

The following are opinions issued by the standing Committee on Legal Ethics. The opinions are issued pursuant to the Rules of Court, Part Six; Section IV, Paragraph 10, and are advisory only. The opinions have no legal effect and are not binding on any judicial or administrative tribunal.

Upon request for LEOs involving a specific issue, the VSB Ethics Counsel will furnish full texts or relevant opinions at no cost. The bar reserves the right to charge for volume requests. Charges will be based upon staff time and copying costs.

LEGAL ETHICS OPINION 1749
PROPRIETY OF ATTORNEY ASKING QUESTIONS ABOUT ADVICE PROVIDED BY CORPORATE COUNSEL WHEN QUESTIONING FORMER EMPLOYEE OF OPPOSING PARTY

You have presented a hypothetical situation in which a plaintiff sues a corporation in a personal injury action. The counsel for the corporation, in the course of investigation, interviews an employee who has knowledge of matters relevant to the litigation. The employee is not within the corporate control group. The interviews all occur on the corporation's premises during the employee's normal work hours. The employee is acting within the course and scope of employment in participating in the interviews. The communications are confidential in nature, and no factors exist which would constitute a waiver of the attorney-client privilege as to these communications.

Thereafter, and while the litigation remains pending, the employee terminates her employment with the corporation. Upon learning this, the plaintiff's counsel initiates *ex parte* contact with the employee and inquires not only regarding the facts known to the employee, but also regarding the substance of the communications with counsel.

Under the facts you have presented, you have asked the committee to opine as to whether it is a violation of the Rules of Professional Conduct for counsel to:

1. Inquire into matters known or reasonably apprehended to be confidential communications when interviewing, *ex parte*, a former employee of a corporate adversary in pending litigation.
2. Induce a former employee of a corporate adversary in pending litigation to disclose matters known or reasonably apprehended to be confidential communications in an *ex parte* interview where: a) such disclosure might subject the employee to civil liability; b) the employee is unrepresented by counsel; or c) the communications fall within the attorney-client privilege and pertain directly to the matters in litigation.

The appropriate and controlling rules relative to your inquiry are Rule 1.6, 1.13(a), 4.2, and 4.4. Those rules state in pertinent part as follows:

RULE 1.6 Confidentiality of Information

- (a) 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).

RULE 1.13 Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

RULE 4.2 Communication With Persons Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

RULE 4.4 Respect For Rights Of Third Persons

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

In considering whether the attorney in this inquiry may participate in the described conversation with the former employee, two distinct questions need resolution. The initial threshold question is whether the attorney may contact the former employee of the opposing corporate party. If that threshold question is answered in the affirmative, then a second question becomes whether the content of that contact is restricted or unlimited.

With regard to the threshold question of whether an attorney may contact the former employee of an opposing party, this Committee previously opined that such contact is permissible so long as that former employee is not represented by his own counsel. *See*, LEOs 533, 905, 1589, 1670. Those opinions all interpret former DR 7-103(A)(1). Current Rule 4.2 is substantially the same as the previous rule; the only change is the replacement of "party" with "person." That change has no pertinent impact on the analysis in those prior opinions. Moreover, Comment 4 to Rule 4.2 expressly clarifies that the contact prohibition of that rule does not apply to contact with former employees. While the Committee is aware that some other states have found such contact generally impermissible under Rule 4.2, the Committee finds the conclusions of those states unpersuasive as only the Virginia rules contain the pertinent language found in Comment 4. Accordingly, the Committee opines that the lawyer in this scenario may contact the former employee of the opposing party regarding the litigation.

In allowing the contact generally, the Committee notes that under Rule 3.4 (f), the employer's counsel can request that the former employee not communicate with opposing counsel. To allow contact from the opposing counsel would merely provide a level playing field where both attorneys in a dispute, neither of which represent the former employee, may contact that potential witness.

The question remains what restrictions, if any, apply to the content of the contact between the attorney and the former employee. Specifically, this request asks whether the attorney may ask questions that seek information from confidential communications with the corporation's attorney. This Committee has previously addressed that protection of client confidences and secrets is a "bedrock principle" of legal ethics. *See*, LEOs

1643, 1702. Accordingly, this Committee does not want to erode that principle unnecessarily. For the attorney-client relationship to develop in a way that facilitates delivery of quality legal services, both the attorney and the client need to depend on the protection of their confidential communications. Without such assurance, open discourse is hampered.

