

ETHICS GAME SHOW, ROUND VI

Kenneth P. Troccoli, with
Ellen Shultz assisting

DISCUSSION OVERVIEW

Note: A .pdf file containing the PowerPoint slides will be e-mailed to program attendees at the conclusion of this session and will also be available at the following link: <http://vae.fd.org/content/training>.

Jeopardy Categories

Infamous Lawyers
Lawyer Well-Being
Got Civility?
Self-Reporting
Grab Bag

- I. Client With Impairment
 - A. RPC 1.6 (Confidentiality of Information)
 - B. RPC 1.14 (Client With Impairment)
 - C. LEO 560 (1984) (Confidence/Secret – Intent to Commit Suicide)

- II. Truthfulness, Fraud, and Candor Toward the Tribunal (Role Play)
 - A. RPC 1.2 (Scope of Representation)
 - B. RPC 1.6 (Confidentiality of Information)
 - C. RPC 1.16 (Termination of Representation)
 - D. RPC 3.3 (Candor Toward the Tribunal)
 - E. RPC 3.4 (Fairness to Opposing Party and Counsel)
 - F. RPC 4.1 (Truthfulness in Statements to Others)
 - G. RPC 8.4 (Misconduct)

- H. LEO 306 (1978) (Fee – Court-Appointed Attorney)
- I. LEO 390 (1980) (Perjured Testimony – Court-Appointed Attorney)

III. Client Files

- A. RPC 1.16 (Termination of Representation)
- B. LEO 1366 (1990) (Files - Duty to Client)
- C. LEO 1790 (2004) (Client Files – Attorney’s Refusal to Release PSR)

IV. Plea Bargaining

- A. RPC 1.3 (Diligence)
- B. RPC 1.7 (Conflict of Interest)
- C. RPC 8.4 (Misconduct)
- D. LEO 1857 (2011) (Waiver of Prospective IAC Claim)

How Virginia Lawyers Self-Regulate: A View from Ethics Counsel

by James M. McCauley, ethics counsel for the Virginia State Bar

As I move into my 30th year of employment at the Virginia State Bar (VSB), I am given an opportunity to reflect on the significant changes in the Rules of Professional Conduct (RPC) and our regulation of the practice of law in Virginia — and how volunteer lawyers have served to shape these changes.

When I started at the VSB in 1989, we were governed by the former Code of Professional Responsibility (Code) with its Disciplinary Rules and Ethical Considerations. The Supreme Court of Virginia adopted the ABA Model Rules format on January 1, 2000, after a five-year study by a special committee, chaired first by Donald Lemons, now Chief Justice of the Supreme Court of Virginia, and succeeded by the late Dennis (“Denny”) W. Dohnal who took the task of drafting the new rules to completion. In comparing the Code to the ABA Model Rules, the special committee found itself keeping some of the old Code rules and language but adopting much more of the new Model Rule language. To this day, there remain some substantial differences between the Virginia Rules of Professional Conduct and the ABA Model Rules. Given a project of considerable scope and importance, the special committee obviously considered each rule before adopting language from the ABA Model Rules, or incorporating language from the former Code, or developing its own language for a particular rule.

The Model Rules adopted by the Court filled several gaps left in the former Code, including Rules 1.2 (scope of representation), 1.13 (organizational clients), 1.14 (clients with diminished capacity), 1.17 (sale of a law practice) and a set of rules for lawyer serving as third party neutrals in alternative dispute resolution (Rules 2.3, 2.10 and 2.11). The former Code also had no counterpart for Rules 4.4 (respect for rights of third persons), 5.1 and 5.3 (requiring supervision of subordinate lawyers and nonlawyer employees or agents), 6.3 (membership in legal services organizations), and 8.2 (criticism of judges). Virginia did not adopt some of the ABA Model Rules, for example, Rule 3.2 (expediting litigation), Rule 3.9 (advocate in non-adjudicative proceedings), Rule 5.2 (duties of subordinate lawyer), Rule 5.7 (responsibilities regarding law-related

services), and Rule 6.4 (law reform activities affecting client interests).

