Committee Opinion
June 30, 2004

LEGAL ETHICS OPINION 1794 CONFIDENTIALITY OF INITIAL CONSULTATION .

You have presented a hypothetical situation in which a husband and wife are planning to divorce. They live in a small community with a limited number of attorneys. The husband wishes to prevent his wife from obtaining adequate counsel. Therefore, he visits each family law attorney in succession, shares his situation, but with no intent to hire them. He in fact already knows that he will retain Attorney A. The wife goes to one of the visited attorneys, Attorney B, seeking representation. When Attorney B writes the husband's attorney (A) establishing B's representation of the wife, Attorney A sends a letter back stating the wife's attorney (B) has a conflict of interest and must withdraw from the representation.

Prior to hiring her attorney, the wife first had gone to Attorney A for representation. Before their initial interview, Attorney A had the wife sign a disclaimer stating that:

> I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney.

He then listened to her story. After the interview, the attorney did a conflicts check, and announced he could not represent her as he already represented her husband. As part of their discussion, the wife had shared information regarding her finances and her personal life, including details that would relate to child custody issues. The wife tells her own attorney, Attorney B, of that appointment, and he writes Attorney A and asks him to withdraw from representing the husband.

Under the facts presented you have asked the committee to opine as to whether either attorney needs to withdraw from this matter.

Rule 1.6(a) establishes the basic duty of client confidentiality:

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

The committee notes that the exceptions outlined in paragraphs (b) and (c) are not at issue in the present hypothetical.

At first blush, Rule 1.6 may seem to apply only to those instances where the potential client actually hires the attorney. The committee opines that such a literal reading of Rule 1.6 is too narrow. This committee has on more than one occasion stressed the

importance of an attorney's duty of confidentiality as a "bedrock principle of legal ethics." See, LEOs ##1643, 1702, 1749, and 1787. As such, the principle should be interpreted broadly to assure that the public feels safe in providing personal information to attorneys to obtain legal services. The "Scope" section of the Rules of Professional Conduct specifically references application of Rule 1.6's confidentiality duty to the context of initial consultations. That section states, in pertinent part:

> Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.

This committee has consistently applied Rule 1.6 to initial consultations in prior opinions. The court in Gay v. Lihuin Food Systems, Inc., 54 Va. Cir. 468 (Isle of Wight County 2001) agreed with that line of opinions and outlined them as follows:

> A long line of Legal Ethics Opinions issued by … the Virginia State Bar likewise recognizes that a prospective client's "initial consultation with an attorney creates an expectation of confidentiality which must be protected by the attorney even where no attorney-client relationship arises in other respects." Va. Legal Ethics Op. 1546, LE Op. 1546 (Aug. 12, 1993); *see also* Va. Legal Ethics Ops. 1697, LE Op. 1697 (June 24, 1997); 1642, LE Op. 1642 (June 9, 1995); 1638, LE Op. 1638 (April 19, 1995); 1633, LE Op. 1633 (June 9, 1995); 1613, LE Op. 1613 (Jan. 13, 1995); 1453, LE Op. 1453 (March 24, 1992); 1189, LE Op. 1189 (Nov. 17, 1988); 1039, LE Op. 1039 (Feb. 17, 1988); 949, LE Op. 949 (July 8, 1987); 629, LE Op. 629 (Nov. 13, 1984); 452, LE Op. 452 (Apr. 12, 1982); 318, LE Op. 318 (June 6, 1979). An attorney, therefore, has a "duty to keep confidential those consultations that occur outside formal attorney-client relationships which nonetheless create an expectation of confidentiality." Va. Legal Ethics Op. 1642, LE Op. 1642 (June 9, 1995).
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> *Gay v. Luihn Food Systems, Inc.*, 5 Cir. CL00121, 54 Va. Cir. 468 (2001).[1]

As stated in Comment 2 to Rule 1.6, the ethical obligation to hold inviolate confidential information of the client "encourages people to seek early legal assistance." To enable that result, people must be comfortable that the information imparted to an attorney while seeking legal assistance will not be used against them.

[1] This Virginia view that the duty of confidentiality may be triggered by an initial consultation is shared by other state bars, such as Vermont and Kansas. *See*, Vermont Legal Ethics Opinion 96-9; Kansas Legal Ethics Opinion 91-4.

