George Mason American Inn Of Court

AGENDA FOR THE OCTOBER 24, 2017, MEETING OF THE GEORGE MASON AMERICAN INN OF COURT:

LET'S PLAY (ETHICS) HARDBALL: TELL ME SOMETHING I DON'T KNOW

Pupilage Team Members:

Steven T. Webster (Moderator)
Richard C. Sullivan, Jr., Esq.
Aaron S. Book, Esq.
Dennis J. Quinn, Esq.
Sara Cohen (Student Member)
Bonnie Kelly (Student Member)
Gregory Michel (Student Member)

AGENDA

- Introduction: 7:30 - 7:35
- Ethics Update: 7:35-7:55
- Presentation of Hypotheticals and Discussion: 7:55 - 8:25 (Panel Members)
- Question and Answer Session: 8:25 - 8:30
- Adjourn—8:30

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ETHICS HYPOTHETICALS

Conflict of Interest; Former Client — Rule 1.9

Real Estate
(LEO 1806)

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

Under the facts presented, does Attorney B have a conflict of interest here, even though:

1) The real estate sale was nineteen years ago;

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

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

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

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

Sly & Bubba
(Courtesy of VSB)

You had represented Bubba over the years in miscellaneous, misdemeanor stuff – assaults, cursing and abusing, and, of course, urinating in public – nothing significant. Then one day, you are retained (properly) by Sly to represent him in what sounds like a significant heroin/crack cocaine distribution investigation by the feds. You immediately ascertain after talking to your good friends in the U.S. Attorney's office and the case agent (who you have known for years and respect) that it is in Sly's best interest to "get in the door first," spill the beans, and actively cooperate in the ongoing investigation. One small problem, however. The target of the investigation is good ol' Bubba who has obviously gone on to bigger and what he apparently thinks to be better things the top of the food chain in the alleged distribution conspiracy. The feds want to wire Sly up and send him in for those admissions from the horse's mouth that they are lacking. If Sly is successful, you have been assured that such would constitute "substantial assistance" that would undoubtedly result in a substantial reduction ala' the Guidelines.

1) Can you continue to represent Sly?

2) Do you have any obligation to get Bubba's permission?

3) What happens if Bubba, suspicious one that he is, contacts you to see if you would be available to represent him in what he hears to be something big coming down?

Smith & Jones

Smith and Jones, PC, a two person law firm, represented Company X in a piece of litigation involving a business dispute in 2000. Smith handled the entire matter. In 2005, Smith dies. Jones continues to practice, now solo.

In 2017, potential client Y asks Jones to sue Company X.

Jones, a pack rat, realizes he still has two bankers boxes full of documents from the case Smith handled in 2000.

Can Jones take the case?

COMPETENCY

Hypo 1

1. Attorney Woody McGuire is the court-appointed attorney for John Gotti, a convicted felon, on a firearms charge. Gotti was caught red-handed on video, made several confessions to the crime, and had no viable defense. He decided to plead guilty, and waived his right to appeal as part of the plea. Despite his abysmal record, Gotti was given a sentence well below the applicable guidelines. Attorney McGuire knows that there is no non-frivolous basis for an appeal that possibly could succeed. And, besides, McGuire knows that Gotti likely would get a much harsher sentence if the case were reversed and he was re-sentenced after a trial. Throughout the representation, Gotti continually stated to McGuire that the judge, Ian "Dropkick" Murphy, was and still is a member of the Irish Mafia and that he would not have pled guilty if some other judge were presiding. Gotti, of course, has no evidence of this. Gotti wishes to appeal on this basis.

Questions:

1) Is McGuire even obligated to advise Gotti of his right to appeal when Gotti, a seasoned criminal, pled guilty, waived his right to appeal, knows the system, and McGuire is certain there is no non-frivolous basis for an appeal?

A. No, because an appeal from a guilty plea will, more often than not, be groundless, and there is no need to provide advise a client of the right to appeal if the appeal has been waived and if an attorney has a good-faith belief that any appeal would be frivolous.

B. It depends on each case and whether there arguably could be a non-frivolous basis to appeal and whether the client already knows of his right to appeal.

C. Yes, an attorney is always obligated to advise of the right to appeal.

D. Yes, an attorney is always obligated to advise of the right to appeal, and the attorney must also advise of the potential risks (e.g., a more severe sentence) if the appeal is successful.

ANSWER: D

A lawyer must advise his client competently as required by Rule 1.1. The court-appointed attorney should advise his client of the potentially adverse consequences of prevailing on appeal. In the case of a guilty plea, followed by conviction and imposition of an anticipated sentence, a court-appointed client would rarely choose to embark on a course to unravel his conviction and sentence via an appeal only to expose himself to a more severe outcome on retrial or resentencing. For example, an indigent federal criminal defendant who directs his court-appointed attorney to appeal a conviction following a plea wherein the "right" to appeal has been waived exposes himself to potentially grave consequences: In the federal system, when the grounds for appeal which have been waived can be shown to fall within the "right to appeal" the government may attempt to treat the appeal as a breach of the defendant's promise contained in the plea agreement, seek to reopen the case and to pursue the original charges, and use facts contained in the plea agreement in a subsequent trial. See, e.g., *U.S. v. Poindexter*, 492 F.3d 263 (4th Cir., 2007). A defendant in state court might be exposed to similar risks.

2) Assuming he is obligated to file a notice of appeal, what is McGuire required to do after filing the notice?

A. Move to withdraw prior to filing a petition for appeal.

B. File the petition for appeal, including the unsupported allegations regarding Judge Murphy, and proceed without notifying the appellate court that he believes the appeal is without merit.

C. File the petition for appeal and identify any non-frivolous basis that might arguably support an appeal.

D. File the appeal, identify anything in the record that might arguably support an appeal and demonstrates to the court that he has reviewed the record, and move to withdraw and for an extension of time.

E. The appellate court will automatically permit withdrawal in this circumstance, so he should move for an extension of time and withdraw from the case prior to filing a petition for appeal.

ANSWER: D

Analysis: Rule 5A:12 applies to this hypothetical:

If McGuire for finds his client's appeal to be without merit, he must comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967), and *Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1989). McGuire is required to file (1) a petition for appeal which refers to anything in the record which might arguably support the appeal and which demonstrates to the Court of Appeals counsel's conscientious examination of the merits of the appeal; (2) a motion for leave to withdraw as counsel; and (3) a motion for an extension of time to allow the appellant to file a supplemental petition for appeal. The petition for appeal and the motion for leave to withdraw as counsel should specifically cite to *Anders*.

Further discussion: Does it matter if McGuire is retained rather than court-appointed? Although a privately retained attorney may contract with a client to limit the scope of representation to matters in the trial court, once there is an attorney-client relationship in connection with a criminal matter, defense counsel must render appropriate advice to the client regarding his appellate rights.

SOURCE: LEO 1880

Hypo 2

Billy Williamson is charged with aggravated assault and is locked up in the jail. His trial is a week away. Billy wants to call Tammy Tamlinson as a witness. She arguably has favorable information for Billy, but is elderly and a former drug addict. She is the only witness that Billy wants to call and he is very eager to have her testify as favorably as possible. Tammy contacts Billy's attorney, Mary Steenburgen, and advises her that she has received a hand-written letter offering her money for her favorable testimony in the case and containing a veiled threat of what would happen if she did not testify favorably. The letter is unsigned with no return address. Steenburgen is certain that the letter either came from her client or was sent at the direction of her client.

Question: What should Steenburgen do?

A. Nothing. Do not prejudice Billy's case. Call Tammy as a witness as planned.

B. Withdraw from the case.

C. Advise Billy of the existence of the letter, the fact that she believes that it was sent by or at the direction of Billy, and that they will not use Tammy as a witness. If Billy objects, move to withdraw.

D. Contact the prosecutor and advise of Tammy's receipt of the letter. Move to withdraw.

ANSWER: C. The best course of action is first to contact the Virginia Bar to cover yourself. Rule 1.2 provides a lawyer with discretion in determining which witnesses to call. That being said, the client may persist in wanting to call Tammy. The rules do not contemplate a mandatory "rat out" provision for a lawyer with regard to a situation like this. The best course of action is C, and if the client persists in wanting to call the witness, move to withdraw.

SOURCE: Virginia State Bar

You recently took the redeye from Los Angeles to Dulles. For the first hour of the flight, the two passengers next to you vigorously discussed a proposed business transaction. It quickly became obvious that one of the passengers was a lawyer, and the other passenger was his client. Besides being annoyed by the noisy exchange, the incident raised several questions in your mind.

Does the lawyer who engaged in the conversation have an ethical duty to keep confidential what he learned from his client during that conversation?

Yes__ No__

Does the attorney-client privilege protect the communications you overheard on the airplane?

Yes__ No__

LEO 1884 Conflicts arising from a lawyer-legislator's employment with a consulting firm owned by a law firm

HYPOTHETICAL

Lawyer A, a member of the Virginia General Assembly, considers joining a consulting firm. The consulting firm, in which lawyers and non-lawyers lobby and bring matters before the state and federal legislatures, is owned by a law firm composed of Virginia lawyers. Lawyer A's proposed role at the consulting firm would be limited solely to lobbying on the federal level and would not involve lobbying before the state legislature.

Lawyer A asks whether the Rules of Professional Conduct would preclude lawyer and/or non-lawyer employees of the consulting firm from lobbying the General Assembly if Lawyer A joins the consulting firm and remains a member of the General Assembly. If so, would the disqualification extend to members of the law firm as well?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 1.11(a)[1], 5.3[2], and 8.4(a) and (d)[3]. Relevant LEOs include 419, 537, 1278, and 1718.

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[1] **Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees**
(a) A lawyer who holds public office shall not:
(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or
(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

[2] **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**
With respect to a nonlawyer employed or retained by or associate with a lawyer:
(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial actions.

[3] **Rule 8.4 Misconduct**
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; [or]
***
(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official[.]

DISCUSSION

Prior opinions establish that a lawyer may not lobby the General Assembly if another member of the lawyer's firm is a member of the General Assembly. *See* LEOs 419, 537, 1278, and 1718. This is so even if the lawyer-legislator complies with the General Assembly Conflict of Interests Act (Va. Code §§ 30-100 *et seq*.) and recuses himself from participation in the decision.[4] As addressed in LEO 1718:

> The sense of the committee is that public confidence in the legal profession is not inspired, nor is an appearance of impropriety avoided, if a law firm represents clients before a governing body on which one of its lawyers is a member even if he/she abstains from participation and voting. A likely public perception, and an understandable one, is that the lawyer for the client has an advantage or an "inside track" because another lawyer in the law firm is a member of the governing body. Regardless of the lawyer-member's recusal, his/her cultivation of a relationship of trust and respect with the other members and their inter-personal relations are likely to result in a public perception that his/her law firm profits from that relationship in its representation before the governing body. Conversely, if the law firm's representation is unsuccessful, a nagging suspicion for the client is whether the governing body's decision was the result of an unarticulated concern that it not be accused of impropriety in dealing with a member's law firm.

The Committee concludes that there is no reason to distinguish between lawyers associated in a law firm and lawyers associated in a lobbying/consulting firm, as the public confidence concerns depend on the fact that the General Assembly member and the lobbyist are associated in the same firm, not on the nature of that firm's business. *See* Rule 1.11(a) and 8.4(d).