After the Court adopted the Virginia Rules of Professional Conduct effective January 1, 2000, the Standing Committee on Legal Ethics (Ethics Committee) was charged with the responsibility of reviewing and recommending any further proposed changes to the RPC. However, any proposals to amend the RPC may originate from other committees, sections, or constituencies of the bar, followed by review and recommendation by the Ethics Committee. Since the RPC are rules of the Supreme Court of Virginia, presumably the Court could adopt a new rule or amend a rule on its own initiative. Although the Court has never done that during my tenure, it has made modifications to rule amendments proposed by the VSB and has occasionally rejected rule amendment proposals submitted to the Court by the VSB.

After a 1998 California case¹ ruled that some New York lawyers committed unauthorized practice of law (UPL) in assisting a client in an arbitration in California, including work performed by the lawyers at their New York offices, state bar regulators began to study their own UPL rules in the early to mid-2000s. The VSB created task forces for corporate counsel, chaired by the late W. Scott Street III, and multijurisdictional practice, chaired by Marni E. Byrum, to study these issues and recommend changes to the RPC. Based on their work product, the Court adopted a Corporate Counsel rule to authorize out-of-state lawyers to serve their employers in Virginia and do pro bono work; and amended Rule 5.5 to allow out-of-state lawyers to engage in temporary practice in Virginia subject to certain conditions. These amendments, adopted in most other states, have given lawyers greater mobility and flexibility in multijurisdictional practice, without the necessity of seeking reciprocity or admission by examination into another state’s bar.

In more recent times, the VSB discontinued its Advertising and UPL committees, finding that the work of both committees could be handled by staff under the supervision of the Ethics Department and the Standing Committee on Legal Ethics. New rules were added to the RPC, including Rule 1.18, which addresses conflicts created by discussions with prospective clients and allows screening to avoid imputation, and Rule 5.8 that sets out rules for notification to clients when a lawyer leaves a law firm.

The Court adopted amendments to Rules 1.1 (competence) and 1.6 (confidentiality) to recognize that lawyers have duties with respect to using technology and exercising reasonable care to safeguard confidential information from interception, theft, inadvertent disclosure, and unauthorized access or destruction by hackers. On the recommendation of the Ethics Committee, the Court has streamlined and simplified the lawyer advertising rules, beginning in 2013 with the removal of the unqualified ban on in-person solicitation in cases involving personal injury or wrongful death, and later in 2017 by removing the disclaimers required for advertising specific case results and specialization certifications awarded lawyers by accrediting organizations. The changes also recognize the more contemporary means by which a lawyer may market legal services and develop clients in the digital age, i.e., social networking, lead generation, online attorney-client matching, and referral services. Most importantly, the overhaul of the lawyer advertising rules rebalances the VSB's interest in policing advertising that is false and misleading with the lawyer's right of commercial speech, by removing technical and unnecessary requirements that do not advance an important regulatory objective.

A special study committee, chaired by Former UPL Committee Chair Adam Elfenbein and composed of persons with expertise and experience with the UPL rules and UPL investigations, met over a two-year period with the goal of rewriting the UPL rules to make them more concise and easier

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to read. Their work product, if adopted by the Court, will produce a more user-friendly regulatory document for judges, lawyers, and members of the public to follow. The proposal may be studied here: www.vsb.org/docs/prop-UPL-050318.pdf

The VSB currently has four full-time lawyers and an executive assistant working the Ethics Hotline and serving several committees and task forces. The Ethics Department is now a separate operation that reports to the executive director and is no longer a part of the Professional Regulation Department. The Ethics Department resides on a different floor and has separate, restricted servers to maintain the confidentiality of all its data. On average, the Ethics Hotline gets 25–30 inquiries per day by telephone or email (ethicshotline@vsb.org). Lawyers can access the hotline at the VSB website here: www.vsb.org/site/regulation/ethics. Lawyers may expect a response within hours of their inquiry and generally on the same day.