In the present scenario, Attorney A agreed to an interview with the wife as she was seeking legal representation in that divorce. As part of that interview, she disclosed to the attorney information regarding her finances and her personal life, in particular information that would be relevant to the child custody issue that is part of this divorce. As Attorney A received confidential information that is pertinent to his representation of the husband against the wife, this attorney may not represent the husband unless the wife consents to his use of the information in this case.

This committee is not dissuaded from that conclusion by the use of a disclaimer by Attorney A. The disclaimer he provided to the wife for signature disclaimed only that no attorney/client relationship had been formed; it did not on its face address confidentiality. As outlined earlier in this opinion, an attorney/client relationship is not required for the duty of confidentiality to be triggered; that duty arises also during a person's initial consultation with a lawyer in seeking possible representation if facts are such that no attorney/client relationship is formed. Accordingly, the disclaimer of an attorney/client relationship by this attorney is ineffective to permit him the unconsented use of information imparted by the wife. As stated above, he can only use this information, and in turn, represent the husband, only if the wife consents to that use, after consultation.

The committee notes that the conclusion that this disclaimer failed to eliminate the attorney's duty of confidentiality is limited to this particular disclaimer. While general disclaimers regarding the attorney/client relationship may not be effective, there may be others that would be. To be effective, the disclaimer must clearly demonstrate that the prospective client has given informed consent to the attorney's use of confidential information protected under Rule 1.6. Nonetheless, in the present scenario, as the particular disclaimer used failed to address the confidentiality of information provided and as important information was communicated by the wife to Attorney A, A's duty to keep that information confidential prevents A from properly representing the husband, absent the wife's consent. Attorney A must withdraw from the representation unless that consent from the wife is obtained. [2]

Your request also inquires whether Attorney B has a conflict of interest arising from his earlier appointment with the husband. The potential for a conflict of interest for Attorney B is distinguishable from that for Attorney A. The basis for the conclusions drawn in the discussion of Attorney A's conflict is that the potential client (in that

[2] This Committee recommends the detailed advice provided by the Kansas Bar as to how to avoid conflicts arising from initial consultations in Kansas Ethics Opinion 91-04. In summary, that advice is as follows:

1) Run a conflicts check before the initial consultation;
2) Caution the potential client not to provide confidential information at that point;
3) Ask whether the potential client has met with other attorneys;
4) Send a "non-engagement" letter if declining the representation; and
5) Be prepared for responding to a motion to disqualify should the opposing party become a client.

discussion, the wife) has a reasonable expectation of confidentiality. The committee maintains that when most members of the public contact a lawyer to discuss obtaining legal services from that lawyer, those members of the public assume the details of the conversation will remain private. However, the husband did not meet with Attorney B for the legitimate purpose of obtaining legal representation; he in fact had already decided he would retain Attorney A. His primary purpose in meeting with Attorney B was to preclude him from representing the wife. The husband's purpose does not create the sort of "reasonable expectation of confidentiality" Rule 1.6 exists to protect. Accordingly, no duty of confidentiality is created for Attorney B out of the visit with this husband who misrepresented his purpose for the appointment. The committee opines that as Attorney B has no duty to maintain the confidentiality of information received from the husband, no conflict of interest was triggered by that initial consultation. Attorney B is not required to withdraw.[3]

While not present in this hypothetical, the committee notes that were an attorney to direct a new client to undertake this sort of strategic elimination of attorneys for the opposing party, that attorney would be in violation of Rule 3.4(j)'s prohibition against taking any action on behalf of a client "when the lawyer knows or when it is obvious that such action would merely serve to harass or maliciously injure another." That such an attorney would not himself be attending the initial consultations does not remove the attorney from ethical impropriety; Rule 8.4(a) establishes that it is improper for an attorney to violate the rules through the actions of another.

[3] The Committee notes that in analyzing the present hypothetical, Rule 1.6 was the pertinent authority. Rule 1.9 was not applicable as, under the facts provided, neither party was a former client of the opposing counsel. However, in any situation where the initial consultation does create an attorney/client relationship, Rule 1.9 would need to be considered in addition to Rule 1.6.