Top Ten Legal Ethics Opinions Every Lawyer Should Know

The Allen Law Firm CLE Series
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Top Ten Legal Ethics Opinions Every Lawyer Should Know[1]

By

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Who Creates Legal Ethics Opinions?

Legal Ethics Opinions, or LEOs, are written by the Standing Committee on Legal Ethics of the Virginia State Bar. The Ethics Committee is comprised of nine practicing lawyers from around the Commonwealth who meet once a month for the purpose of drafting LEOs and amendments to the Rules of Professional Conduct and the Unauthorized Practice of Law Rules. Membership of the Ethics Committee is by appointment of the President of the Virginia State Bar and members may serve two consecutive three- year terms.

Are LEOs Controlling or Persuasive Authority?

Both. Most LEOs are Committee opinions, which means they are persuasive authority only. Some LEOs, however, have been approved by the Supreme Court of Virginia and as such, have the force of law.

Since 2016, the Supreme Court of Virginia has required that all LEOs drafted by the Ethics Committee be submitted for approval to the Court. Accordingly, now the Bar issues only LEOs approved by the Court that have the force of law. The Court has also reviewed older LEOs and approved some opinions that previously were persuasive authority only.

[1] And where to find them.

How Are LEOs Initiated?

The Ethics Committee may *sua sponte* initiate LEOs. In addition, any member of the Virginia State Bar may request a written LEO. Requests must be written and may be made by visiting the Virginia State Bar's website. See below at https://www.vsb.org/site/regulation/request-leo:

Virginia State Bar
An agency of the Supreme Court of Virginia

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PROFESSIONAL REGULATION

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Home > Professional Regulation > Ethics Questions and Opinions > Request an LEO

Request an Informal Legal Ethics Opinion

A member of the Virginia State Bar may request a written legal ethics opinion (LEO) from the Standing Committee on Legal Ethics. A legal ethics opinion applies ethics rules to a hypothetical set of facts and states whether the activity or conduct complies with or violates such ethics rules. The committee will not decide questions of law nor make any factual determinations. The committee will also not issue an opinion if a prior LEO is dispositive of the inquiry and may decline to issue an opinion if the question raised is the subject of collateral litigation or a pending bar complaint.

If you desire a quick informal response to an ethics question by the ethics staff, please use the Ethics Hotline or submit your ethics question online.

Legal Ethics Opinion request form (Word doc)
Legal Ethics Opinion request form (fillable pdf)

Updated: Aug 30, 2018

Finding LEOs

LEOs may be found on many legal research search engines. In addition, the Bar's website provides a handy index that associates LEOs with applicable Rules of Professional Conduct. The index may be found at https://www.vsb.org/site/regulation/leos. See below:

A sample of the organization of the Bar's index is set forth below:

LEO INDEX: VIRGINIA RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 **Competence:** 1791, 1814, 1798, 1739, 1872, 1853, 1818, 1850, 1823, 1821, 1815, 1865, 847, 1788.

RULE 1.2 **Scope of Representation:** 1840, 1762, 1823, 1816, 1771, 1802, 1737, 1841, 1875, 1836, 1869, 1778, 1791, 1854, 1783, 1803, 1814, 1865, 1838, 1874.

RULE 1.3 **Diligence:** 1857, 1797, 1798, 1853, 1814, 1757, 1818, 1821, 1802, 1817, 1865 1815.

Tom Spahn, an authority on legal ethics and an attorney with McGuireWoods, has also created a topical index, which is linked on the Bar's website:

Tom Spahn's index is organized by topic, and he includes 86 topics. A sample of his index is set forth below:

Legal Ethics Opinion Index - Tom Spahn

1 - **Adversity to Current Clients:** 1642, 1203, 843, 1796, 1875, 290, 1337, 1609, 234, 1094, 1460, 253, 1225, 495, 1057, 1821, 223, 947, 1769, 222, 344, 241, 595, 296, 894, 739, 819, 1408, 1731, 244, 1623, 1312, 1168, 1815, 692, 327, 1239, 1427, 1592, 873, 493, 1681, 1630, 808, 483, 1785, 1257, 236, 1774, 310, 698, 1637, 706, 1842, 1776, 1150, 975, 800, 1476, 371, 631, 1725, 1767.

(ABA: 367, 434, 435, 377.)

Top Ten LEOs Every Lawyer Should Know[2]

LEO 1606- Compendium Opinion on Fees

Issued by the Standing Committee on Legal Ethics in 1994, approved by the Supreme Court of Virginia on November 2, 2016. LEO 1606 has the effect of law and provides guidance as follows:

- Fees must be reasonable
- See Rule 1.5 for factors

  (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

  (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

  (3) the fee customarily charged in the locality for similar legal services;

  (4) the amount involved and the results obtained;

  (5) the time limitations imposed by the client or by the circumstances;

  (6) the nature and length of the professional relationship with the client;

  (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

  (8) whether the fee is fixed or contingent.
- Fixed fees are encouraged
- A true retainer is rare--it's properly called an "advanced legal fee"

There Is No Such Thing As An Ethical Nonrefundable Fee!

[2] Of course this is a matter of opinion. Some LEOs may be more applicable to a practice area than others. I selected these LEOs for their broad applicability.