There were significant changes in the manner that the VSB and the Court promulgate new rules, amendments to the RPCs, and Legal Ethics Opinions (LEOs). When I started as ethics counsel, in 1995, LEOs were issued by the Standing Committee on Legal Ethics, and they were effective when issued, although they were non-binding and advisory only. There was no opportunity for public comment, except in rare instances where the particular LEO was sent to the VSB Council and the Court for approval. Now, all LEOs must be reviewed and approved by Council and the Court before they become effective. Once the Court adopts a LEO, it has the effect of a decision of the Court. The Committee releases a proposed LEO and publishes it for public comment to start the promulgation process. This same procedure is required for new rules added to the RPC or rule amendments. This enables the committee to consider comments that have been made before submitting the proposed LEO or rule amendment to Council. Both Council and the Court are given all the comments to a proposed LEO or rule change. This process slows down the pace of the rule-making and LEO promulgation, but it results in a more deliberate and thoroughly vetted rule or LEO.

A more recent and noteworthy change is a national movement that focuses on lawyer well-being. This movement grew out of two studies published in 2016 revealing that lawyers and law students are 2–3 times more likely to suffer from anxiety, depression, substance abuse, and suicide than

the general population. Based on these studies, the Ethics Committee issued two LEOs, 1886 and 1887, which discuss a lawyer's ethical obligations when faced with a lawyer that appears to have impairment. A national task force on lawyer well-being issued a report² in August 2017 urging a call to action by all stakeholders in our legal system — regulators, insurers, law schools, lawyers' assistance programs, judges, public and private employers, admissions officials — to address what might be described as a "wellness crisis" for the legal profession. Our Chief Justice

Donald Lemons and Katie Uston, assistant bar counsel, sat on that national task force, so Virginia is playing an active role in this movement. Our Supreme Court appointed a Committee on Lawyer Well-Being chaired by Justice Mims which issued its report³ in September 2018 recommending changes designed to improve lawyer well-being. The most significant change is a call for increased funding of Lawyers Helping Lawyers, a Virginia non-profit organization whose clinician, executive director, and 150 lawyer volunteers throughout the state help lawyers with mental health and substance abuse issues get assessments, referrals, support, treatment, and counselling. Another important recommendation is mandatory continuing education to improve lawyers' awareness and knowledge of wellness, and to learn how to reach out and be proactive when we see a colleague at risk. To this end the VSB is amending its MCLE rules and regulations to enable lawyers to earn MCLE

VSB Ethics Department Staff

Left to right: James M. McCauley, Seth M. Guggenheim, Barbara B. Saunders, Emily F. Hedrick, and Kristi R. Hall



credit for courses that focus on lawyer wellness issues. The Ethics Committee had already embraced a recommendation of the national task force to amend Rule 1.1 (competence) to call attention to the fact that well-being is an aspect of providing competent representation to clients; and the fact that lawyers must be aware of the role of well-being in maintaining competence to practice law. The proposed amendment was submitted to the Court in June 2018.

As I grow closer to the end of my career at the VSB, I am extremely grateful to all the volunteers that have served the VSB as members of its many different committees and task forces. The Ethics Committee, though, has enjoyed most of my time and attention. The Ethics Committee, currently chaired by Eric Page, struggles with some of the most difficult questions on a regular basis. All the easy questions have been asked and answered. The “black and white” situations do not go to the Ethics Committee. The committee’s composition changes regularly but the VSB has kept diversity in the forefront. Every volunteer that has served on the committee and has shared their opinion with me has said that serving on the committee was by far the most fulfilling and intellectually stimulating experience of all their service to the bar. That committee has the important responsibility and privilege of drawing the ethical boundaries in which lawyers practice law by interpreting and applying the RPC to a given factual scenario and by recommending changes to the rules when necessary.⁴

The ability of members of the bar to write and enforce the rules by which they are governed is a unique privilege, especially when compared to how other occupations and professions are regulated. But the privilege of self-regulation has its price — the sacrifice of the time, hard work, and talent of the many wonderful volunteers who contribute to maintaining public confidence in our bar as a *profession*, not a business. The price of self-regulation also means serving the public and our clients by regulating the profession with fairness, efficiency and transparency to the fullest extent possible. The privilege of

self-regulation also demands that we advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system.