Lawyers are held to a higher standard of conduct than mere compliance with legal requirements, and may not act in a way that "diminishes public confidence in and respect for the integrity of the legal profession, as well as the administration of government." LEO 1718. Accordingly, Rule 8.4(d) prohibits the lawyer/lobbyist from representing a client before the public body on which his lawyer/colleague sits, regardless of whether that colleague participates in the matter.

This hypothetical involves a consulting firm that is owned by a law firm composed of lawyers licensed in Virginia and other jurisdictions. Just like the lawyers in the consulting firm, lawyers in the law firm may not represent clients or otherwise lobby before the General Assembly, again regardless of whether the General Assembly member complies with the Conflict of Interests Act. To conclude otherwise would be to place form over function and essentially allow the firms to use a screen to circumvent the conflict created by the General Assembly member's employment by the consulting firm – members of a public body could be employed by the consulting firm - to allow the law firm to represent clients it would not be able to represent if the consulting/lobbying business were all conducted through the law firm.

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[4] If the lawyer were not a member of the General Assembly, but a member of another public body, the applicable Conflict of Interests Act would be the State and Local Government Conflict of Interests Act (Va. Code §§ 2.2-3100 *et seq*.).

Prior opinions do not address whether *non-lawyer* members of the consulting firm may lobby the General Assembly when the consulting firm also employs a lawyer who is a member of the General Assembly. Non-lawyers are, of course, not directly subject to the Rules of Professional Conduct, though a lawyer who supervises a non-lawyer may in certain circumstances be responsible for ensuring the non-lawyer's conduct complies with the lawyer's ethical obligations. *See* Rule 5.3.

The lawyers in this consulting firm may not have supervisory or managerial authority over all of the non-lawyer employees, since the firm is not a law firm and non-lawyers can engage in the work on their own, without any supervision, and can be partners/owners/executives of the firm. Nonetheless, a lawyer may not circumvent the Rules of Professional Conduct by using others to engage in conduct that he could not personally engage in. *See* Rule 8.4(a). The lawyers in the consulting firm cannot permit the non-lawyer employees of the firm to engage in conduct the lawyers themselves are not permitted to undertake. This prohibition exists regardless of whether the lawyers have any managerial or supervisory authority over the non-lawyer employees. As discussed above, prior opinions on this topic emphasize the need for lawyers on public bodies to avoid even an appearance of impropriety and to avoid diminishing public confidence in the administration of government. Permitting non-lawyer colleagues of a member of a public body to lobby that body would not serve any of those important purposes, and in fact might undermine those purposes by suggesting that the ethical obligations here are merely technical rules that can be easily evaded by permitting non-lawyers to do the work that lawyers within the same firm would be prohibited from doing.

CONCLUSION

When a lawyer in a consulting firm is a member of a public body, including the General Assembly, other members of that firm may not represent clients before that public body, regardless of whether those members of the firm are lawyers or non-lawyer lobbyists. Lawyers in the law firm that own the consulting firm also may not represent clients before the public body. This prohibition does not depend on whether the member of the public body complies with the applicable Conflict of Interests Act; his colleagues are forbidden by Rule 8.4 from appearing before his public body even if he recuses himself as required by statute.

APPROVED BY THE SUPREME COURT OF VIRGINIA
SEPTEMBER 30, 2016

Legal Ethics Opinion 1885

On September 13, 2017, the Standing Committee on Legal Ethics approved the proposed opinion and it will be submitted to Council for its consideration at its meeting on October 27, 2017.

LEO 1885:
ETHICAL CONSIDERATIONS REGARDING A LAWYER'S PARTICIPATION IN AN ONLINE ATTORNEY-CLIENT MATCHING SERVICE

This opinion provides guidance to a lawyer who is considering participating in an online program conducted by a lay for-profit entity operating as an attorney-client matching service (ACMS). Under the hypothetical presented to the Committee, the lawyer

a) provides a client with limited scope legal services advertised to the public by the ACMS for a legal fee set by the ACMS;

b) allows the ACMS to collect the full, prepaid legal fee from the client, and to make no payment to the lawyer until the legal service has been completed;

c) authorizes the ACMS to electronically deposit the legal fee to the lawyer's operating account when she completes the legal service; and

d) authorizes the ACMS to electronically withdraw from the lawyer's bank account a "marketing fee" which, by prior agreement between the ACMS and the lawyer, is set by the ACMS and based upon the dollar amount of the legal fee paid by the client.

The prospective client selects the advertised legal service and chooses a lawyer identified on ACMS's website as willing to provide the selected service. The prospective client pays the full amount of the advertised legal fee to the ACMS. Thereafter, the ACMS notifies the selected lawyer of this action, and the lawyer must call the prospective client within a specified period. After speaking to the prospective client, and performing a conflicts check, the lawyer either accepts or declines the proposed representation.

QUESTION PRESENTED:

Would a lawyer's participation in the program described above violate any Virginia Rules of Professional Conduct?

ANSWER:

As discussed below, a lawyer who participates in an ACMS using the model identified herein violates Virginia Rules of Professional Conduct because she

a. cedes control of her client's or prospective client's advanced legal fees to a lay entity;
b. undertakes representation which will result in a violation of a Rule of Professional Conduct;
c. relinquishes control of her obligation to refund any unearned fees to a client at the termination of representation;
d. shares legal fees with a nonlawyer; and

e. pays another for recommending the lawyer's services.

A lawyer who participates in an ACMS does not violate Rules of Professional Conduct governing limited scope representation, reasonableness of legal fees, and the exercise of independent professional judgment, if she adheres to the Rules governing those aspects of every representation.

APPLICABLE RULES OF PROFESSIONAL CONDUCT:

The analysis of the question presented involves the application of Virginia Rules of Professional Conduct 1.2(b)[1],1.5(a)[2], 1.15(a)(1) and (2)[3], 1.16(a)(1) and (d)[4], 2.1[5]5.4(a)[6], 7.3(d)[7], and 8.4(a)[8]

ANALYSIS:

Ethical Considerations Regarding Limited Scope Representation

It is ethically permissible for a lawyer to limit the scope of her representation of a client, provided the limitation does not impair the lawyer's ability to provide competent representation and is otherwise consistent with the Rules of Professional Conduct. The client must consent "after consultation" to the limited scope representation. *See,* Rule 1.2(b). The Rules of Professional Conduct do not prohibit a lawyer's representing a client on a matter appearing on the ACMS's online menu of available services *provided* the lawyer explains the nature and scope of the service to be rendered to the prospective client *before* the attorney-client relationship is established. A lawyer does not violate Rule 1.2(b) merely because her contact with a prospective client flows from a proposed limited scope legal representation advertised by a non-lawyer business firm. Indeed, there are several contexts in which a third-party nonlawyer defines the scope of a lawyer's representation of a client. In pertinent part, Comments [6] and [7] to Rule 1.2 state that

> [6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or **by the terms under which the lawyer's services are made available to the client**. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. ***.
>
> [7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. **Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [Competence]*****. [Emphasis supplied throughout.]

Regardless, the lawyer and client must have agreed to the scope of representation, with an understanding of the scope of services being provided for the fixed fee. Moreover, Rule 2.1 requires the lawyer to "exercise independent professional judgment," which means that she cannot permit the ACMS's description of the legal services to be provided to the client to control if the client's legal matter requires services which differ in nature or scope from the description. The lawyer's obligation is to ensure that the description of the legal services to be provided to a client is complete and accurate.

The Lawyer Must Consider Whether the Advertised Fixed Legal Fees Are Reasonable

The ACMS presents an online menu of limited scope legal services available to the public at fixed legal fees from lawyers who are willing to provide those services. Virginia Legal Ethics Opinion 1606 defines "fixed fee" and states that the use of fixed fees is to be encouraged:

> Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

Notwithstanding the foregoing considerations, fixed fees, like every other type of legal fee, must be reasonable. The eight factors set forth in Rule 1.5(a) must be considered when determining the reasonableness of legal fees. Factor (3) calls for a consideration of "the fee customarily charged in the locality for similar legal services". Factor (7) refers to "the experience, reputation, and ability of the lawyer or lawyers performing the services".

Lawyers traditionally set their own fees—including fixed fees—whether set forth in their advertising, or after conferring with clients who are seeking representation. Lawyers know the "going rates" for particular services in their localities, and every lawyer certainly knows her level of "experience, reputation, and ability."

A lay business firm which dictates to lawyers what they must charge clients as fixed fees as a condition of participation in the online program may not have conducted the reasonableness-of-fee analysis required of lawyers by Rule 1.5(a). It is therefore incumbent upon the participating lawyer that she agrees to represent a client only if the fixed fee set by the ACMS is reasonable for the contemplated legal service. Indeed, if the fee identified for each menu item of limited scope services is the same for all participating lawyers—*irrespective of their experience*, and *irrespective of the locality in which the services are to be performed*—then the matter of reasonableness of fee is a subject which the lawyer must very carefully consider before agreeing to a proposed representation.

The client's actual needs are an important consideration in setting a fixed fee and limiting the scope of legal services, regardless of the rubric given the legal service identified on the ACMS's online menu of services. For example, in determining whether a fixed fee is reasonable the lawyer and the prospective client must understand what is involved regarding a menu item such as "Document review: Residential purchase and sale agreement $495."

A fixed fee of $495 might be perfectly reasonable were the prospective client, either as purchaser or seller, to require review of a proposed contract custom-tailored to a transaction and prepared by the other party's lawyer. The same fee might be unreasonable if the lawyer is being asked to review a standard form contract in universal use by real estate agents and brokers in the community where the home is being sold. There may be very little value the reviewing lawyer adds to the transaction. In the latter instance, the lawyer may determine that she is exposed to virtually no risk that the task will consume more than a minimal amount of her professional time.

In addressing a menu item such as "File for uncontested divorce $995," a lawyer must determine whether $995 is a reasonable fee if her colleagues with like experience customarily charge $500 for such a service in the locality in which she is practicing. Charging almost twice the customary fixed fee for a like service in the lawyer's locality might be unreasonable under the factors set forth in Rule 1.5(a). The Committee notes that the fixed fee of $995 appears only for filing for the divorce, and not completing the representation by obtaining a final decree. Further, this limited scope representation may not include a property settlement agreement that may be

necessary for obtaining an uncontested divorce. The "reasonableness" of the $995 fee should be considered in light of these limitations. A lawyer abdicates her ethical obligation to exercise the independent professional judgment required by Rule 2.1 if she defers to the ACMS in determining the legal fees she will charge her clients. [9]See also Rule 1.8(f) indicating that a lawyer may accept compensation from a person other than the client provided "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Thus, the lawyer's acceptance of payment from the on-line "matchmaking" company is subject to this requirement.

In sum, a lawyer participating in the ACMS's program must conduct an independent assessment of whether the fee identified for the limited scope representation is reasonable, and exercise independent professional judgment in light of the nature of the legal service to be rendered and the prospective client's needs.

A Lawyer's Obligations Regarding Safekeeping Clients' Advanced Legal Fees

Many lawyers routinely handle legal matters for clients whose legal fees are paid by third parties. Sources of payment may be insurance companies or legal services plans.[10] While the client may have paid premiums to an insurance company or a legal services plan which entitles him to legal representation funded by that third party, the premiums, themselves, are not advanced legal fees, and Rule 1.15 is not implicated.

