LEGAL ETHICS OPINION 1807 GARNISHMENT OF A RETAINER FEE HELD IN THE ATTORNEY'S TRUST ACCOUNT.

You have presented a hypothetical in which a client terminated his relationship with Attorney A during the course of litigation. The client then hired Attorney B. The client has an unpaid balance with Attorney A for attorney's fees. Attorney A obtained a judgment against the client for fees incurred in the course of the litigation. In an attempt to collect on the judgment, Attorney A caused a garnishment summons to be served on Attorney B as garnishee. The summons specifically is for "Custodian of client's retainer (unused)." Attorney A also had served on Attorney B a subpoena duces tecum for "all documents that disclose the amount of retainer paid to the custodian by client and that disclose all charges against said retainer."

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

1) Does the conduct of former counsel described in the hypothetical interfere with the client's right to terminate the attorney/client relationship and be represented by counsel of his own choosing?

2) Is the conduct of the former counsel described in the hypothetical ethically appropriate?

3) How should current counsel respond to the garnishment and subpoena?

Before analyzing the specific issues raised regarding this hypothetical, the committee notes one clarification. In the hypothetical, the client's funds in the trust account are referred to as a "retainer." As identified in LEO 1606, the use of the word " retainer" for an "advanced legal fee," while common, is inaccurate. As explained in that opinion, "advanced legal fees" are "fees paid in advance for particular services not yet performed." *Id*. In contrast, a "retainer" is a "payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future." *Id*. The difference is significant in that advanced legal fees remain the property of the client and must be placed in the trust account, whereas a retainer is earned immediately upon receipt, is property of the lawyer, and should not be in the trust account. *Id*. The label given a fee does not determine whether it is an advanced legal fee or a retainer; only the purpose of the payment is dispositive. LEO 510. The committee assumes that the client funds in this hypothetical were paid as advanced legal fees, despite the term "retainer" being used. Throughout this opinion, the committee will refer to and treat this money as advanced legal fees.

The committee will address the first two questions together as each question is essentially asking whether this attorney's garnishment is unethical as improperly interfering with the rights of the client.

The committee does respect the importance of the principle that a client must be free to select the attorney of his choice, including the right of termination. Comment 3 to Rule 1.16 ("Declining or Terminating Representation") states that a "client has a right to discharge a lawyer at any time, with or without cause." This principle is also reflected in Comment 1 to Rule 5.6, which states that an "agreement restricting the rights of lawyers to practice after leaving a firm not only limits their professional autonomy *but also limits the freedom of clients to choose a lawyer*."(Emphasis added.) The question becomes is it an improper restriction on a client's freedom to choose a lawyer (and discharge a lawyer) for a former attorney to garnish the advanced legal fees in a subsequent attorney's trust account.

The importance of the client's freedom to choose a lawyer must be weighed against the attorney's right to be paid for his services. *See Allen v. United States,* 606 F.2d 432 (4th Cir. 1979)(a client who authorizes litigation on his behalf must expect to pay a reasonable fee for services performed by his lawyer). This committee has weighed that balance in prior opinions and found permissible an attorney's suing a former client for unpaid legal fees. LEOs 1325, 974. Other jurisdictions have similarly approved the referral of a former client's overdue legal bill to a collection agency. *See* Arizona Ethics Op. 2000-07; D.C. Ethics Op. 298 (2000); West Virginia Ethics Op. 94-1; Ohio Ethics Op. 91-6; New York Ethics Op. 608 (1990); Georgia Ethics Op. 49 (1985). Of course, any such collection effort by an attorney against a former client must be pursued in compliance with Rule 1.6. Paragraph (b) does allow the disclosure of confidential information "to establish a claim…on behalf of the lawyer in a controversy between the lawyer and the client." While the need to take collection action against a former client does allow the attorney to disclose confidential information necessary to collect the fee; the attorney must *not* disclose any confidential information beyond that needed for collection of the fee.

With regard to collecting fees from a former client, this committee sees no reason to distinguish between litigation and collection agencies as acceptable but garnishment as not acceptable. Of course, the garnishment at issue is of the funds paid in advance to the client's new attorney. That attorney may think of those funds, once deposited into his trust account, as somehow belonging to him, or at least reserved exclusively for him, but that is not the case. As outlined above, the funds in a lawyer's trust account remain property of the client. At any time, the client could request return of the funds to pay some other creditor, such as for a mortgage. The lawyer in possession of trust account funds lacks the authority to place himself ahead of any other creditor of the client, should the client choose to pay another creditor or if, as in this case, the creditor (i.e., the former attorney) legally garnishes the funds. As the new attorney has not yet earned the legal fees, he has no legal claim to them and holds them only on behalf of the client. The committee opines that it is not a per se violation for an attorney to garnish the funds of a former client that are in a new lawyer's trust account.

That the funds through garnishment deplete the client's suggested payment source for a new lawyer does not render the garnishment unethical. While it may or may not make it harder for the client to obtain new counsel, it is not unreasonable to this committee for the right to be paid of a lawyer who has already performed legal services to have priority over the right to be of a lawyer who has not yet performed legal services. It was ethically permissible for the former attorney in this hypothetical to garnish the trust account funds so long as he lawfully was entitled to the funds.

As part of the garnishment procedure, the former attorney also had issued a subpoena duces tecum requesting detailed information regarding the size of the retainer and the billing records. As identified above, in collecting an overdue fee from a client, Rule 1.6 permits the attorney to disclose only that confidential information necessary for collection of the fee. Similarly, an

attorney, in collecting his fee in this particular situation, should not seek more confidential information from the new attorney than is necessary for collection. That limitation is in line both with the importance of the attorney/client privilege and with the attorney's duty to terminate the attorney/client relationship in such a way as to "protect the client's interest." Rule 1.16(d). Whether the terms of this subpoena comport with that standard is a fact-specific determination. The hypothetical lacks sufficient facts for the committee to make that determination.

In addressing the third question, this is a question of both fact and law, exact resolution of which is outside the purview of this committee. However, the committee can highlight principles that should be considered for making that determination. As just mentioned above, the subpoena would be improper if it seeks greater detail about the client's new representation than is necessary for the purposes of garnishment. The new attorney should consider that in determining whether to challenge the summons, through legal means, or whether to recommend to the client that the garnishment should be accepted. This committee has repeatedly concluded that where an attorney thinks complying with a subpoena request violates his client's confidentiality protection under Rule 1.6, that attorney may rightfully challenge the request. *See* LEOs ## 1628, 1352, 967, 645, 334, 300. A similar determination should be made as to the merit and amount of the underlying debt. Again, the attorney would need to determine whether to recommend to the client that the garnishment should be challenged or accepted. Resolution of those issues remains outside the purview of this committee.

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