I look forward to a few more years working with the Ethics Committee and my hard-working, talented and energetic colleagues: Kristi Hall, Emily Hedrick, Barbara Saunders, and Seth Guggenheim. Each of them, in addition to handling the Ethics Hotline, wear other special hats in serving other committees, task forces, and sections within the VSB. In addition, they all write articles, teach CLE seminars, draft opinions, and provide resources on legal ethics to the VSB website. Kristi Hall, our executive assistant, coordinates, supports and interacts with all of our VSB staff internally and with our lawyer volunteers externally; and she keeps our operation running smoothly and effectively. They do all of this consistently with enthusiasm and professionalism. I am grateful for their support, comradery, and friendship. ♡

Endnotes:

- 1 *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 2 Cal.3d 535, 543, 86 Cal.Rptr. 673, 469 P.2d 353 (1998)
- 2 www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf
- 3 www.vsb.org/docs/A_Profession_At_Risk_Report.pdf
- 4 See page 67 for a committee preference form. President-elect Marni E. Byrum seeks volunteers to serve on committees, including legal ethics.

PREFACE

“The Supreme Court of Virginia endorses the attached Principles of Professionalism for Virginia Lawyers prepared by the Virginia Bar Association Commission on Professionalism. Having been unanimously endorsed by Virginia’s statewide bar organizations, the Principles articulate standards of civility to which all Virginia lawyers should aspire. The Principles of Professionalism shall not serve as a basis for disciplinary action or for civil liability. We encourage the widest possible dissemination of these Principles.”

Leroy Rountree Hassell, Sr.
Chief Justice, Supreme Court of Virginia

PRINCIPLES OF PROFESSIONALISM FOR VIRGINIA LAWYERS

Preamble

Virginia can take special pride in the important role its lawyers have played in American history. From Thomas Jefferson to Oliver Hill, Virginia lawyers have epitomized our profession’s highest ideals. Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves “professionally and courteously.” Lawyers help their clients, the institutions with which they deal and themselves when they treat everyone with respect and courtesy. These Principles of Professionalism serve as a reminder of how Virginia lawyers have acted in the past and should act in the future.

Principles

In my conduct toward everyone with whom I deal, I should:

- Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.
- Act at all times with professional integrity, so that others will know that my word is my bond.
- Avoid all bigotry, discrimination, or prejudice.
- Treat everyone as I want to be treated — with respect and courtesy.
- Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.
- Contribute my skills, knowledge and influence in the service of my community.
- Encourage those I supervise to act with the same professionalism to which I aspire.

In my conduct toward my clients, I should:

- Act with diligence and dedication — tempered with, but never compromised by, my professional conduct toward others.
- Act with respect and courtesy.
- Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward courts and other institutions with which I deal, I should:

- Treat all judges and court personnel with respect and courtesy.
- Be punctual in attending all court appearances and other scheduled events.

- Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants.
- Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions.

In my conduct toward opposing counsel, I should:

- Treat both opposing counsel and their staff with respect and courtesy.
- Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.
- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.
- Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.
- Cooperate in scheduling any discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsel's schedules whenever possible.
- Agree whenever possible to opposing counsel's reasonable requests for extensions of time that are consistent with my primary duties to advance my clients' interests.
- Notify opposing counsel of any schedule changes as soon as possible.
- Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.
- Be punctual in attending all scheduled events.
- Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Committee Opinion
November 16, 1978

LEGAL ETHICS OPINION 306

FEE – COURT-APPOINTED ATTORNEY.