The ACMS business model presented in this hypothetical, however, calls for the prospective client to advance full payment of the fixed legal fee for the selected menu item of legal service directly to the ACMS. The ACMS is an intermediary between the client and the lawyer, with no obligation to place the advanced legal fees in a trust or escrow account for safekeeping as required of a Virginia lawyer. The lawyer who accepts the client's case is foreclosed from safekeeping the advanced fixed legal fee paid by the client as she receives payment from those advanced fees only when the representation has been completed.

In Virginia Legal Ethics Opinion 1606[11], the Committee opined that

> **A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account.** If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. *** [Emphasis supplied.]

A Virginia lawyer has the obligation to safeguard her client's advanced legal fees during the course of the representation. A Virginia lawyer cannot ethically "opt-out" of the obligations imposed by Rule 1.15 by consenting to a third-party lay ACMS's collection and retention of the client's advanced legal fees. The ACMS is not a law firm, cannot maintain an IOLTA account, and is not subject to professional regulation by the Virginia State Bar, nor a financial institution approved by the bar subject to overdraft reporting requirements and covered by FDIC protection. A client's advanced legal fees must remain intact and in trust in a financial institution approved by the Virginia State Bar until they are earned by the lawyer. Unearned fees must be returned to the client in the event the lawyer's services are terminated by the client or terminated by the lawyer for any reason, including her death, impairment, or license suspension

or revocation. The duty to safekeep client funds and property contained in Rule 1.15 are intended, in part, to protect clients from the risk of having unearned legal fees become part of the lawyer's estate, and thus subject to the reach of the lawyer's other creditors via garnishment or as part of a bankruptcy or probate proceeding. Unearned legal fees must thus stand to the credit of the client by remaining on deposit, in trust, in a financial institution identified in Rule 1.15(a)(2) if the lawyer or law firm is located in Virginia. It should be noted, as well, that the business model under discussion calls for advancement of a *legal fee* to the lay business entity *before* any lawyer has agreed to represent the prospective client. A Virginia lawyer, whether or not she comes to represent a particular client obtained through the online service, must not promote, via her participation in, a program operated by a lay entity which solicits advanced legal fees from the public when the lawyer knows that those fees will not be protected as required by Rule 1.15. *See*, Rule 8.4(a).

The importance of a lawyer's keeping her client's advanced legal fees secured in a trust account cannot be overstated. The lawyer may not avoid this significant client protection requirement by delegating the handling of a client's legal fees to a lay third party. The ACMS collects advanced legal fees from a prospective client before the prospective client has had any contact with the lawyer whom she might engage. Thus, the prospective client, in most instances, will not have been informed by a lawyer that her advanced legal fees will be handled by the ACMS in a manner that differs from how a lawyer would have been required to handle those fees. The ACMS is the recipient and custodian of the client's unearned legal fees under the program here presented. The approach is contrary to the requirements of Rule 1.15 and inconsistent with the purposes of the Rule. The firm is neither a financial institution nor a bonded trustee or other fiduciary regarding the legal fees collected from the prospective client. The client, pending completion of the legal services for which he has paid in advance, stands as a general creditor of the ACMS, and is not protected from risk of pecuniary loss occasioned by the firm's cash-flow problems, insolvency, bankruptcy, or mismanagement.

It is no answer to the problem of the client's potential risk of loss that the business model presented here is for "limited scope" representation, permitting the Virginia lawyer to side-step her ethical obligation to preserve an advanced legal fee by ceding complete control of that incident of the representation to a third-party lay business. Comment [7] to Rule 1.2, *supra*, states unambiguously that "An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law." Rule 1.15 is a Rule of Professional Conduct, and a lawyer's attempt to avoid its application through the acts of another itself violates Rule 8.4(a).

Rule 1.16(d) requires that a lawyer refund to a client at the termination of representation "any advance payment of fee that has not been earned." A Virginia lawyer who participates in the service rendered by the ACMS cannot comply with this Rule of Professional Conduct because she is not, and has never been, the custodian of the advanced fee. She has ceded control of that fee to the ACMS, which decides how to dispose of the client's fees, both earned and unearned. A lawyer must not accept a legal matter under an arrangement which requires that she delegate the function of holding and disposing of the client's advanced legal fees to a lay entity. In accepting such representation, the lawyer also violates Rule 1.16(a)(1), which

prohibits any representation which would result in the lawyer's violation of the Rules of Professional Conduct.

Ethically Impermissible Sharing of Legal Fees with a Nonlawyer

Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer. The Rule is violated by a lawyer when there is direct linkage between the amount of the lawyer's fee revenue derived from a marketing firm's operations, and the firm's entitlement to compensation. Lawyers may, however, pay a lay business entity sums which represent the reasonable costs of advertising. *See,* Rule 7.3(d)(1). There are legal ethics opinions which differentiate between the reasonable costs of advertising and ethically impermissible fee-sharing.

The North Carolina State Bar has issued a legal ethics opinion which approves a lawyer's participation in an online for-profit service which has both the attributes of a lawyer referral service and a legal directory[12] . The business model under review in that opinion is described, in pertinent part, as follows:

> A commercial Internet company (the company) operates a website that matches prospective clients with lawyers. A prospective client logs onto the website where he registers and is given an identification number to preserve anonymity. The prospective client posts an explanation of his legal problem on the website and consents to contact from participating lawyers. There is no charge to the prospective client for the standard service but, for more individualized and faster service, there is a fee.
>
> The company solicits lawyers to participate in its service. To participate, a lawyer must be licensed and in good standing with the regulatory agency of his state of licensure. A participating lawyer is charged a **one-time registration fee** that covers expenses for verifying credentials, technical system programming, and other set-up expenses. An **annual fee** is charged to each participating lawyer for ongoing administrative, system, and advertising expenses. The **amount of the annual fee varies by lawyer based on a number of components, including the lawyer's current rates, areas of practice, geographic location, and number of years in practice**. ***
>
> If a client-lawyer relationship is formed between a participating lawyer and a user of the service, it is done without the participation of the company. **The company does not get involved in the lawyer-client relationship or in related financial matters such as fees, retainers, invoicing, or payment.** [Emphasis supplied throughout.]

In answer to the question of whether a lawyer may ethically participate in such a program, the opinion states:

> Yes, **provided there is no fee sharing with the company in violation of Rule 5.4(a)**, and further provided the participating lawyer is responsible for the veracity of any representation made by the company about the lawyer or the lawyer's services or the process whereby lawyers' names are provided to a user. [Emphasis supplied.]

A Rhode Island legal ethics opinion[13] specifically approved lawyers' participation in a program run by an Internet company called "Legal Match.com". In addressing whether the arrangement violated the prohibition on fee sharing, the opinion draws the important distinction between ethically permissible advertising costs and impermissible fees charged to a lawyer based upon legal fees generated:

> The fee to LM.com is a flat fee which buys advertising and access to requests for legal services posted by consumers. **Unlike the fees in [Rhode Island] Ethics Advisory Opinion No. 2000-04, the annual fee is not a percentage of, or otherwise linked to, a participating attorney's legal fees.** [Emphasis is supplied.]

Rhode Island Ethics Advisory Opinion No. 2000-4, referred to above, found linkage between a consulting company's fee and the attorney's fee to be unethical fee-sharing with a nonlawyer *and* ethically impermissible payment for recommending a lawyer's services:

> In the arrangement proposed by the inquiring attorney, **there is a direct relationship between the consulting fees paid to the consulting company and the attorney's fees earned through the website**. A participating attorney agrees to pay $15,000 to the consulting company for every $100,000 in gross fees he/she earns as a result of the site. In essence, the fee paid to the consulting company is a fifteen percent commission of the gross attorney's fees. As such, **the consulting fee is payment for recommending the lawyer's services** and is violative of Rule 7.2(c).
>
> The proposed arrangement is problematic in other respects. It runs afoul of Rule 5.4(a) **which prohibits attorneys from sharing fees with nonlawyers**.*** [Emphasis supplied.]

The Committee believes that in contrast to the business models identified with approval in the North Carolina and first-cited Rhode Island legal ethics opinions, the model here under review calls for legal fee sharing which is ethically impermissible under Rule 5.4(a). A legal fee is shared with a nonlawyer when a fixed portion of it is given by the lawyer to her Internet advertiser, whose entitlement to the fee occurs only when the lawyer has earned her legal fee, and when the amount of the advertiser's fee is based on the amount of that legal fee. Calling the online service's entitlement a "marketing fee" does not alter the fact that a lawyer is sharing her legal fee with a lay business. As stated, the amount of the "marketing fee" is itself linked directly to the amount of the lawyer's fee earned on each legal matter obtained by the lawyer through the intermediary ACMS. The fact that the ACMS executes a separate electronic debit from the lawyer's bank account for its "marketing fee" following the firm's electronic deposit of the full legal fee to the lawyer's bank account does not change the ethically impermissible fee-sharing character of the transaction. If the ACMS were to withhold its "marketing" fee from the legal fee due the lawyer, the "fee sharing" element might appear more pronounced. However, the firm's debiting the lawyer's account following transmission of the full legal fee is but a technical nicety which does not change the substance of the transaction. The form of the

transaction cannot mask the substance of it: the legal fees are shared with a nonlawyer in direct violation of Rule 5.4(a).

The Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee in Formal Opinion 2016-200 flatly declared that "[a] lawyer who participates in [a program such as is detailed here] in which the program operator collects "marketing fees" from that lawyer that vary based upon the legal fees collected by the lawyer, violates RPC 5.4(a)'s prohibition against sharing legal fees with a nonlawyer.

The Opinion identifies other jurisdictions' like conclusions on the subject of ethically impermissible fee-sharing with a nonlawyer, stating:

> Ethics opinions that have considered similar compensation arrangements have concluded that marketing, advertising, or referral fees paid to for-profit enterprises that are based upon whether a lawyer received any matters, or how many matters were received, or how much revenue was generated by the matters, constitute impermissible fee sharing under RPC 5.4(a). For example, Ohio Opinion 2016-3, which addresses the same types of FFLS [acronym for "Flat Fee Limited Scope"] programs discussed in this Opinion, states that "a fee-splitting arrangement that is dependent upon the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct." S.C. Opinion 16-06, which also addressed a FFLS program, reached the same conclusion. Other ethics opinions which have, in various contexts, concluded that advertising, marketing, or referral fees calculated on the basis of matters received or legal fees generated violate Rule 5.4(a) include: Arizona Opinion 10-01; Alabama State Bar Ethics Opinion RO 2012-01 ("Alabama Opinion 2012-01"); Indiana State Bar Association Legal Ethics Committee Opinion 1 of 2012 ("Indiana Opinion 1 of 2012"); Kentucky Bar Association Ethics Opinion E-429 and South Carolina Ethics Advisory Opinion 93-09.

In addition, on June 21, 2017, three Committees of the New Jersey Supreme Court issued a Joint Opinion (ACPE Opinion 732, CAA Opinion 44, UPL Opinion 54) which addresses the ethical implications of a lawyer's participation in an ACMS such as is discussed herein. The Joint Opinion concluded that such a program is an impermissible lawyer referral service, in violation of New Jersey Rules of Professional Conduct 7.2(c) and 7.3(d), and comprises improper fee sharing with a nonlawyer in violation of New Jersey Rule of Professional Conduct 5.4(a).