To maintain protection of client confidences and secrets, some states have opted to prohibit all contact with former employees that have communicated with former counsel. See generally, *Restatement (Third) of the Law Governing Lawyers* § 162 (Proposed Official Draft 1998); Susan J. Becker, *Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 Md. L. Rev. 239. As discussed above, the Comments to Virginia's Rule 4.2 preclude that option. Moreover, the Committee opines that such a sweeping prohibition is broader than needed for the goal of confidentiality protection. Many former employees will have had little or no contact with the former employer's counsel. Such employees may have valuable information having to do with the facts of a case and not with the counsel's legal advice. Such nonlegal information can be critical in opposing counsel's determination of whether a potential case has merit or would be frivolous. This Committee opines that a more limited prohibition can serve the confidentiality protection.

The Committee believes that the only needed prohibition on contact with former employees is one of content restriction. The Rules of Professional Conduct already limit the content of an attorney's communication with unrepresented parties; Rule 4.3 requires that the attorney identify his role in the matter and that the attorney provide no legal advice other than to obtain independent counsel. Thus, attorneys are directed by Rule 4.3 to curb their contact with unrepresented parties to prevent overreaching. Similarly, confidentiality protection can survive contact with former employees with a prohibition on seeking any information that may reasonably be foreseen as stemming from attorney-client communications.

In determining the parameters of this content prohibition, consideration must be given to the complexity presented by an entity client. Virginia's Rules of Professional Conduct address that complexity in Rule 1.13(a), which notes that an attorney represents an entity client through its "constituents," defined as "officers, directors, employees, shareholders, and other constituents." See, Rule 1.13, Comment 1. Thus, the former employee in this inquiry was a constituent of the corporation at the time of his communications with the corporation's attorney. Comment 2 to Rule 1.13 establishes that the confidentiality protections afforded all clients under Rule 1.6 attach to constituent/attorney communications in order to preserve the client's (i.e., the entity's) right to confidentiality. Thus, under that provision, the communications between the former employee, during the tenure of his employment, with the corporation's attorney must receive the confidentiality protection of Rule 1.6.

In considering whether the attorney in the inquiry may ask this former employee about those confidential communications, Rule 4.4 is pertinent. Rule 4.4 prohibits an attorney from obtaining evidence in a manner that violates the rights of a third party. As established above, the corporation has a right to confidentiality for the constituent/attorney communications involving this former employee. The attorney would violate that right and, therefore, Rule 4.4 if he were to ask the former

employee to disclose the content of those constituent/attorney discussions.

The committee opines that the attorney in this request's scenario may contact the former employee but that such contact must be limited as described in this opinion. As the answer to the first question of this request prohibits inquiry into confidential communications in all instances, the answer to the remaining three questions is, of course, that such inquiries are prohibited.

Committee Opinion
March 29, 2001

LEGAL ETHICS OPINION 1750 ADVERTISING ISSUES

The Standing Committee on Lawyer Advertising and Solicitation issued twelve advertising opinions between April 28, 1993, and February 29, 2000. Despite publication of those opinions in the *Virginia Lawyer Register*, many members of the Bar have had difficulty accessing the opinions. The Standing Committee on Lawyer Advertising and Solicitation has reviewed all of its previous opinions, and hereby issues the following compendium opinion which summarizes many of the existing advertising opinions and incorporates previously issued legal ethics opinions on the subject of lawyer advertising. In order to provide all members of the Bar with better access to the advertising opinions, this compendium opinion, issued by the Standing Committee on Lawyer Advertising and Solicitation, will be published as a Legal Ethics Opinion. See, Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 10; Virginia State Bar Bylaws, Article VII, Section 5.

Some of the issues addressed in this opinion include: use of actors; use of the phrase "no recovery, no fee;" laudatory statements by third parties; use by a law firm of a fictitious name; use of specific or cumulative case results; and participation in a lawyer referral service. The prohibition in Rule 7.1 concerning advertising which is false, fraudulent, deceptive or misleading applies to all public communications and includes communications over the Internet. The committee observes that a lawyer's communications over the Internet are "disseminated to the public by use of electronic media" for which the lawyer has given value, and therefore are subject to the requirements of Rule 7.1.