A court-appointed attorney may accept a fee from his client upon learning that the client is not truly indigent, provided that the court is informed, the attorney submits no voucher with the court and the client is extended the opportunity to retain counsel of his choice once his ability to pay has been ascertained. [See II: DR:7-102(A)(3).]

Committee Opinion
November 16, 1978

Committee Opinion
August 25, 1980

LEGAL ETHICS OPINION 390

PERJURED TESTIMONY – COURT-
APPOINTED ATTORNEY.

A court-appointed attorney has an ethical duty to report to the appropriate authorities the true financial status of his client regardless of the source of his information that the client can afford private counsel. However, the attorney must first call upon his client to reveal the truth to the authorities. [See II: DR:4-101(D)(2).]

Committee Opinion
August 25, 1980

Committee Opinion
April 10, 1984

LEGAL ETHICS OPINION 560

CONFIDENCE/SECRET – INTENT TO
COMMIT SUICIDE.

It is not improper for an attorney to disclose to appropriate mental health authorities the stated intentions of a client to leave the state and commit suicide. [DR:4-101(B)(1), DR:4-101(D)(1), ABA Informal Opinions 1188, 1413, 1458.]

Committee Opinion
April 10, 1984

You have indicated that former clients have requested the entire contents of all files relating to legal services performed for them over a period of several years, which files include notes, multiple drafts and other documents which led to final documents or resulted in advice given as to a particular matter. You have also noted that the former clients in question were sent copies of all relevant documents prepared for them throughout the course of the firm's representation. You advise that your firm recognizes that any client has a right to receive all documents that it would have reason to need, including "work product" created for the client, and that you are willing to copy such documents at your (firm's) cost. Finally, you indicate that your former clients (and their new counsel) have declined your invitation to review all material of any kind that was prepared in representing them and, if that review uncovered any needed documents, those documents would be given to the former clients.

You have asked that the Committee opine as to whether, under the circumstances you describe, the "work product" to which the former client is entitled includes multiple drafts of documents and attorney's notes and internal memoranda.

For purposes of this opinion, the Committee assumes that no fees are owing to the firm as a result of its representation of the former clients.

The appropriate and controlling Disciplinary Rule relevant to your inquiry is DR:2-108(D) which, while permitting the lawyer to "retain papers relating to the client to the extent permitted by applicable law," requires that, upon termination of representation, the lawyer deliver to the client all papers and property to which the client is entitled. The operative concept involved in the pertinent Disciplinary Rule is meant to ensure that the former lawyer does not prejudice his former client in any way.

The Committee has earlier opined that the "applicable law" to which DR:2-108(D) refers is that which relates to an attorney's lien for legal fees owed by the client. See LE Op. 1171. Thus, under the assumption that your former client does not owe any fees, the Committee further assumes that no statutory or common-law possessory lien arises upon which you or your firm may base any retention of any materials in the client's file.

The Committee is of the view that any legal definition of "work product," as applied in the Rules of Evidence or elsewhere in a legal context is inapposite to the question of delivery of a client's file since a file may contain additional materials which were not prepared in anticipation of litigation or for trial. Rather, the Committee opines that the term's plain meaning is applicable and refers to all materials prepared or collected by the attorney, or at the attorney's direction, in relation to any legal services for which the client engaged the attorney or the law firm over the entire period of the provision of such services. Thus, the Committee is of the opinion that, with relation to the ownership of a

Committee Opinion
July 24, 1990

client's file, where no fees are outstanding, "work product" includes, as you have enumerated, attorney's notes, internal memoranda and multiple drafts and other documents which lead to final documents or result in advice given as to a particular matter.