Ethical Restriction on Giving Anything of Value to One Who Recommends the Lawyer's Services

Subject to the exceptions set forth below, Rule 7.3(d) prohibits a lawyer from giving "anything of value" to a person who recommends the lawyer's services. Whether the referring person is a lawyer or nonlawyer is not relevant to an analysis of conduct covered by Rule 7.3(d)[14]. A lawyer may violate Rule 7.3(d) without at the same time violating the fee-sharing prohibition contained in Rule 5.4(a) because the source of the compensation given to the referring person need not be a legal fee.

Rule 7.3(d) lists only four specific exceptions under which a lawyer may give something of value to another (who is not an employee or lawyer in the same law firm) for recommending a

lawyer's services ,only two of which are applicable to a lawyer's participation in the for-profit business firm's operations here under review:

1. payment of "the reasonable costs of advertisements or communications"; and/or
2. payment of the "usual charges of a legal service plan or a not-for-profit qualified lawyer referral service".

A "marketing fee" based upon a lawyer's having been actually hired to perform legal services for which a fee has been earned, with the amount of the "marketing fee" based upon the amount of the lawyer's fee is not a reasonable cost of advertisement. It is in form and function the payment of a referral fee to a nonlawyer. Payment of the so-called "marketing fee" is not required unless and until the lawyer finishes a legal matter for a client the lawyer has obtained as a result of the ACMS's efforts. The ACMS which identifies available lawyers on its website is neither a "legal service plan" nor a "not-for-profit qualified lawyer referral service". It is a for-profit lay entity with a business model whose revenue is derived by sharing the lawyers' earnings derived specifically from clients and fees generated to the lawyers by the program.

In discussing a rule analogous to Virginia Rule 7.3(d), the South Carolina bar deemed it a violation of its rule to compensate an Internet service which advertises lawyers' services by paying the Internet service based on fees obtained from clients whom the lawyer receives via participation in the service:

> South Carolina Rule of Professional Conduct 7.2(c)[15] prohibits lawyers from giving "anything of value to a person for recommending the lawyer's services" but includes an exception for the "reasonable cost of advertisements." A lawyer may ethically make payments to an Internet service for advertising the lawyer's services based either on a set monthly or yearly fee or based on the number of hits or referrals from the service to the lawyer. **Lawyers could not ethically pay the service any portion of the fees received from clients obtained through the service.** See S.C. Rule Prof. Cond. 5.4(a). This opinion deals only with services that are open to attorneys generally. Services that restrict or screen attorney participation may violate Rule 7.2(c). [Emphasis is supplied.]

See, South Carolina Bar Ethics Advisory Opinion 01-03.[16]
South Carolina Bar Ethics Advisory Opinion 16-06, issued in 2016, analyzed the ethical implications of a lawyer's participation in a service precisely as described here. It concluded that the marketing fees charged are not the ethically permissible reasonable costs of advertising:

> The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or "click." In essence, the service's charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services.
>
> Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services

> of one type of case versus another. For example, a newspaper or radio ad would cost the same whether a lawyer was advertising his services as a criminal defense lawyer or a family law attorney. The cost of the ad may vary from publication to publication, but the ad cost would not be dependent on the type of legal service offered.

PA Formal Opinion 2016-200, cited above, addresses the "reasonable cost of advertisements" issue from the perspective of the differing marketing fees charged, as tethered to the legal fees themselves:

> *** The cost of advertising does not vary depending upon whether the advertising succeeded in bringing in business, or on the amount of revenue generated by a matter. One FFLS [Flat Fee Limited Scope] program charges participating lawyers "marketing fees" ranging from $10 for a $39 "Advice Session" to $400 for a "Green Card Application," which generates $2,995 in legal fees. Clearly, there cannot be a 4000% variance in the operator's advertising and administrative costs for these two services, particularly since the operator does not, and cannot, have any role in the actual delivery of legal services.***

There are a variety of forms in which lawyers may advertise, one being via Internet services which identify lawyers available to handle particular types of legal matters. Comment [4] to Rule 7.3 speaks approvingly of services available to lawyers:

> [4] Lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. However, Paragraph (d)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the **costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising**. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as **publicists, public-relations personnel, business-development staff, and website designers[.]*** [Emphasis supplied.]

A Virginia lawyer may certainly participate in a for-profit lay business firm's Internet advertising platform from which members of the public are matched with Virginia lawyers who are identified as willing and available to handle particular matters for fixed legal fees *if the cost of doing so* complies with Rule 7.3(d)(1) and if the lawyer complies with the other Rules of Professional Conduct discussed above. The "reasonable costs of advertising or communications" may be based on any number of factors which the advertising lawyer may assess for herself: quality of presentation, market exposure, demography, and measurable levels of interest evoked (through Internet "clicks" or "hits"). However, a Virginia lawyer violates Rule 7.3(d) when she pays another—including an Internet marketer—a sum tethered directly to her receipt, and the amount, of a legal fee paid by a client.

CONCLUSION:
The Virginia Rules of Professional Conduct do not prohibit a lawyer from participating in an Internet program operated by a for-profit ACMS which identifies limited scope services available to the public for fixed fees. Before accepting a legal matter from a prospective client, the lawyer must consult with the client regarding the limited scope of the proposed legal services and be satisfied that the services can be competently performed consistent with the Rules of Professional Conduct.

Before accepting a prospective client's legal matter, the lawyer must exercise independent professional judgment and assure herself that the fee set by the ACMS is reasonable for the legal task to be undertaken for the client, taking into consideration the factors enumerated in Rule 1.5(a).

It would be ethically impermissible for a lawyer to participate in a program whereby a client's advanced legal fee is to be held by a lay business firm, contrary to the lawyer's obligations under Rule 1.15. A lawyer who permits a lay business entity to retain and dispose of a client's advanced legal fees surrenders her ethical obligation to refund unearned legal fees to the client at the termination of representation as required by Rule 1.16(d).

A lawyer must not participate in a program whereby the lawyer pays a for-profit business entity a portion of the legal fee charged to the client as compensation for the lawyer's having received the client from the firm which operates the program. The payment constitutes an impermissible sharing of fees with a nonlawyer, and violates the rule prohibiting a lawyer from giving anything of value to one who recommends the lawyer's services.

[1] RULE 1.2 Scope of Representation

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

[2] RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

[3] RULE 1.15 Safekeeping Property

(a) Depositing Funds.

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

[4] RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law[.]

(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).

[5] RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

[6] 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;

(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; and

(4) a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client.

[7] RULE 7.3 Direct Contact With Potential Clients

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1, including online group advertising;
(2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

[8] RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

[9] In Opinion 2016-3, the Supreme Court of Ohio Board of Professional Conduct sharply observes, with respect to a proposed business model such as is under discussion here that

> ***the company, not the lawyer, controls nearly every aspect of the attorney-client relationship, from beginning to end. The company, not the lawyer, defines the type of services offered, the scope of the representation, and the fees charged. The model is antithetical to the core components of the client-lawyer relationship because the lawyer's exercise of independent professional judgment on behalf of the client is eviscerated.

[10] *See, e.g.,* Sec. 38.2-4400 of the 1950 Code of Virginia, as amended.

[11] Legal Ethics Opinion 1606 was approved by the Supreme Court of Virginia on November 2, 2016, and has the dignity of a decision of the Court.

[12] North Carolina Ethics Op. 2004-1 (2004) **"Participation in On-Line Legal Matching Service"** http://www.ncbar.com/ethics/ethics.asp

[13] Rhode Island Supreme Court Ethics Advisory Panel Opinion No. 2005-01 https://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/2005-01.pdf

[14] There is one exception: Rule 1.5(e) permits a lawyer to share legal fees, under certain conditions, with *another lawyer* who has referred a case to her. A note to Virginia Legal Ethics Opinion 1130 states:

> **Legal Ethics Committee Notes.** – This LEO was overruled by Rule 1.5(e), which does not require that a lawyer sharing in fees also share responsibility, thus allowing "referral fees" if the client consents after full disclosure.

[15] **RULE 7.2: ADVERTISING**

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and

(3) pay for a law practice in accordance with Rule 1.17.

[16] *See, also,* New York State Bar Association Committee on Professional Ethics Opinion 1132 (8/8/17), which concluded that a lawyer's payment of a marketing fee charged by an ACMS as discussed herein would be an improper payment for a recommendation in violation of New York Rule 7.2(a).

Legal Ethics Opinion 1888

The Virginia State Bar's Standing Committee on Legal Ethics is seeking public comment on proposed advisory Legal Ethics Opinion 1888, Prosecutor's duty to disclose evidence that tends to negate the guilt of the accused. Comment deadline: November 3, 2017.

Pursuant to Part 6, § IV, ¶ 10-2(C) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1888: Prosecutor's duty to disclose evidence that tends to negate the guilt of the accused.

This proposed opinion addresses a situation where a prosecutor receives 200 hours of recorded jail calls involving a defendant who is being prosecuted for strangulation, abduction, and domestic assault and battery. In one of those calls, the defendant asks the victim if she understands that he "didn't do it," and she says "yeah" in response. The question presented is whether the prosecutor fulfills her duty under Rule 3.8(d) by merely providing the recording of all the calls to the defense lawyer, or whether she is required to specifically identify the conversation where the victim acknowledges that the defendant "didn't do it"?

In the proposed opinion, the Committee concludes that once the prosecutor knows about the conversation, which tends to negate the guilt of the defendant, she must specifically identify that conversation to the defendant as possibly exculpatory information. "Disclosure" of evidence means more than merely making the evidence available to be found; under the facts presented in this hypothetical, it requires identifying the specific evidence that the prosecutor knows tends to negate the guilt of the defendant. The prosecutor does not provide disclosure in any meaningful way if she merely turns over a large volume of material and implicitly tells the defense lawyer to "go fishing" for whatever exculpatory evidence can be found somewhere in the material.

Rule 3.8(d), and therefore the conclusion of this proposed opinion, applies only when the prosecutor actually has knowledge of the evidence that tends to negate the guilt of the accused. If the prosecutor has not reviewed the recordings, and therefore does not know what is contained in them, she has no obligations under Rule 3.8(d).

Inspection and Comment

The proposed advisory opinion may be inspected at the office of the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at 804-775-0557, or can be found at the Virginia State Bar's website at http://www.vsb.org. Any individual, business, or other entity may file or submit written comments in support of or in opposition to the proposed opinion with Karen A. Gould, Executive Director of the Virginia State Bar, not later than **November 3, 2017**. Comments may be submitted via email to publiccomment@vsb.org.

Legal Ethics Opinion 1888 – *Prosecutor's duty to disclose evidence that tends to negate the guilt of the accused*

Hypothetical

A lawyer is prosecuting a strangulation, abduction, and domestic assault and battery case. The jail provides her with a recording of approximately 200 hours of phone calls that the defendant has participated in; in turn, the prosecutor provides these recordings to the defense lawyer. After providing the recordings, the prosecutor listens to a call in which the defendant asked the victim if she understands that he "didn't do it." She says "yeah" in response.

Question Presented

Does the prosecutor fulfill her duty under Rule 3.8(d) by providing the full 200 hours of phone calls to the defense lawyer, or is the prosecutor required to specifically identify the portion of the conversation where the victim says that the defendant "didn't do it"?