The appropriate and controlling rule relevant to the questions raised is Rule 7.1, which states in part:

- (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication or advertisement violates this rule if it:
 - (1) contains misleading fee information;
 - (2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits;
 - (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;
 - (4) contains an endorsement by a celebrity or public fig-

- ure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement; or
- (5) contains a portrayal of a client by a non-client without a disclosure that the depiction is a dramatization.

In the determination of whether a communication or advertisement violates this rule, the communication or advertisement shall be considered in its entirety including any qualifying statements or disclaimers contained therein.

A. Use of Actors in Lawyer Advertising

Rule 7.1(a) articulates several examples of communications which are prohibited, including an advertisement which contains a portrayal of a client by a non-client without a disclosure that the depiction is a dramatization. Rule 7.1(a)(5). The committee considered the issue of whether a television advertisement is misleading when a lawyer or law firm uses an actor to portray an attorney associated with the law firm without disclosing that fact in the advertisement.

The committee viewed numerous advertisements in which, either by direct statement or by implication, it appears that a person is an attorney associated with the advertised law firm, even though that person is not, in fact, an employee or member of the law firm. In particular, when actors are speaking they frequently include first person references to themselves as lawyers or as members of the law firm being advertised. The committee is of the opinion that failing to disclose that the actor is not truly an employee or member of the law firm, when the language used implies otherwise, is misleading or deceptive.

Therefore, the committee concludes that advertisements that use actors who portray attorneys or employees of a law firm are misleading and deceptive, absent a clear disclosure that the actor is not a member or employee of the firm or that the depiction is a dramatization.

LEO 1119 is overruled to the extent that it is inconsistent with this opinion.

B. Use of “No Recovery, No Fee”

The committee considered whether the language “no recovery, no fee” contained in advertising or other public communication soliciting claims for cases in which contingent fees are permissible was misleading or deceptive pursuant to Rule 7.1(a), under circumstances in which the advertising or public communication did not also include an explanation that the client was obligated to pay litigation expenses and court costs, regardless of whether any recovery was obtained.

The committee determined that use of the explicit phrase “no recovery, no fee” in the solicitation of contingent fee cases is misleading or deceptive without any additional explanation that litigation expenses and court costs would be payable regardless of outcome because the public generally may not distinguish the differences between the terms “fee” and “costs.” See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-3 (1985) (finding that “[t]he State’s position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client’s liability for costs is reasonable enough to support a requirement that information regarding the client’s liability for costs be dis-

closed”). The statement “no recovery, no fee” is misleading in light of the fact that a client is or may be liable for costs even if there is no recovery. See Rule 1.8(e). The statement is improper unless a suitable disclaimer is added.

Also, the committee considered the propriety of such phrases as “we guarantee to win, or you don’t pay,” “we are paid only if you collect,” “no charge unless we win,” or other language not making explicit reference to a legal “fee.” Language of this type that does not make explicit reference to a “fee” is misleading and deceptive in violation of Rule 7.1(a) since the language includes the implication that the client will not be required to pay either expenses or attorney’s fees if there is no recovery, but does not disclose the circumstances in which the client will be obligated to reimburse the attorney for any litigation expenses and court costs advanced, regardless of outcome. See also Rule 1.8(e).

LEO 1029 is overruled to the extent that it is inconsistent with this opinion.

C. Use of Fictitious Names

The question arises whether and under what circumstances attorneys may advertise using a corporate, trade, or fictitious name which is not the name or names of the firm, the attorney, or the attorneys in the firm. For example, in reviewing the telephone directory yellow page advertisements, the committee has observed instances where attorneys have used the letter “A,” “AA” or “AAA” as the first word in a name listing with the apparent intent to be in the front or near the front of the “Attorneys” or “Lawyers” section of the yellow pages.

It is misleading and deceptive under Rule 7.1(a)(1) and 7.5(d) for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. Use of a name which is not the name used in the practice is misleading and deceptive as to the identity, responsibility, and status of those using such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign. Furthermore, the usage of such name shall be in compliance with Rule 7.5 and shall comply with applicable laws, including Sections 13.1-542 et seq. or Sections 59.1-69 et seq. of the Code of Virginia.

See also LEOS 589, 935, 937, 1242, 1342, 1356, 1369.