Thus, the Committee is of the further opinion that the client is entitled to the entire contents of his file and the attorney is not entitled to refuse to turn over that file or any portion thereof. The Committee reiterates its view that the entire file is "property to which the client is entitled," thereby eliminating any necessity for a determination by anyone other than the client as to what the client may need. Furthermore, such ownership of the file is irrespective of any earlier provision of copies to the client. LE Op. 1171; Scroggins v. Powell, Goldstein, Frazier and Murphy, 15 B.R. 232, 241 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 B.R. 729 (N.D. Ga. 1982). See also Vargas v. United States, 727 F.2d 941, 944 (10th Cir. 1984), cert. denied, 469 U.S. 819 (1984).

Committee Opinion
July 24, 1990

Legal Ethics Committee Notes. – Rule 1.16(e) governs a lawyer's duty to provide files to a former client.

LEGAL ETHICS OPINION 1790

CLIENT FILES – REFUSAL OF ATTORNEY TO
RELEASE A COPY OF THE DEFENDANT’S
PRE-SENTENCE REPORT TO THE
DEFENDANT.

Your request presented a hypothetical situation involving a client requesting a copy of his file from an attorney. Specifically, the attorney had represented the client in a criminal matter. The client was convicted in a Virginia circuit court. The trial judge set a sentencing hearing and ordered a probation officer to prepare a pre-sentence report for use at that hearing. The officer forwards a copy of the report to the attorney, who reviews it with his client. One day after the sentencing hearing, the client informs the attorney that the client will be petitioning the Supreme Court of Virginia for a writ of *habeas corpus*. The client requests that the attorney provide the file to the client, including the pre-sentence report.

The question raised by your hypothetical is whether the attorney has a duty to provide the pre-sentence report to the client. The pertinent provision of the Rules of Professional Conduct is Rule 1.16(e), which specifically governs the lawyer’s duty to transmit the client’s file upon termination of the relationship and at the request of the client. Whether the attorney must provide a copy or an original of the contents depends on the nature of each document; however, paragraph (e) does require provision of the client’s *entire* file, except for one narrow category:

Billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts, staffing considerations, or difficulties arising from the lawyer-client relationship.

A pre-sentence report is not the sort of internal document described by the exception. Therefore, the general requirement from this provision would apply: that the lawyer provide file contents or, in many instances, *copies* of those contents, to the client. Comment 11, however, sets forth an important limitation:

The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

Your request references Attorney General Jerry W. Kilgore’s Advisory Opinion, dated March 31, 2003, which interprets Virginia Code §19.2-299, as addressing the legal issue of whether disclosure of pre-sentencing reports by attorneys to their clients is prohibited by law. The exclusive purview of this committee is to interpret the Rules of Professional Conduct; it would be outside that purview for this committee to analyze other legal authority regarding disclosure of pre-sentence reports. This committee, therefore, declines to do so.

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

**MAY A PROSECUTOR OFFER, AND MAY A
CRIMINAL DEFENSE LAWYER ADVISE HIS
CLIENT TO ACCEPT, A PLEA AGREEMENT THAT
REQUIRES A WAIVER OF THE RIGHT TO LATER
CLAIM INEFFECTIVE ASSISTANCE OF
COUNSEL?**

In this hypothetical, a defense lawyer represents a client who intends to plead guilty. The plea agreement provides that “I waive any right I may have to collaterally attack, in any future proceeding, any order issued in this matter and agree I will not file any document which seeks to disturb any such order. I agree and understand that if I file any court document seeking to disturb, in any way, any order imposed in my case, such action shall constitute a failure to comply with a provision of this agreement.” This provision is standard in all plea agreements offered by the prosecutor’s office, however, defense counsel has concerns that this provision may have the legal effect of waiving the client’s right to later claim ineffective assistance of counsel. The defense lawyer asks whether he can ethically advise his client as to whether to waive that right and whether the prosecutor can ethically require this waiver as a term of a plea agreement.