Applicable Rule of Professional Conduct

The applicable Rule of Professional Conduct is Rule 3.8(d), Additional Responsibilities of a Prosecutor:

> A lawyer engaged in a prosecutorial function shall:
>
> (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court[.]

Analysis

Rule 3.8(d) only applies to evidence that the prosecutor *knows* exists and tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. The rule does not impose any obligation on a prosecutor to seek out evidence, although the prosecutor's duties of competence and diligence do require her to gather and review the evidence necessary to competently prosecute the case. Once the prosecutor knows of the existence of the evidence, and of the fact that it tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment of the accused, then she must make timely disclosure of that evidence to the defense lawyer. The question in this scenario is whether "making disclosure" requires the prosecutor to specifically identify a statement or piece of evidence that is exculpatory for purposes of Rule 3.8(d), or whether the prosecutor fulfills her duty by providing bulk discovery that contains the exculpatory evidence along with many other pieces of inculpatory or irrelevant information.

The Committee concludes that the duty under Rule 3.8(d) is affirmative and cannot be delegated to the defense lawyer by turning over a large quantity of material without disclosing the particular information that is exculpatory. "Disclosure" of evidence means more than merely

making the evidence available to be found; under the facts presented in this hypothetical, it requires identifying the specific evidence that the prosecutor knows tends to negate the guilt of the defendant. The prosecutor does not provide "disclosure" in any meaningful way if she merely turns over a large volume of material and implicitly tells the defense lawyer to "go fishing" for whatever exculpatory evidence can be found somewhere in the material. The purpose of Rule 3.8, which is titled "*Additional*Responsibilities of a Prosecutor" (emphasis added) is to ensure that, in addition to the ethical obligations that apply to every lawyer, the prosecutor is complying with her ethical duties to act as a minister of justice and to ensure that the defendant is accorded procedural justice, as Comment [1] to the rule explains. This purpose is not served if the prosecutor is able to effectively conceal information by failing to draw the defense lawyer's attention to a single needle in a haystack composed of 200 hours of recorded conversations. Likewise, the fact that the defense lawyer has his own duties of diligence and competence that may require him to review all of the available evidence does not affect the prosecutor's duty of disclosure. The Rule focuses entirely on the prosecutor's obligation to the defendant and his counsel, and those obligations exist regardless of the defense lawyer's ability to locate or review the evidence at issue.

On the other hand, the result would be different if the prosecutor had not reviewed the recordings at all. For example, the jail only provided the recordings to the prosecutor hours before trial, and the prosecutor promptly turned them over to the defense lawyer without listening to the recordings; in that situation, Rule 3.8(d) does not require the prosecutor to disclose the existence of this conversation because she does not know that it exists. Rule 3.8(d) does not apply to evidence unless it is actually known by the prosecutor, even if it is in the prosecutor's possession and even if it is known by law enforcement officials.

LEO 1880:

OBLIGATIONS OF A COURT-APPOINTED ATTORNEY TO ADVISE HIS INDIGENT CLIENT OF THE RIGHT OF APPEAL FOLLOWING CONVICTION UPON A GUILTY PLEA; DUTY OF COURT-APPOINTED ATTORNEY TO FOLLOW THE INDIGENT CLIENT'S INSTRUCTION TO APPEAL FOLLOWING A GUILTY PLEA WHEN THE ATTORNEY BELIEVES THE APPEAL WOULD BE FRIVOLOUS.

QUESTIONS PRESENTED:

1. Is it ethically permissible for a court-appointed attorney[1] to file an appeal following his client's guilty plea[2] if the attorney believes such appeal to be frivolous?

2. Is a court-appointed attorney ethically obligated to advise his indigent client that the client has an opportunity to file an appeal under federal constitutional law to a conviction or sentence based on a plea of guilty when the attorney believes that no grounds for appeal exist?

3. Must a court-appointed attorney petition for an appeal if his client so requests when the attorney believes such appeal would be frivolous?

APPLICABLE RULES OF PROFESSIONAL CONDUCT:

Rules of Professional Conduct l.1[3], 1.2(a)[4] 1.3(a)[5], 1.4(b)[6], and 3.1[7] apply to the issues addressed in this opinion.

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[1] All references to court-appointed attorneys in this Opinion shall be deemed to include public defenders.

[2] All references to guilty pleas in this Opinion shall be deemed to include pleas of *nolo contendere*.

[3] **RULE 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[4] **RULE 1.2 Scope of Representation**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

DISCUSSION:

The Committee has determined that the answer to the three questions set forth above is "yes."

An appeal from a conviction or sentence flowing from a guilty plea will more often than not be groundless. However, a court-appointed attorney instructed by his indigent client to petition for an appeal must do so even when the attorney deems such appeal to be frivolous. The attorney does not violate Rule 3.1 by so doing. Federal constitutional and Virginia law compel such action, and deprive the court-appointed attorney of the authority to decline to follow his client's instruction. Beyond that, as detailed hereafter, the constitutionally mandated procedures applicable to frivolous appeals provide that the indigent's attorney assert that, in his opinion, the appeal lacks merit and move to withdraw from representation. Thus, the attorney is at no risk of violating Rule 3.1 because he is mandated by law to file a frivolous appeal if requested by the client and the relevant pleadings will contain the attorney's candid assessment that the appeal lacks merit.

The law is well settled that when an appeal is filed on behalf of an indigent client by a court-appointed attorney who believes that his client's appeal is frivolous, it is for the court, and not the attorney, to determine that the client's appeal has no merit. In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court held that

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. *** Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. [Footnote omitted.] His role as advocate requires that he support his client's appeal to the best of his ability. Of course, **if**

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[5] **RULE 1.3. Diligence**

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

[6] **RULE 1.4. Communication**

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[7] **RULE 3.1. Meritorious Claims And Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

> **counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.** A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; **the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous**. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. [386 U.S. at 744; emphasis supplied.]

The Court of Appeals of Virginia in *Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1989), embraced the constitutional requirement identified in *Anders* and set forth the very language quoted above in its own opinion. *See, Akbar, supra,* 376 S.E.2d at 546.

Anders and *Akbar* are specifically cited and the precepts of those rulings are embedded in Rule 5A:12(h) of the Rules of the Supreme Court of Virginia for appeals to the Court of Appeals of Virginia:

> **Rule 5A:12. Petition for Appeal.**
>
> (h) *Procedure for an Anders appeal.* –If counsel for appellant finds his client's appeal to be without merit, he must comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967), and *Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1989). In compliance therewith, counsel is required to file (1) a petition for appeal which refers to anything in the record which might arguably support the appeal and which demonstrates to the Court of Appeals counsel's conscientious examination of the merits of the appeal; (2) a motion for leave to withdraw as counsel; and (3) a motion for an extension of time to allow the appellant to file a supplemental petition for appeal. The petition for appeal and the motion for leave to withdraw as counsel should specifically cite to *Anders*. All three pleadings must be served on opposing counsel and upon the client and must contain a certificate providing evidence of such service. The Court of Appeals will rule upon the

> motion for extension of time upon its receipt, but will not rule on the motion to withdraw as counsel until this Court considers the case in its entirety, including any supplemental petition for appeal that may be filed.

The Supreme Court of Virginia has determined that, while not constitutionally mandated, an indigent appellant is *by statute* entitled to a court-appointed attorney beyond his first-level appeal to the Court of Appeals of Virginia *and* that the appointed attorney must discharge his duties consistent with *Anders* when faced with an appeal to the Supreme Court of Virginia which the attorney believes is wholly frivolous.[8] The provisions of Rule 5:17(h), governing appeals to the Supreme Court of Virginia, track the provisions of the Rule set forth above regarding petitions for appeal to the Court of Appeals of Virginia.[9]

Both such Rules unquestionably and clearly anticipate the inevitable frivolous appeals filed by court-appointed attorneys for indigent clients consistent with those clients' constitutional and statutory rights. The Rules codify the method contained in *Anders* and *Akbar* by which appeals deemed non-meritorious by court-appointed appellate counsel are to be handled by those attorneys and the court.

There is, however, opportunity for confusion, occasioned by Virginia caselaw and the suggested contents of a circuit court plea colloquy, by the use of the word "right" to appeal, when reference to a waiver of "grounds" for appeal would be more appropriate in the cases of indigent defendants. For example, in *Stokes v. Slayton*, 340 F.Supp. 190 (W.D. Va., 1972) a United States District Court in Virginia held that

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[8] *See*, *Dodson v. Director, Dept. of Corrections*, 233 Va. 303, 355 S.E.2d 573 (1987) and *Brown v. Warden of Virginia State Penitentiary*, 238 Va. 551, 385 S.E.2d 587 (1989).

[9] **Rule 5:17. Petition for Appeal.**

(h) *Procedure for an Anders appeal.* If counsel for appellant finds appellant's appeal to be without merit, counsel must comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967), and *Brown v. Warden of Virginia State Penitentiary*, 238 Va. 551, 385 S.E.2d 587 (1989). In compliance therewith, counsel is required to file (1) a petition for appeal which refers to anything in the record which might arguably support the appeal and which demonstrates to this Court counsel's conscientious examination of the merits of the appeal; (2) a motion for leave to withdraw as counsel; and (3) a motion for an extension of time to allow the appellant to file a supplemental petition for appeal. The petition for appeal and the motion for leave to withdraw as counsel should specifically cite to *Anders*. All three pleadings must be served on opposing counsel and upon the client and must contain a certificate providing evidence of such service. This Court will rule upon the motion for extension of time upon its receipt, but will not rule on the motion to withdraw until this Court considers the case in its entirety, including any supplemental petition for appeal that may be filed.

> An appeal **does not lie** from a conviction entered upon a valid plea[10] of guilty, unless the trial court either lacked jurisdiction or imposed a sentence which exceeds that authorized by law. [340 F.Supp. at 192; emphasis added.]

Following Rule 3A:1 *et seq.* of the Rules of the Supreme Court of Virginia appears an "Appendix of Forms." Form 6 contains "Suggested Questions to Be Put by the Court to an Accused Who Has Pleaded Guilty (Rule 3A:8)" Question 19 reads as follows:

> 19. Do you understand that, by pleading guilty, **you may waive any right to appeal** the decision of this court? [The judge may, but need not, inform the defendant that a guilty plea does not waive the right to appeal lack of jurisdiction or imposition of an impermissible sentence.] [Emphasis supplied.]

Both *Stokes* and Question 19 refer to a waiver of the *right* to appeal, when, in fact, at least with respect to an indigent defendant, the right to appeal, however hollow the right, remains intact under *Anders*. Thus, even when a court-appointed attorney believes his indigent client's appeal would be wholly frivolous, he is not free to reject his client's request for an appeal following a guilty plea by maintaining that the client has waived the *right* to appeal.[11] An appeal from a conviction and sentence following a plea of guilty may be every bit as frivolous as an appeal following an error-free trial at which the client has confessed in open court to the commission of the crime charged. The procedures called for in *Anders* and *Akbar* are applicable to an appeal on behalf of an indigent defendant of *any* conviction, regardless of how and why the final order of conviction was issued.

The right to petition for appeal in criminal cases is not reserved only for those persons convicted of a crime following trial upon a plea of not guilty. Virginia, by statute, permits *any* aggrieved party to present a petition for appeal to the Court of Appeals of Virginia from *any* final conviction of a crime entered by a circuit court. [12] The provision by its terms makes no

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[10] Of course, the validity of a plea, itself, may be the proper subject of an appeal when the record contains evidence to support such a challenge.