D. Advising That An Attorney Must Be Consulted

The question arises whether it is permissible for an advertisement to state that an individual injured in an automobile accident must consult an attorney before speaking to any representative of an insurance company. While it may make good sense for an individual involved in an accident with an injury to consult with an attorney before speaking with a representative from an insurance company, there is no legal requirement for this. Since the proposed advertisement makes an explicitly false statement, to wit, that an individual “will have to consult an attorney,” the proposed advertisement would be in violation of Rule 7.1.

E. Participation in Lawyer Referral Services

Attorneys may advertise participation in lawyer referral services and joint marketing arrangements so long as the advertising is not false, fraudulent, deceptive or misleading. See Rule 7.3(a). The committee is concerned that some advertising con-

cerning lawyer referral services and joint marketing arrangements are deceptive. As noted in LEO 910, statements which violate the Rules of Professional Conduct and which are used in advertisements by lawyer referral service would create automatic rules violations by the participating attorneys. The committee has opined that the following practices are deceptive and misleading:

1. Advertising participation in a Lawyer Referral Service which is not a true, qualifying Lawyer Referral Service as defined by prior opinions of the Standing Committee on Legal Ethics; *see* LEOs 926 and 1348;
2. Implying in advertising that a lawyer is selected for participation in a Lawyer Referral Service based on quality of services or some other process of independent endorsement when in fact no *bona fide* quality judgment has been objectively made;
3. Stating or implying that the Lawyer Referral Service contains all of the lawyers or law firms eligible to participate in the Service by the objective criteria of the Service when in fact the Service is closed to some lawyers or law firms who meet the objective criteria;
4. Stating or implying that there are a substantial number of attorneys or firms participating in the Service when in fact all calls in a geographic area will be directed to one or two attorneys or firms; *see* LEO 1543;
5. Using the name of a Lawyer Referral Service or joint marketing arrangement in a way which misleads the public as to the true identity of the advertiser.

See also LEOs 910, 926, 1014, 1175, 1348, 1543.

F. Advertising Specific or Cumulative Case Results/ Jury Verdicts/Comparative Statements

The committee considered the question of whether it is misleading to the public for an attorney to advertise results obtained in a specific case or to advertise cumulative results obtained in more than one specific case, e.g., “We’ve collected millions for thousands,” or “We’ve collected \$30 million in 1996.”

The committee determined that it is misleading to the public for an attorney to advertise specific case results, whether individually or cumulatively, for two reasons:

1. The results obtained in specific cases depend on a variety of factors, and any advertisement of the results obtained in a specific case or cases that does not include all factors is inherently misleading. This is true, in part, because it is generally impossible to know all factors that have influenced a specific result or an accumulation of specific results.
2. Each legal matter consists of circumstances that are peculiar or unique to the specific case, and the result obtained under one set of circumstances does not provide useful information to the public as a predictor of the result likely to be obtained in a case that necessarily involves different circumstances.

An example will illustrate why information describing a specific

case result or a blanket statement of cumulative results may be entirely accurate, but nonetheless misleading. An attorney could accurately cite in advertising a verdict of one million dollars, yet the public would plainly be deceived if the verdict were obtained under circumstances in which the offer prior to trial had been two million dollars. The same advertisement would be similarly deceptive if the one million dollar verdict were obtained against an uncollectible defendant, under circumstances in which the case was lost as to a collectible co-defendant who had made a substantial offer prior to trial. More importantly, since no member of the public is likely to have a case in which the circumstances precisely duplicate the advertised verdict, the report of a specific case result not only fails to provide helpful information to the consumer, but is likely to mislead the consumer as to the result that will be obtained in their case.

An advertisement which includes a statement such as “we have obtained the largest jury verdict in the city” is inherently misleading and thus violates Rule 7.1(a). The reader of the advertisement does not know, nor can the advertisement fully reveal, the circumstances or context in which the firm obtained “the largest verdict in the city.” For example, the verdict or judgment may have been by default or arose out of a stipulation because liability or damages were clear and uncontested. Another factual matter not disclosed by the advertisement may be that the judgment is uncollectible. This prohibition against advertising specific or cumulative results and the specifics of jury verdicts extends to the inclusion of such information in the body of any form of published communication, as defined in Rule 7.1(a). For example, incorporating or reprinting in a published communication a newspaper article which quotes a specific case result or verdict would be a violation of Rule 7.1(a).