QUESTIONS PRESENTED

1. May a defense lawyer advise a client to enter into a plea agreement with language that may effectively waive the right to allege ineffective assistance of counsel as part of a waiver of the right to collaterally attack a conviction covered by a plea agreement?
2. If the defendant’s lawyer declines to advise him on the issue, does the prosecutor’s suggestion that the defendant agree to the provision knowingly take advantage of an unrepresented defendant?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.3(c)¹, Rule 1.7(a)(2)², Rule 1.8(h)³, and Rule 8.4(a)⁴. Additionally, Legal Ethics Opinions 1122, 1558, and 1817 are relevant to the conflict of interest analysis.

¹ Rule 1.3 Diligence
* * *

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

² Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
* * *

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

³ Rule 1.8 Conflict of Interest: Prohibited Transactions
* * *

(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to the client for malpractice.
* * *

⁴ Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

ANALYSIS

Federal courts have consistently held that such a provision is legally enforceable against the defendant. In *U.S. v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005), the court held that there is no reason to distinguish between a waiver of direct appeal rights and a waiver of collateral attack rights, and therefore a waiver of all collateral attack rights is valid so long as the waiver is knowing and voluntary. In general, a defense lawyer may counsel a client to enter into a lawful plea agreement; however, in this case, the content of the plea agreement raises ethical concerns, to the extent that the language of the plea agreement has the intent and effect of waiving the client's right to claim ineffective assistance of counsel.

Though they are not in full agreement on the rationale for their opinions, several states have found that it is unethical for a defense lawyer to advise his client to accept such a plea bargain provision, and that it is unethical for a prosecutor to propose such a provision.⁵ Only one state has found such a provision ethically permissible, on the grounds that Rule 1.8(h) applies exclusively to waivers of malpractice liability.⁶

Defense lawyer's duties

The Committee agrees with the majority of states that have considered this issue that, to the extent that a plea agreement provision operates as a waiver of the client's right to claim ineffective assistance of counsel, a defense lawyer may not ethically counsel his client to accept that provision. There is a concurrent conflict of interest as defined by Rule 1.7(a)(2) between the lawyer's personal interests and the interests of the client. Defense counsel undoubtedly has a personal interest in the issue of whether he has been constitutionally ineffective, and cannot reasonably be expected to provide his client with an objective evaluation of his representation in an ongoing case. This conflict was discussed in LEO 1122, which concluded that a lawyer should not represent a client on appeal when the issue is the lawyer's own ineffective assistance because "he would have to assert a position which would expose him to personal liability." Likewise, LEO 1558 concluded that a lawyer could not argue that he had improperly pressured his client into accepting a guilty plea, because of the conflict between the interests of the client and the lawyer's interest in protecting himself. Further, both conflicts cannot be cured even with client consent. LEO 1817 recently reaffirmed the accuracy of this conflict of interest analysis.

A defense lawyer who counsels his client to agree to this provision also violates Rule 1.3(c). The client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client.

Although other states have interpreted their versions of Rule 1.8(h) to bar the defense lawyer from advising his client on this issue,⁷ Virginia's Rule 1.8(h) does not apply in this situation because the defense lawyer is not making the agreement in this case – he is advising his client whether to enter into an agreement sought by the government.

(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;

* * *

⁵ Advisory Committee of the Supreme Court of Missouri, Formal Opinion 126 (2009); The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

⁶ State Bar of Arizona Commission on the Rules of Professional Conduct, Opinion 95-08 (1995).

⁷ The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

Prosecutor's duties

Your second question presented addresses the prosecutor's role in seeking this waiver. The Committee is of the opinion that it is a violation of Rule 8.4(a) for the prosecutor to offer a plea agreement containing a provision that has the intent and legal effect of waiving the defendant's right to claim ineffective assistance of counsel. Because the prosecutor refuses to offer a plea agreement that does not include this provision, he is implicitly requesting that the defense lawyer counsel his client to accept this provision, which is an inducement to the defense lawyer to violate Rules 1.3(c) and 1.7.

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

Committee Opinion
July 21, 2011