[11] *See, Miles v. Sheriff of Va. Beach City Jail*, 266 Va. 110, 581 S.E.2d 191 (2003):

> Although the range of potential grounds for appeal following a guilty plea is limited in Virginia, a defendant who has pled guilty still retains the statutory right to file a notice of appeal and present a petition for appeal to the Court of Appeals of Virginia. See Code §§ 17.1-406 and -407.

[12] § 17.1-406. Petitions for appeal; cases over which Court of Appeals does not have jurisdiction.

A. Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime***.

exception for petitions for appeal from convictions which were the outgrowth of a guilty plea. It may be that the record of a case on appeal reveals that a defendant did not knowingly and voluntarily[13] waive his constitutional rights at the time his guilty plea was accepted by the court.[14] It may also reveal error occurring *after* the plea was accepted, such as with regard to the adjudication or imposition of a sentence.

In 2004, the Virginia General Assembly created the Virginia Indigent Defense Commission. The Commission oversees and supports lawyers who serve as public defenders and court-appointed attorneys representing indigent criminal defendants in Virginia state courts. The Commission has published *Standards of Practice for Indigent Defense Counsel*. The Standards are

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[13] Rule 3A:8(b) of the Rules of the Supreme Court of Virginia provides as follows:

> **Rule 3A:8. Pleas.**
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> (b) *Determining Voluntariness of Pleas of Guilty or Nolo Contendere.* (1) A circuit court shall not accept a plea of guilty or nolo contendere to a felony charge without first determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea. (2) A circuit court shall not accept a plea of guilty or nolo contendere to a misdemeanor charge except in compliance with Rule 7C:6.

[14] The entry of a guilty plea involves the waiver of rights guaranteed by the federal constitution. In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. ***. Second, is the right to trial by jury. ***. Third, is the right to confront one's accusers. *** **We cannot presume a waiver of these three important federal rights from a silent record**.
>
> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories. [395 U.S. at 243, 244; emphasis supplied; citations and footnotes omitted.]

legislatively mandated,[15] and court-appointed attorneys who do not comply with them may be removed from the list of those eligible to serve in such capacity.

The Comment to Standard 1.0 ("The Lawyer-Client Relationship") contains the following statement: "An indigent client is entitled to take an appeal and a lawyer must, if the client so requests, protect the client's right to an appeal even though grounds for an appeal do not exist." The statement, however, conflicts with the Comment to Standard 6.4 ("Entry of the Plea Before the Court"):

> Counsel should inform the client and make sure that the client understands that by entering a plea of guilty, the client will be waiving the following rights and privileges:
> ***
> (g) **Right** to appeal. [Emphasis supplied.]

The cited portion of the Comment is not strictly accurate, for the same reason that the contents of Question 19 are not strictly accurate: The distinction between a "right" to appeal and "grounds" for appeal is not taken into account. An indigent defendant has the federal constitutional right to file an appeal, even if meritless, reversible error may occur during the proceedings in which the guilty plea is tendered and accepted; error may be committed in proceedings which *follow* the tender and acceptance of the plea; and *Anders* and *Akbar* do not permit court-appointed attorneys for an indigent client to have the last word on whether an appeal before an appellate court is frivolous. Thus, any indigent defendant, or any defendant represented by retained counsel or acting pro se, who enters a plea of guilty or *nolo contendere* does *not* waive a "*right* to appeal," even if such right is rendered hollow because the appeal would be frivolous due to a waiver of *grounds* for appeal.

Standard 9.2 also confuses "rights" and "grounds," in connection with a court-appointed attorney's duty to inform a client regarding his right to appeal:

> **Standard 9.2 Right to Appeal**

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[15] § 19.2-163.01. Virginia Indigent Defense Commission established; powers and duties.

A. The Virginia Indigent Defense Commission (hereinafter Indigent Defense Commission or Commission) is established. The Commission shall be supervisory and shall have sole responsibility for the powers, duties, operations, and responsibilities set forth in this section.

The Commission shall have the following powers and duties:

***

4. To establish official standards of practice for court-appointed counsel and public defenders to follow in representing their clients, and guidelines for the removal of an attorney from the official list of those qualified to receive court appointments and to notify the Office of the Executive Secretary of the Supreme Court of any attorney whose name has been removed from the list.

***

> Counsel shall inform the client of his or her right to appeal the judgment of the court, **unless such right has been knowingly, intelligently, and voluntarily waived**, and the action that must be taken to perfect an appeal. If the client advises counsel that he or she wishes to note an appeal, counsel shall take all necessary steps to perfect such appeal in a timely fashion pursuant to the Rules of the Supreme Court of Virginia. If trial counsel is relieved in favor of other appellate counsel, trial counsel shall cooperate in providing information to appellate counsel concerning the proceedings in the trial court. [Emphasis supplied.]

The Committee believes that as long as *Anders* and *Akbar* remain the law which sets forth the minimum constitutional standards due indigent appellants, a court-appointed attorney has a duty under Rule 1.4(b) to advise his client regarding the availability of a petition for appeal, even if it were frivolous and pertains to a conviction based on guilty plea.

Thus, the Committee further believes that Standard 9.2 should not be read to excuse a court-appointed attorney from the ethical obligation to advise the client of the availability of an appeal[16]. The Standards incorporate by reference the Virginia Rules of Professional Conduct. Thus, consistent with Rule 1.4(b), the Standards must be read to require that a court-appointed attorney advise his indigent client of his constitutional right to independent appellate court scrutiny under *Anders* and *Akbar*[17]. An indigent client's informed decision regarding an appeal requires that he know that by filing an *Anders* brief the court-appointed attorney activates an obligation of the appellate court to examine on its own the record of the client's case, affords the client himself an opportunity to present appellate issues to the court, and calls for the court to

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[16] An attorney's ethical obligation to advise a client of his appellate rights is not, of course, limited to court-appointed counsel. While a privately retained attorney may contract with a client to limit the scope of representation to matters in the trial court, once there is an attorney-client relationship in connection with a criminal matter, defense counsel must render appropriate advice to the client regarding his appellate rights.

[17] The United States Supreme Court in *Roe v Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) comprehensively addressed the question of how a court must determine whether an attorney who failed to consult with her client regarding an appeal had rendered ineffective assistance. The Court stated:

> We *** hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

determine if there are any grounds for appeal upon which the court-appointed attorney should be ordered to proceed. With that said, the court-appointed attorney must go beyond merely identifying the client's constitutional right to file an appeal. He must advise his client competently as required by Rule 1.1. The court-appointed attorney should advise his client of the potentially adverse consequences of prevailing on appeal. In the case of a guilty plea, followed by conviction and imposition of an anticipated sentence, a court-appointed client would rarely choose to embark on a course to unravel his conviction and sentence via an appeal only to expose himself to a more severe outcome on retrial or resentencing. For example, an indigent federal criminal defendant who directs his court-appointed attorney to appeal a conviction following a plea wherein the "right" to appeal has been waived exposes himself to potentially grave consequences: In the federal system, when the grounds for appeal which have been waived can be shown to fall within the "right to appeal" the government may attempt to treat the appeal as a breach of the defendant's promise contained in the plea agreement, seek to reopen the case and to pursue the original charges, and use facts contained in the plea agreement in a subsequent trial. *See, e.g.,* the discussion contained in *U.S. v. Poindexter,* 492 F.3d 263 (4th Cir., 2007). A defendant in state court might be exposed to similar risks. These risks must be adequately explained to the client by the court-appointed attorney when the client is being advised of his rights under *Anders*.

After such an advisement, the court-appointed attorney must follow the client's direction to appeal because it is the client's prerogative under Rule of Professional Conduct 1.2(a) to determine the objectives of representation. The attorney must take the steps required both by Standard 9.2 and Rule of Professional Conduct 1.3(a) to perfect the client's appeal when the client requests an appeal.

Standard 10.2.1 is consonant with the obligations imposed by Standard 9.2 and Rule 1.3(a), and addresses court-appointed attorney's obligation to file a further appeal to the Supreme Court of Virginia unless the client has expressed his desire to abandon such an appeal.

> **Standard 10.2.1 Scope of Appellate Representation**
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> ***
>
> (d) **Where instructed by the client to do so, counsel must appeal a criminal conviction** or revocation of a suspended sentence to the Court of Appeals of Virginia and to the Supreme Court of Virginia. If a client has not explicitly elected to appeal to the Supreme Court of Virginia after losing an appeal in the Court of Appeals of Virginia, and counsel has not learned that the client desires to abandon his appeal, counsel should continue to prosecute the client's appeal in the Supreme Court of Virginia.*** [Emphasis supplied.]

Consistent with the law, this Standard deprives the court-appointed attorney of any authority to decline the client's instruction to appeal, and makes no exception for those appeals which lack merit and follow a guilty plea[18]. A Comment to this provision makes this crystal clear:

[18] *See,* also, **Standard 10.3.3 Presentation of Appellate Issues; Frivolous Issues.** Sections (a) and (b) of that Standard provide as follows:

> **COMMENT**: While a guilty plea waives most appellate issues, **counsel is nevertheless obligated to appeal from a guilty plea if the client so instructs**. *Miles v. Sheriff of Va. Beach City Jail*, 266 Va. 110, 581 S.E.2d 191 (2003). Limited issues that can be raised following a guilty plea include a sentence that exceeds the statutory maximum or lack of subject matter jurisdiction. If there are no appealable issues, counsel may file an *Anders* petition. [Emphasis supplied.]

CONCLUSION:

A court-appointed attorney must file petitions for appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia, or the applicable federal appellate court, when directed to do so by an indigent client, even when such an appeal is to a conviction entered following a guilty plea, and is deemed frivolous by the attorney. A court-appointed attorney must advise his indigent client that he has a right to appeal, even under those circumstances, but must also identify to the client the risks which may attend asserting such a right A court-appointed attorney who follows the procedure set forth in the Rules of Court which embody the constitutional requirements of *Anders* and *Akbar* does not violate the ethical prohibition regarding non-meritorious claims and contentions.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion
July 23, 2015

(a) Appellate counsel shall identify all issues that counsel believes, in good faith, may have merit for appeal and shall litigate those issues which, in counsel's judgment, are the most promising. When counsel reasonably believes that no potentially meritorious issues exist in a case, he shall so advise the client, and shall inform the client of the costs associated with proceeding with the appeal. Counsel should advise the client that it may be in the client's best interests to withdraw the appeal. If the client nevertheless desires to proceed with the appeal, or fails to respond, counsel shall proceed to litigate the case to the best of his or her ability under the circumstances.

(b) In the alternative, when counsel determines there are no meritorious issues to support an appeal, counsel may elect to advise the court of that fact and request permission to withdraw pursuant to *Anders v. California,* 386 U.S. 738 (1967). Any motion to withdraw, however, must be accompanied by a petition presenting anything in the record that might arguably support the appeal, and by a motion for extension of time to allow the client to respond. The motions and petition should be promptly provided to the indigent client.

Committee Opinion
December 2, 1998

LEGAL ETHICS OPINION 1718

CONFLICT OF INTEREST; ATTORNEY AS MEMBER OF LOCAL GOVERNING BODY AND MEMBER OF LAW FIRM WHICH REPRESENTS A CLIENT IN MATTER WHICH MUST BE ACTED UPON BY THAT GOVERNING BODY.

