

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday, the 8th day of November, 2018.

On June 21, 2018, came the Virginia State Bar, by Leonard C. Heath, Jr., its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1889.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1889 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1889: SCOPE OF REPRESENTATION—DUTY OF COURT-APPOINTED LAWYER TO APPEAL TERMINATION OF PARENTAL RIGHTS ORDER

In this opinion, the Committee addresses the scope of a court-appointed lawyer's duty to appeal or continue representing a parent when that parent's parental rights have been terminated by a Juvenile and Domestic Relations District Court if the attorney has lost contact with the parent, the parent has not directed the attorney to appeal the matter, and the parent fails to appear in court or otherwise participate with the attorney in the course of the representation.

QUESTIONS PRESENTED

The questions presented in this opinion are:

1. Does court-appointed counsel for a parent have an ethical duty to appeal to a Circuit Court or to the Court of Appeals an order of a Juvenile and Domestic Relations District Court terminating a parent's residual parental rights, or other order involving removal or foster care in respect to a child, when the parent fails to appear after notice, fails to maintain contact with counsel and has never advised or requested counsel to appeal an adverse ruling?
2. Does court-appointed counsel have an ethical duty to appeal a termination in the Circuit Court if the parent has never appeared or contacted counsel? In this scenario, the parent's

whereabouts are typically unknown and they are served by publication.

The Committee concludes that the answer to both questions is “no,” there is no duty for court-appointed counsel to file an appeal.

HYPOTHETICAL

A child is removed from care of a parent by an emergency removal order. The parent is appointed counsel pursuant to Va. Code § 16.1-266 if they qualify as indigent. Va. Code § 16.1-268 states that “[t]he attorney so appointed shall represent the child or parent, guardian or other adult at any such hearing and at all other stages of the proceeding unless relieved or replaced in the manner provided by law.” After the parent is shown to have failed to remedy the circumstances which caused the child’s removal, the Department of Social Services (DSS) files petitions to terminate the parent’s residual parental rights pursuant to Va. Code § 16.1-283.

Throughout the process from emergency removal to foster care to termination of parental rights (TPR), the court serves or attempts to serve the parent with notices of these hearings. A parent will often sign the DC-508 form acknowledging the date of the next hearing. Court-appointed counsel has informed or has attempted to inform the parent of her right to appeal a TPR order. At some point, the parent ceases communication with her court-appointed counsel, the GAL appointed for the child, and DSS, and does not appear at the termination hearing. After hearing sufficient evidence to support termination, the court terminates parental rights. Court-appointed counsel for the parent has not received any direction or request to appeal any adverse ruling. Court-appointed counsel asks if she is ethically required to appeal the termination order to the Circuit Court, in spite of the fact that she has not received any direction from the parent to note an appeal.

Appeals from the Juvenile and Domestic Relations District Court to the Circuit Court are a matter of right if noted within 10 days from entry of the final order and other requirements, i.e., bond, filing fee, are met. When the parent fails to appear in Circuit Court, the appeals will be dismissed by the Circuit Court pursuant to Va. Code § 16.1-106.1(D) on the motion of DSS for the failure of the parent(s) to appear.

APPLICABLE RULES OF PROFESSIONAL CONDUCT AND PRIOR LEOS

In this opinion, the Committee reviewed Rules 1.2(a) (scope of representation) which indicates the decision to appeal belongs to and must be made by the client, 1.1 (duty to represent a client competently), 1.3 (diligence), and 1.4 (duty to communicate), which require the attorney to give competent advice and communicate with the client regarding her right to appeal. Also relevant is Rule 3.1 that prohibits a lawyer from filing a pleading or taking an action on behalf of a client that would be frivolous. *See also* Legal Ethics Opinion 1880 (duty of court-appointed counsel to follow client's direction to appeal defendant's conviction when the attorney believes the appeal would be frivolous).

ANALYSIS

The Committee concludes that absent some direction or request from the client at some stage in the proceeding to appeal an adverse ruling, the court-appointed counsel should not be obligated to do so. The Committee acknowledges the grave consequences of a TPR, the parents' right to counsel in those proceedings and the right to appeal an adverse ruling. While the parent has a right to appeal an adverse decision, that right has to be exercised first by the client directing the attorney to appeal. Unlike the situation presented in LEO 1880, the parent in this opinion has not directed the attorney to file an appeal and the attorney has not been able to determine the parent's wishes or desire in that regard. In addition, unlike the circumstances presented in LEO 1880 where the client is actively participating in the representation, in this opinion the parent either cannot be contacted or found or has essentially abandoned the representation or proceedings.

The decision to appeal is the client's after consultation with the lawyer. Rule 1.2(a). *See* Comment 1 ("The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations."). Although a TPR is a civil and not a criminal proceeding, the Committee finds guidance in standards for appeals in criminal cases. In criminal matters, counsel for the defendant is not required to appeal a decision *unless asked by the client to do so*. Standard of Practice 9.2 for Virginia Indigent Defense Counsel provides:

Standard 9.2 Right to Appeal

Counsel shall inform the client of his or her right to appeal the judgment of the court, unless such right has been knowingly, intelligently, and voluntarily waived, and the action that must be taken to perfect an appeal. *If the client advises counsel that he or she wishes to note an appeal*, counsel shall take all necessary steps to perfect such appeal in a timely fashion pursuant to the Rules of the Supreme Court of Virginia. If trial counsel is relieved in favor of other appellate counsel, trial counsel shall cooperate in providing information to appellate counsel concerning the proceedings in the trial court. (Emphasis added).

The Restatement (3d) of the Law Governing Lawyers § 22 (2000) states that the authority to appeal in civil or criminal matters is reserved to the client. Comment (a) states that this section specifies decisions that fall outside a lawyer's presumptive authority. ABA Criminal Justice Standards, Defense Function Standard 4-5.2 (Control and Direction of the Case) sets out the decisions ultimately to be made by a competent client, after full consultation with defense counsel to include whether to appeal.

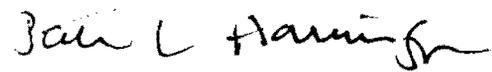
Therefore, the Committee believes that Rule 1.2(a) requires that the lawyer consult with the parent about filing an appeal of an adverse decision and that the parent must request that the lawyer file an appeal. In the hypothetical, the court-appointed counsel has advised or attempted to advise the parent of her right to appeal but has received no instruction to do so. Further, Rule 3.1 admonishes that an attorney must not bring a proceeding, assert, or controvert an issue therein unless there is a basis for doing so that is not frivolous. If the court-appointed counsel files an appeal of a TPR, without the parent's knowledge or informed consent, knowing that her client cannot be found and will not appear in court, that action may violate Rule 3.1.

In the facts presented, the client has made no direction to counsel to appeal adverse rulings at any point during the proceeding. The client's failure to maintain involvement in the proceeding provides the basis for the adverse ruling against the parent as the parent has "failed to substantially plan for the future of the child(ren)" or substantially remedy the situation which caused the child(ren) to be placed in foster care.

While the parent/client may have a right to court-appointed counsel and a right to appeal, the parent must communicate with the lawyer in order to exercise that right. The lawyer cannot exercise that right without the client's knowledge and consent.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Paul L. Harrington". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Clerk