Committee Opinion
March 16, 2005

LEGAL ETHICS OPINION 1803 — ETHICAL OBLIGATIONS THAT APPLY TO AN ATTORNEY WHO IS SERVING AS AN INSTUTIONAL ATTORNEY AT A STATE PRISON.

I am writing in response to your request for an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("committee").

You have presented a hypothetical situation in which an attorney serves at a state prison, pursuant to Virginia Code §53.1-40. That statute calls for the judge of a county or city circuit court to appoint an attorney for a state correctional facility upon motion of the Commonwealth's Attorney for that locality, "to counsel and assist indigent prisoners…regarding any legal matter relating to their incarceration." That attorney does not, as part of this position, represent the inmates as counsel of record in court. However, he does provide various levels of assistance to them regarding whether and what to file with the court. Depending on the needs and the request of an inmate, the attorney may type a draft provided orally or in writing by the inmate, may provide legal advice about the inmate's case, and may actually draft the documents needed by an inmate. Most of the work involves state or federal habeas relief, and there are usually appropriate form documents to complete. However, a narrative is often required for that completion. While some of the inmates are illiterate, others appear to be capable but prefer to have the attorney do the work.

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

1) Does an attorney/client relationship exist between the attorney and a prisoner receiving services and consultation from that attorney, and, if so, when does it start and end?

When presented with this question in other requests, this committee has looked to the definition provided at the start of the Unauthorized Practice of Law Rules[1], which states that:

> Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

Thus, in LEO 1592 this committee concluded that an attorney/client relationship had been established where the attorney hired to represent the uninsured motorist carrier had also provided legal advice and assistance to the *pro se* uninsured driver. *See also* LEO 1127(finding an attorney/client relationship where attorney provided legal assistance on items such as discovery requests for *pro se* litigants). The "Scope" section introducing the Rules of Professional Conduct discusses the creation of an attorney/client relationship as follows:

[1] *See* Rules of Supreme Court of Virginia, Pt. 6, §I.

> Furthermore, for the purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. 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. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

In line with the LEOs and rules provision cited above, the committee considers the attorney to be in an attorney/client relationship with at least some of the inmates receiving assistance, based on the legal advice or services provided in those instances. In any particular instance, the lawyer would have to make fact specific determinations for each inmate case-by-case regarding whether such a relationship exists, and, if it does, when it concludes.

2) If there is an attorney-client relationship, what duties other than that of the duty of confidentiality apply to this attorney?

In recent LEO 1798, the committee answered whether Commonwealth's Attorneys are held to the same ethical standards as other lawyers. In that opinion, the committee looked to the "Scope" section of the Rules of Professional Conduct to conclude that all attorneys licensed to practice law in Virginia, including Commonwealth's Attorneys, were held to provisions in the Rules. The "Scope" section contains no exceptions, not for Commonwealth's Attorneys and not for attorneys appointed pursuant to §54.1-30. Thus, whenever this attorney is in an attorney/client relationship with an inmate, the attorney must comply with all provisions in the Rules.

3) If the attorney is working solely as a scrivener for an inmate, with the actual text of a pleading having been decided upon by the prisoner, can the attorney produce a typed final draft for the prisoner without placing the attorney's name and identifying information on the pleading, or otherwise represent on the pleading that the attorney is the author?

The term "scrivener" is defined in Black's Law Dictionary as, "A writer. Especially, a professional drafter of contracts or other documents." Here in Question 3, the attorney is doing nothing more than typing the exact words presented handwritten or orally by the inmate. A typist is neither an attorney nor a scrivener. Where the only service provided to a particular inmate is typing, the attorney has done nothing triggering an attorney/client relationship. The committee opines that where an individual types a pleading for another person, no disclosure is needed when that person files his pleading as a *pro se* litigant, even where the individual serving as typist is a licensed attorney and is employed pursuant to §53.1-40. However, the committee cautions that the attorney must be cognizant of the impression created for any inmate having an attorney type a document; absent some clarifying disclaimer to the inmate, the inmate may well assume that the lawyer has not only typed the document but also vouched for its legal soundness. If the attorney in any particular instance intends merely to type and not to review and approve

the content of a document, the attorney should make sure the inmate has the same understanding as to the work to be done.