The committee has repeatedly opined that the use of statements or claims such as “the best lawyers,” and “the biggest earnings,” are self-laudatory and amount to comparative statements which cannot be factually substantiated, in violation of Rule 7.1(a)(3). (*See also* Comment 6 to Rule 7.1)

See also LEOs 1229, 1443.

LEOs 1297, 1321 are overruled to the extent that they are inconsistent with this opinion.

G. Statements by Third Parties

The committee addressed whether a lawyer can circumvent the prohibition against comparative statements with the use of client testimonials. For example, a lawyer’s television advertisement shows a former client making statements about the client’s satisfaction and about the quality of the lawyer’s services, using statements to the effect that the lawyer is “the best” and will get you “quick results.”

Rule 7.1(a)(3) prohibits statements comparing attorneys’ services, unless the comparison can be factually substantiated. The committee has previously opined that a lawyer’s advertising of specific case results is misleading. Thus, an attorney has clear guidance as to the impropriety of making certain statements in his advertising.

Rule 8.4(a) states that an attorney shall not violate a disciplinary rule through the actions of another. Moreover, the language of the restriction in Rule 7.1 makes no qualification as to the maker of the regulated statements. To the contrary, the

rule's requirements are directed at any statements contained in the communication. Thus, there is no support in Virginia's Rules of Professional Conduct for affording greater leeway to advertising statements made by clients than to those made by attorneys. The standard is the same in both instances. Applying that standard to this hypothetical, the client's statements make a comparison ("the best") that cannot be factually substantiated and offer a guarantee of results ("quick"). If such improper statements are contained in the lawyer's advertisement, the lawyer would be in violation of Rule 7.1.

In further clarification, even statements of opinion by clients that contain comparative statements are not appropriate. This committee adopts the mixed approach, used in Pennsylvania, while prohibiting testimonials regarding results and/or comparisons, it does allow "soft endorsements." *Philadelphia Ethics Opinion 91-17; Pennsylvania Bar Association Ethics Opinion 88-142*. Examples of "soft endorsements" include statements such as the lawyer always returned phone calls and the attorney always appeared concerned. *Id.*

In sum, the requirements for lawyer advertising are all intended for the protection of the public. The restrictions on advertising content are carefully chosen to avoid misleading the public as they make the important choice of whom to select for legal representation. This committee will not erode that protection where non-lawyers or their statements appear in the advertisements. Such a distinction would violate both the language of the pertinent disciplinary rule and the spirit behind it.

Committee Opinion
March 20, 2001

VIRGINIA LEGAL ETHICS OPINION 1752 **CONTACT WITH REPRESENTED PARTY**

You have presented a hypothetical situation in which the defendant/company in a personal injury case has limited insurance coverage. Recent settlements and verdicts in similar cases indicate the possibility of an excess verdict which would exceed defendant's insurance coverage, exposing defendant's personal assets. Defendants (company owner and driver) are represented by the same attorney, who was retained by the insurance company. Defense counsel refuses to acknowledge Plaintiff's inquiry as to whether the defendants have been advised of their right to separate counsel and objects to Plaintiff's counsel advising the defendants in this regard.

Under the facts you have presented, you have asked the committee to opine as to whether Plaintiff's counsel can advise the defendants by mail or at depositions of their right to separate counsel.

The appropriate and controlling rule relative to your inquiry is Rule 4.2, which states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Interpreting Rule 4.2's predecessor [former Discipline Rule 7-103(A)(1)], this committee opined that even where the opposing counsel is wrongfully withholding information from his client, an attorney may not directly contact that opposing party. LEO 521. Similarly, despite his concerns that the opposing

counsel may have a conflict of interest, the attorney in the present inquiry is prohibited from contacting the opposing party without consent of the opposing counsel. The basic prohibition of Rule 4.2 contains no exception other than when the contact is "authorized by law." The attorney in the present context is not within that narrow exception.

The committee notes that the inquiry asks about contact via mail and in person at depositions. Clearly, the contact by mail is of the sort prohibited by Rule 4.2. Moreover, the committee opines that giving advice to a party in the presence of his lawyer, with no advance consent, is also prohibited. Such a "surprise" contact would not afford the opposing counsel the opportunity to decline the communication, but only to comment upon it afterward. Rule 4.2 requires consent of opposing counsel, not merely his presence. Therefore, the committee opines that the attorney in this inquiry may communicate with the opposing client neither through mail nor at the deposition unless opposing counsel has consented.

Committee Opinion
March 29, 2001