You have presented a hypothetical in which Lawyer A and Lawyer B are members of the same law firm. Lawyer A is a member of a local governing body. Lawyer B represents a client of the law firm in a zoning application before the local governing body. Lawyer A will disclose his relationship with Lawyer B and will abstain from participation in the local governing body's consideration and decision concerning the zoning application of the law firm's client. Based on those facts, you have asked the committee to opine whether it is ethically permissible for Lawyer B to represent a client in a matter before the local governing body on which Lawyer A serves if Lawyer A discloses his relationship with Lawyer B and abstains from participation in the local governing body's consideration of the matter.

The appropriate and controlling disciplinary rules pertinent to your inquiry follow:

DR:8-101(A): A lawyer who holds public office shall not:

> (1) Use his public position to obtain or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

> DR:9-101(C): A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.

Guidance is also provided in the Ethical Considerations to the Disciplinary Rules, as follows:

> EC:8-8: Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC:9-6: Every lawyer owes a solemn duty . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Committee Opinion
December 2, 1998

In prior LEOs the committee has addressed whether a lawyer may lobby the General Assembly on behalf of a client when another lawyer in the law firm is a member of the General Assembly. In LE Op. 419, dated July 21, 1981, the committee opined that it was not ethically permissible for a lawyer to lobby the General Assembly or other legislative body when his partner was a member of the legislative body, notwithstanding disclosure and abstention by the lawyer-legislator and disclosure by the lawyer-lobbyist. In LE Op. 537, dated January 18, 1984, the committee affirmed LE Op. 419. In doing so, the committee observed that "the Virginia Comprehensive Conflict of Interest Act does not obviate [the conclusion reached in LE Op. 419] nor in any way diminish the professional responsibility of the attorney."

The subject was revisited in LE Op. 1278, dated September 21, 1989. The committee was asked to consider whether, in view of the enactment of the detailed General Assembly Conflict of Interests Act (Code of Virginia §§ 2.1-639.30, et seq) a member of a law firm was permitted to lobby the General Assembly when another member of the law firm was a member of the General Assembly. The committee affirmed LE Op. 419 and LE Op. 537, stating:

> The Committee is of the view that the conclusions reached in Legal Ethics Opinions Nos. 419 and 537 continue to be applicable to the situation you have described, notwithstanding the greater detailed disclosure now required of legislators under the [Conflict of Interests] Act. It is the Committee's opinion that the legal requirements of disclosure and abstention imposed on members of Virginia legislative bodies do not override the ethical admonitions of the applicable disciplinary rules. The Committee continues to believe that compliance with the Act by the legislator is a legal, not an ethical, requirement and will not obviate the need for both lawyer-legislators and lawyer-lobbyists to adhere to the ethical obligations of the profession.
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> * * *
>
> Therefore, upon careful reconsideration, the Committee reaffirms the prohibitions articulated in Legal Ethics Opinions Nos. 419 and 537 and opines that, the General Assembly Conflict of Interests Act notwithstanding, it is improper for an attorney to lobby before the General Assembly or other legislative body when a lawyer with whom he shares a professional relationship is an elected member of that body.

Ethics panels in most other jurisdictions have concluded that it is not ethically permissible for a lawyer in the lawyer-legislator's law firm to represent clients in matters before a legislative body on which the lawyer-legislator serves. That the lawyer-legislator recuses himself/herself from participation and voting in the matter was found to be inadequate to cure what some ethics panels described as a conflict of interest, and others, an appearance of impropriety. However the ethical proscription was described, it was imputed to the entire law firm. See Michigan Op. RI-22 (1989); Connecticut Op. 37 (1988) and Op. 94-19 (1994); Illinois Op. 90-17 (1991); Iowa Op. 92-31 (1993), 93-25 (1994), and Op. 96-20 (1996); Rhode Island Op. 93-14 (1993); Kentucky Op. E-347

(1991); Alaska Op. 76-1 (1976); Nebraska Op. 96-2 (undated); Philadelphia Bar Ass'n Op. 87-20; South Carolina Op. 90-20 (1990); and Maryland Op. 91-15 (1991); see In re Vrdolyak, 137 Ill. 2d 407, 560 N.E.2d 840 (1990), and In re Opinion 452 87 N.J. 45, 432 A.2d 829 (1981).

A different conclusion was reached in In re Ethics Op. No. 74-28, 111 Ariz. 519, 533 P.2d 1154 (1975) (en banc). In that case a lawyer was an elected member of the city counsel. One question presented was whether members of the city councilman's law firm were prohibited from representing clients in civil matters before the city council.

It was argued that the Arizona conflict of interests laws controlled. The public interest was fully protected, it was contended, by compliance with the statutory curative measures by which public officials could avoid potential conflict of interests. The Arizona Supreme Court turned away the "exclusivity" of the conflict of interests laws, stating that "This court can obviously set higher standards for the members of the bar than the legislature has set for public officials in general." 111 Ariz. at 521, 533 P.2d at 1156. The court reached what it described as a common sense solution to avoid an appearance of impropriety and to encourage public service by lawyers:

> [M]embers of the firm can appear before the city council if: 1) the attorney public official publicly announces his disqualification and, if there is a record of proceedings, that disqualification appears in the record, 2) the attorney public official refrains from discussing the matters upon which the firm appears with any of his colleagues on the council and any city employees involved with the matters, and 3) there is a separation of accounts so that the attorney public official in no way shares in the fee or other remuneration received by the firm.

Id.

In a concurring opinion, Chief Justice Cameron addressed the Canon 9 axiomatic norm that lawyers are to avoid "even the appearance of impropriety," stating at 522, 533 P.2d at 1157:

> Canon 9 states, `A lawyer should avoid even the appearance of professional impropriety. ' This is, of course, a worthy and commendable goal, but that is all it can be - a goal that is often unattainable in the practical world of private law practice. What is professionally improper is frequently in the eye of the beholder and ethical conduct to those outside the legal profession can have the appearance of professional impropriety. . . . [I]t should then be emphasized that while we are concerned with avoidance of conduct that would give the appearance of professional impropriety, it is actual unethical conduct which is our primary concern. Ethical conduct which only incidentally creates the appearance of professional impropriety in the minds of the public should not, absent other factors, be proscribed. To be overly strict in interpreting Canon 9 would prevent an attorney from discharging his responsibility as a citizen to participate in public affairs and hold public office. To deny an attorney this opportunity for public service would not only unnecessarily restrict his rights as

> a citizen, but would imply that attorneys are exempt from the reasonable demands and responsibilities of citizenship, a result which, we believe, would reflect unfavorably upon the legal profession and be a loss to society.

See West Virginia Op. 84-5 (1985), permitting a lawyer to serve as a hearing examiner for a state commission when his law firm represented clients before the commission, provided he did not participate in the matters in which his law firm or law firm clients were involved; New Hampshire Op. 1996-92/14 (1992), permitting law firm to represent clients before workers' compensation appeals board on which one of its lawyers was an appointed member, provided the lawyer-member publicly disqualified himself and abstained from participation and did not attempt to influence the other members, and the law firm did not have access to information of the appeals board.

The ABA Standing Committee on Legal Ethics has issued two opinions on the ethics issue presented. ABA Formal Opinion 296 (1959) concluded that there was an inherent conflict of interest in a lawyer lobbying the legislature for a client when another lawyer in the law firm was a member of the legislature. The conflict of interest affected the public, and the public could not consent.

Three years later, the ABA reconsidered and modified its conclusion. In ABA Formal Opinion 306 (1962), the ABA said that the unintended effect of its earlier opinion deterred lawyers from serving in state legislatures, and that a modification was warranted. Its modification was tied to states' conflict of interests rules for legislators.

The ABA reasoned that when a state had adopted constitutional or statutory conflict of interests rules requiring legislators to disclose personal interests and abstain from voting, those rules expressed the public policy of the state. Hence, a disclosure of the lawyer-legislator's interest in and relationship to the lobbying by a lawyer in his/her law firm, coupled with abstention from voting on the matter, cured the conflict of interest. The "implied consent" rule was stated, as follows:

> We have concluded that if in any particular state there are constitutional or statutory provisions or legislative rules which expressly or by necessary implication recognize the propriety of a lawyer appearing before legislative committees, or otherwise lobbying in the legislature for a client where a member of his firm or associate was at the time a member of the legislature, or where provision has been made permitting a member of the legislature to disqualify himself from voting on or participating in the discussion of the matter involved, consent has been given resolving the conflict of interest questions, either by the people through the constitution or by the legislature speaking for the state.

Notwithstanding the ABA's conclusion, the committee is not persuaded that a lawyer-legislator's compliance with the applicable conflict of interests laws ethically permits his law firm to represent clients in matters before a state or local governing body on which he serves. Such compliance discharges a legal obligation only. Conduct that is permissible

as a matter of law is not necessarily permissible as a matter of ethics. The distinction was clearly drawn in Gunter v. Virginia State Bar, 238 Va. 617, 621 (1989):

> The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct that would be lawful if done by laymen. . . . [W]e emphasize that more is expected of lawyers than mere compliance with the minimum requirements of that standard . . . .
>
> * * *
>
> [C]onduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful. . . .

State and local government conflict of interests laws express a salutary public policy. The public policy expressed embraces citizen legislators generally. Lawyers who hold public office assume responsibilities beyond those of other citizens by virtue of the Code of Professional Responsibility. See Annotated Rules of Professional Conduct, Rule 8.4, com. 3 (3rd ed. 1996). Moreover, the committee has opined in several opinions that the Code of Professional Responsibility governs the conduct of lawyers who serve in a capacity other than lawyer for a client. See LE Op. 1443 (lawyer acting as "lender's agent"); LE Op. 1487 (lawyer acting as executor); LE Op. 1587 (lawyer acting as Chapter 7 bankruptcy trustee); LE Op. 1617 (lawyer acting as executor, trustee, guardian, or attorney-in-fact). Hence, the committee affirms its conclusion in LE Op. 1278 that the legal requirements of disclosure and abstention applicable to all members of legislative bodies do not override the ethical constraints under the Code of Professional Responsibility applicable to lawyers who are members of legislative bodies.

The committee recognizes that no Disciplinary Rule explicitly answers the question presented. As the committee observed in LE Op. 1702, legal ethics, like ethics generally, are fraught with gray areas that do not fit under a literally dispositive Disciplinary Rule. There is not an ethical vacuum, however. The polestar is conduct that, consistent with the admonitions of EC:9-2 and EC:9-6, reflects credit on and inspires public confidence in and respect for the integrity of the legal profession and avoids the appearance of impropriety.

Compliance with conflict of interests laws does not necessarily satisfy those ethical admonitions. The Virginia Attorney General has addressed the purpose of the conflict of interests law, as follows:

> Our system of government is dependent in large part upon its citizens maintaining the highest trust in their public officials. The conduct and character of public officials is of particular concern to state and local governments, because it is chiefly through that conduct and character that the government's reputation is derived. The purpose of the conflict of interests law is to assure the citizens of the Commonwealth that the judgment of public officers and employees will not be compromised or

> affected by inappropriate conflicts. To this end, the [Conflict of Interests] Act defines certain standards or types of conduct which clearly are improper. The law cannot, however, protect against all appearance of conflict.