4) If the attorney can permissibly act as scrivener, can he go beyond mere typing of the pleading and actually affect the text, content or argument contained in the pleading itself, without having to represent himself as counsel of record on the document?

While the questions refer to the terms "typist" and "scrivener", the committee opines that in no instance does the title alone determine the character of the work and the corresponding ethical responsibilities. If the attorney is doing no more than typing the draft as developed by the inmate, the attorney is within the analysis presented above. However, if the attorney actually provides legal advice such as the advisability of particular language or if the attorney actually is the author of the language, then the attorney has left behind the role of mere typist and created an attorney/client relationship.[2] Thus, this attorney, appointed pursuant to Va. Code §53.1-40, will need to determine with each inmate just where on the spectrum of service delivery he is before he can determine whether he must disclose his role to the court.

In LEO 1592, this committee addresses this question of when an attorney needs to identify his work for a *pro se* litigant to the court.[3] In that opinion, the committee concluded that:

> It would be improper for Attorney A to permit Defendant Motorist to continue to represent to the court that he is appearing *pro se* if Attorney A has advised Defendant Motorist about the issues in the case or matters which will be presented to the court.

The committee opines that in line with LEO 1592 and the authorities cited therein, whenever this attorney in the present situation is more than a mere typist but rather is doing any actual drafting and/or providing any legal advice, he must make sure that the inmate does not present himself to the court as having developed the pleading *pro se*. This is not to say the attorney must sign the pleading as attorney of record; such a requirement would far exceed the intended parameters of the job created by Virginia Code §53.1-40. While the precise form or language of

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[2] The committee further notes that mere stylistic, editorial language changes alone would, like typing, not create an attorney/client relationship so long as the language changes do not affect the meaning of the text.

[3] The committee in the discussion of this question is *only* addressing when the lawyer's work needs to be disclosed to the court; the committee is *not* questioning the propriety of the actual provision of these limited services. This committee has consistently approved the provision of limited legal services so long as the limitation was provided in compliance with Rule 1.2 ("Scope of Representation"). In those opinions, this committee focused on two necessary elements for permissible limitations: client consent after full disclosure as well as assurance that the restriction would not materially impair the client's rights. *See*, LEO 1193 (allowing a legal aid office to limit divorce representation by delaying issues of support, custody, and marital property through reservation), LEO 1276 (allowing limitations on representation of students by university legal services program so long as only attorneys delineate the limitations with the clients), LEO 1523 (allowing attorney to abide by civil client's wish to negotiate with, but not sue, defendant where defendant was a friend of the client), LEO 1723 (disallowing plan of limitations by third party payor that precluded informing client of the litigation restrictions), and LEO 1737 (requiring attorney to abide by competent client's choice to refrain from presenting mitigating evidence regarding the death penalty).

the notation need not be dictated by this opinion, the committee does conclude that the attorney must see to the inclusion of such a notation to avoid a misrepresentation to the court.

5) Do the answers to questions 3 and 4 depend on the situation of the inmate (i.e., whether he is illiterate, writes illegibly, etc.)?

The basis for the answers to questions 3 and 4, above, is the nature of the services provided, not the characteristics of the inmate to whom they are provided. Even if something about the abilities of the inmate placed the service delivery outside the scope of intended services under this assistance program, that would be an issue outside the purview of this committee and would not affect the answers or the conclusions drawn in this opinion.

To the extent that this opinion conflicts with prior LEOs ##553, 824, 1126, 1352, 1368, 1464, 1726, and 1761 regarding the role of scrivener, those opinions are hereby superseded. This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.