A does not have a conflict of interest under paragraph (b) of the rule, regarding a lawyer's own interests. That Attorney A previously worked with Attorney B is not such a strong connection as to "materially limit" Attorney A's ability to represent the child.

Rule 1.9 also does not trigger a conflict of interest for Attorney A. That rule can only apply regarding a former client. The husband was never a client of Attorney A; therefore, Attorney A does not have a Rule 1.9 conflict of interest here.

Applying Rules 1.7 and 1.9 directly to Attorney A is not the end of the analysis for determining whether Attorney A has a conflict of interest preventing this representation. Rule 1.10 (a) imputes conflicts of interest to other members of an attorney's firm. Thus, the question becomes, does Attorney B's representation of the husband, either now or previously while with Attorney A's firm, preclude Attorney A from involvement as guardian. The two attorneys were in a firm together at the time Attorney B initiated his representation of the father in the divorce. As outlined above, Rule 1.7 precludes an attorney from representing one client directly adverse to another client in that matter. If that rule precludes any attorney in a firm from representing a particular client, Rule 1.10(a) extends that bar to every other attorney in the office. Thus, no member of Attorney B's present firm can represent anyone else in B's client's domestic matter.

While Attorneys A and B were in the same firm in the past, Attorney B left that firm. Comment 7 to Rule 1.10 explains the application of the imputation concept to a law firm where an attorney has left the firm. Comment 7 states, in pertinent part, that:

> Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with a firm.

Paragraph (b) of the rule establishes that a law firm may represent any client previously represented by a firm attorney who has left the firm so long as no attorney currently in the firm has confidential information about that representation. In applying Rule 1.10 to Attorney B's representation of this client, the imputation of conflicts of interest is limited to those attorneys in the firm together *now*. See LEO 1806. Attorney B's current representation of this father cannot trigger any conflict of interest for Attorney A as Attorney A and Attorney B are now

FOOTNOTE

1 LEO 1729 makes reference to the Code of Professional Responsibility, which were the ethics rules in effect at the time of that opinion. The change to the Rules of Professional Responsibility, effective January 1, 2000, does not change the committee's position stated in LEO 1729.

in two different firms and Attorney A did not learn any confidential information about the representation[2].

Similarly, Rule 1.9(a) could only reach Attorney A, through the imputation language of Rule 1.10(a), if some member of his current firm used to represent a party in the matter; that is not the case. Attorney A would also not have a conflict of interest under Rule 1.9(c) regarding use of information gained in a prior representation. Attorney A himself received no confidential information from the father. To reiterate, Rule 1.10 does not impute Attorney B's information to members of the firm he left. Thus, Rule 1.10 does not impute the information gained by Attorney B to Attorney A as they are no longer in the same firm.

The committee opines that Attorney A has no conflict of interest in serving as the guardian ad litem for the child in the custody case even though his former partner represents the father.

Your second question asks whether the mother has waived any conflict of interest here by her prior actions. The scenario and question contemplate that the mother's oral assent to Attorney A's appointment as guardian may have operated as such a waiver. The committee opines that this position is unfounded for two reasons.

FOOTNOTE

2 The hypothetical scenario provided no facts suggesting that unlike Attorney A, some other member of his firm did learn confidential information about Attorney B's representation of the husband while at the firm. Accordingly, the committee reads the facts that Attorney A *like all members of his firm* received no such information while Attorney B was with the firm.

First, the committee opined in response to question one, above, that appointment as guardian ad litem triggers no conflict of interest for Attorney A. Accordingly, there is no conflict in need of a waiver or consent.

Secondly, were Attorney A concerned about a possible conflict of interest in this situation, it would not be the mother's consent that he would need. In LEO 1725, this committee opined that if:

> A lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest, either because of a personal interest … or a multiple representation…then the attorney, before appointment, must make the same full disclosure to the court that he or she would make to a *sui juris* client for an informed consent to the representation.

Thus, the proper course for Attorney A if concerned about a possible conflict of interest would be to present the circumstances to the court for resolution. According to the scenario of this request, Attorney A did exactly that and the court approved his appointment. The mother's consent was neither sufficient, nor necessary.

The committee opines that Attorney A permissibly serves as guardian ad litem in this custody dispute; no conflict of interest precludes that service.

Committee Opinion
December 10, 2004