Attorney General COI Advisory Opinion No. 9-A10 (1989) [AG COI:9-A10] (emphasis supplied).

You express a concern that LE Op. 1278 is unduly restrictive and could have a chilling effect on lawyers who wish to stand for election to a local governing body. The committee is not insensitive to your concern, yet a different rule could have a chilling effect on the adequacy of a lawyer-legislator's representation of his constituents. For example, if the lawyer-member of the local governing body in your hypothetical is associated with a law firm that has a substantial zoning practice before the local governing body, his/her recusal from participation in all of those applications would effectively leave his constituents without a voice in the decision-making process.

The sense of the committee is that public confidence in the legal profession is not inspired, nor is an appearance of impropriety avoided, if a law firm represents clients before a governing body on which one of its lawyers is a member even if he/she abstains from participation and voting. A likely public perception, and an understandable one, is that the lawyer for the client has an advantage or an "inside track" because another lawyer in the law firm is a member of the governing body.

Regardless of the lawyer-member's recusal, his/her cultivation of a relationship of trust and respect with the other members and their inter-personal relations are likely to result in a public perception that his/her law firm profits from that relationship in its representation before the governing body. Conversely, if the law firm's representation is unsuccessful, a nagging suspicion for the client is whether the governing body's decision was the result of an unarticulated concern that it not be accused of impropriety in dealing with a member's law firm.

That the lawyer-legislator would not, as required in In re Ethics Op. No. 74-28, receive any portion of the legal fee does not diminish an appearance of impropriety. The requirement itself seems to elevate form over substance. Even if a portion of the defined fee is not distributed to the lawyer-member of the governing body, the fee paid the law firm may well be used to pay law firm overhead allocable to the lawyer-member and thus benefit him/her. If the lawyer-member of the governing body produces significant clients that the law firm represents before the governing body, the law firm may consider his/her production of business in arriving at his/her compensation or percentage of profits. There, too, the lawyer-member has derived an economic benefit from his law firm's representation of clients before the governing body on which he/she serves.

Moreover, if a law firm represents clients before a governing body when one of its lawyers is a member, there is the appearance, if not the fact, of conflicting loyalties. The law firm, which includes the lawyer who sits on the governing body, owes a duty of loyalty to the client and must use all available resources to achieve the client's lawful

objective. The duty of loyalty is diluted and the available resources impaired, however, when the law firm must exclude the lawyer-legislator from the representation, and the law firm cannot enlist his knowledge of the subject matter or of the governing body in the representation. The lawyer-legislator may have acquired non-public or even confidential information as a member of the governing body that would serve the client's interest. The client is denied the benefit of such information, however. If the law firm seeks client-consent to the limitation on its resources, the law firm might well be asking for consent to less than adequate representation.

Similarly, the lawyer-legislator has a duty to the governing body on which he/she serves and to his/her constituents. When he/she abstains from the governing body's decision-making because it involves his/her law firm's representation of a client, then his/her personal interest is elevated over his/her duty as a public servant. Both the governing body and the lawyer-legislator's constituents are deprived of the benefit of his/her voice in the decision-making process.

The committee is not unmindful of Chief Justice Cameron's observation that avoiding an appearance of impropriety is but a worthy goal that is often unattainable in the private practice of law. The rationale underlying the worthy goal is, as Plato's allegory of the cave illustrated long ago, that appearance can be understood to be reality. "[W]here public confidence is in issue, what people think is true may be as important as what is true." Association of the Bar of New York, Report of the Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service 17 (1960). "The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself." Lloyd N. Cutler, Conflicts of Interest, 30 Emory L.J. 1015, 1020 (1981). Significantly, the appearance of impropriety test remains in the ethics law of the federal government. See generally Daniel L. Koffsky, The Appearance of Wrongdoing, 6 Georgetown J. of Legal Ethics 501 (1993).

The sense of the committee is that whenever lawyers' conduct presents an appearance of impropriety that can diminish public confidence in and respect for the integrity of the legal profession, as well as the administration of government, lawyers must adhere to the "higher standard" of ethical conduct emphasized in Gunter to avoid the appearance of impropriety The committee concludes, therefore, that it is not ethically permissible for a law firm to represent a client in a matter before a governing body when one of the law firm's lawyers is a member of the governing body even if he/she discloses the conflict and abstains from participation and voting in the matter.

Committee Opinion
January 6, 2002

LEGAL ETHICS OPINION 1763

RECONSIDERATION OF LEO 1718; REPRESENTATION OF CLIENT BEFORE GOVERNING BODY WHEN OTHER ATTORNEY IN SAME FIRM IS MEMBER OF GOVERNING BODY.

You have requested a reconsideration of Legal Ethics Opinion 1718 [LE Op. 1718]. That opinion involved the following hypothetical:

> Lawyer A and Lawyer B are members of the same law firm. Lawyer A is a member of a local governing body. Lawyer B represents a client of the law firm in a zoning application before the local governing body. Lawyer A will disclose his relationship with Lawyer B and will abstain from participation in the local governing body's consideration and decision concerning the zoning application of the law firm's client. Based on those facts, is it ethically permissible for Lawyer B to represent a client in a matter before the local governing body on which Lawyer A serves if Lawyer A discloses his relationship with Lawyer B and abstains from participation in the local governing body's consideration of the matter?

The committee concluded that "it is not ethically permissible for a law firm to represent a client in a matter before a governing body when one of the law firm's lawyers is a member of the governing body even if he/she discloses the conflict and abstains from participation and voting in the matter."

Your request suggests that reconsideration of that conclusion occur for two reasons: 1) the adoption of the Rules for Professional Conduct since the issuance of LEO 1718 [LE Op. 1718] and 2) the possible effect of LEO 1718 [LE Op. 1718] on the availability of attorneys for service on public boards.

LEO 1718 [LE Op. 1718] cites a number of legal authorities as comprising the legal foundation for the conclusion that the proposed conduct triggers an incurable conflict of interest. The opinion analyzes discipline rules, ethics considerations, prior Virginia ethics opinions, an ABA opinion, and numerous ethics opinions from other states.

The pertinent regulatory authority has changed since 1998, the year the committee issued LEO 1718 [LE Op. 1718]. That opinion cites the following authority as pertinent from the former Code of Professional Responsibility: Discipline Rules 8-101 (A) [DR:8-101] and 9-101(C) [DR:9-101], along with Ethical Considerations 8-8 [EC:8-8] and 9-6 [EC:9-6]. The change highlighted by your request is that the phrase "appearance of impropriety" in the title of former Canon 9, of which DR 9-101 [DR:9-101] was a part, was not repeated in the corresponding portion of the new Rules for Professional Conduct, that is, Rule 8.4(d) [Prof. Conduct Rule 8.4]. Also, the text of the two Ethical Considerations cited in LEO 1718 [LE Op. 1718] does not appear in the new rules. However, the text of DRs 8-101(A) [DR:8-101] and 9-101(C) [DR:9-101] remains virtually intact in the new rules. Thus, the new rules maintain the prohibitions regarding

the use of a public office for improper influence or advantage and regarding the suggestion that a lawyer has influence with a government official or entity.

While express reference to the "appearance of impropriety" standard is no longer in the rules, the conflict of interest portion of the rules remains an appropriate source of analysis for the question raised in LEO 1718 [LE Op. 1718]. As referenced in that opinion, a majority of the state bars that have issued an opinion regarding this issue have found that the proposed conduct is improper. While some of those opinions are based on an analysis of the "appearance of impropriety" standard, opinions from other states are based in whole or in part on a conflict of interest analysis.

This committee finds especially compelling the analysis developed by the Michigan Bar on this issue. In considering this issue, the Michigan Bar relied upon an analysis of Rule 1.11. Mich. Bar Op. RI-22 (1989). Part (b) of that rule addresses an attorney's working on a matter both as a public official and in representing a private client. A conflict of interest arising under Rule 1.11(b) [Prof. Conduct Rule 1.11] can be "cured" if both the private client and the appropriate government agency consent after consultation. That provision also provides that an attorney in that first attorney's firm could work on the matter so long as the lawyer is properly screened and notice is given to the proper agency. In applying that rule to the present issue, the Michigan Bar found that, at first blush, the rule would suggest that the government board member could "cure" the conflict by recusing himself from the matter. Nevertheless, the Michigan Bar concluded that such a "cure" was not available to the attorney/board member as such a withdrawal from duty would "deprive citizens of the representative elected to exercise judgment in such matters." This committee agrees with the Michigan Bar's conclusion that the attorney/board member's obligation to his constituents would disqualify any attorney in his firm from appearing before the board.

This committee opines that the situation in the present hypothetical triggers an impermissible conflict of interest under the Rules for Professional Conduct. This conflict of a partner representing a client before a partner's board should not be "cured" by the board member's recusal from the matter. Such recusal goes against the directive found in Comment 1 to Rule 1.11 [Prof. Conduct Rule 1.11], which states,

> This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client. A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or *foreseeably may* be in conflict with official duties or obligations to the public.

Thus, this committee opines that for an attorney/board member to recuse himself from a matter before his board in order that his law firm may accept representation of a private client creates an impermissible conflict of interest. Therefore, an attorney may not accept representation of a client in a matter that would require an appearance before a board, or other public body, of which any member of that attorney's firm is a member.

Committee Opinion
January 6, 2002

Your request raises as cause for reconsideration not only the recent rules change in Virginia but also the concern that the conclusion of LEO 1718 [LE Op. 1718] could limit the availability of lawyers for service on public boards. The committee notes that this concern is actually one of public policy rather than of rules interpretation. The committee opines that, regardless of public policy considerations, the Rules of Professional Conduct do not permit the proposed conduct. The committee also notes that this particular potential consequence was considered and addressed in LEO 1718 [LE Op. 1718].

This committee reaffirms the conclusion of Legal Ethics Opinion 1718 [LE Op. 1718].

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

Committee Opinion
January 6, 2002

LEGAL ETHICS OPINION 1806

CONFLICT OF INTEREST IN LITIGATION INVOLVING REAL ESTATE THAT IS OWNED BY TRUSTEES.

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

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

1) The real estate sale was nineteen years ago;
2) Attorney A did not search or certify the title to the property as those tasks were performed by a title company;
3) The current adverse parties are the trustees of a trust whereas the prior representation was of the three purchasers as individuals;
4) Attorney B has not reviewed the file and was not at the firm at the time of A's representation of the purchasers; and
5) The trustees' attorney has failed to respond to Attorney B's inquiry about the matter.

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

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

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

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

Attorney A and Attorney B together would seem to be in a classic "former client" conflict situation in that Attorney A represented parties who are now adverse parties in B's case, which

may be substantially related to that of Attorney A. However, the request, in effect, raises five potential reasons why no such conflict is in fact triggered here. The Committee will review each of these five factors individually.

1) The real estate sale was nineteen years ago.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Thus, regardless of the outcome of the Rule 1.9(a) determination outlined above, if Attorney A received any confidential information during the representation of the purchasers/trustees at the time of purchase that would be pertinent in Attorney B's representation against those parties in the new matter, then, as Rule 1.9 and Rule 1.10 together impute the effect of that information form Attorney A to Attorney B, Attorney B could not represent the neighboring landowner, absent consent from X, Y, and Z. Whether Attorney A received such information is a factual determination that the Committee cannot make based on the limited facts provided in the hypothetical.

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

Committee Opinion
September 20, 2004