LEO 1606

Contingency fees

- Ethically permissible when there is a *res* from which to draw the fee
- Encourage lawyers to accept cases that carry inherent risk of nonpayment of fees
- Access to justice for the impecunious
- Ministerial matters where there is no risk of nonpayment of fees, improper for contingency fee---example, collecting med-pay for the client
- Contingency fees are rarely ethical in domestic or criminal matters
- Rule 1.5 (c) requires contingency fees to be in writing

LEO 1305--Disposition of Closed Client Files

Committee opinion November 21, 1989. The Committee was asked to issue an opinion on the following inquiry:

You have advised that you have slightly over 700 closed files in storage, a majority of which concern cases where you were the court-appointed defense counsel in criminal matters which took place between April 1, 1981 and May 15, 1989. You indicate your concern with costs of rental of storage space and of sending notices or complete files to former clients. You have asked that the Committee consider first the length of time that clients' records need to be retained by an attorney who is no longer engaged in the private practice of law, and second, the propriety of disposal of files by shredding, incineration, or landfill burial.

Committee opined:

- No duty to preserve client files indefinitely
- Do not destroy originals where it would harm the client—wills, marriage certificate
- Must protect client confidences when destroying or disposing of files.

  -Disposal by throwing intact files into a dumpster would fail to preserve client confidences.

No set time period for preserving client files. Rule 1.15, however, requires that lawyers preserve all trust account records for five years.

LEO 1332—Lawyers Leaving Law Firm

This is a Committee opinion issued April 20, 1990. It governs conduct of when a lawyer leaves a law firm or a firm dissolves. The main point of this LEO is that lawyers do not "own" clients, and that clients choose whether to be represented by the departing lawyer, the law firm, or another attorney of the client's choosing.

LEO 1506, a Committee opinion issued on February 17, 1993, opines that a law firm's refusal to provide clients with the contact information for a departing lawyer constitutes unethical conduct.

On May 1, 2015, the Supreme Court of Virginia adopted Rule 5.8 of the Rules of Professional Conduct, which codified the tenants of LEO 1332. Rule 5.8 provides:

> **Rule 5.8: Procedures For Notification to Clients When a Lawyer Leaves a Law Firm or When a Law Firm Dissolves**
>
> a) Absent a specific agreement otherwise:
>
> (1) Neither a lawyer who is leaving a law firm nor other lawyers in the firm shall unilaterally contact clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer and an authorized representative of the law firm have conferred or attempted to confer and have been unable to agree on a joint communication to the clients concerning the lawyer leaving the law firm; and
>
> (2) A lawyer in a dissolving law firm shall not unilaterally contact clients of the law firm unless authorized members of the law firm have conferred or attempted to confer and have been unable to agree on a method to provide notice to clients.
>
> (b) When no procedure for contacting clients has been agreed upon:

(1) Unilateral contact by a lawyer who is leaving a law firm or the law firm shall not contain false or misleading statements, and shall give notice to the clients that the lawyer is leaving the law firm and provide options to the clients to choose to remain a client of the law firm, to choose representation by the departing lawyer, or to choose representation by other lawyers or law firms; and

(2) Unilateral contact by members of a dissolving law firm shall not contain false or misleading statements, and shall give notice to clients that the firm is being dissolved and provide options to the clients to choose representation by any member of the dissolving law firm, or representation by other lawyers or law firms.

(c) Timely notice to the clients shall be given promptly either by agreement or unilaterally in accordance with Rule 5.8(a) or (b).

(d) In the event that a client of a departing lawyer fails to advise the lawyer and law firm of the client's intention with regard to who is to provide future legal services, the client shall be deemed a client of the law firm until the client advises otherwise or until the law firm terminates the engagement in writing.

(e) In the event that a client of a dissolving law firm fails to advise the lawyers of the client's intention with regard to who is to provide future legal services, the client shall be deemed to remain a client of the lawyer who is primarily responsible for the legal services to the client on behalf of the firm until the client advises otherwise.

LEO 1739—Referral Fees

Rule 1.5(e) governs

- Terms of division of fees must be disclosed to client
- Must delineate each lawyer's responsibilities
- Client must consent
- Total fee is reasonable
- Division of fees and client consent obtained *in advance* of rendering legal services
- Preferably in writing

Since adoption of Rules of Professional Conduct in 2000, referring lawyer no longer must assume full responsibility to the client and no longer must continue to participate in the representation as a condition of receiving referral fee.

- Referring lawyer is not automatically assuming ethical responsibility for activity of the other lawyer
- Policy is to encourage referrals under appropriate circumstances
- Referring lawyer must, however, assess the client's legal matter and take reasonable steps to ensure that referral will result in competent legal representation in the field in question.

Caution:

- Referral fee ethical rules vary from jurisdiction to jurisdiction
- Lawyers may not share fees with non-lawyers

BONUS: Proposed LEO 1890 and LEOs Dealing with Interactions with Represented Parties: 1670, 1752, 1749, 1863, 1861, 1820, 848, 1755, 459, 801, 347, 530, 1821, 1811, 1854, 1553, 1802, 1819.

Several LEOs govern a lawyer's conduct when dealing with represented parties. Proposed LEO 1890 addresses 15 different scenarios arising under Rule of Professional Conduct Rule 4.2, and collects authorities including Rule 4.2 and its comments, other LEOs, case law, and other states' ethics opinions to explain the purpose and application of Rule 4.2 to the most common issues raised by the rule.

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.

Proposed LEO 1890 opines as follows regarding Rule 4.2:

1. The rule applies even if the represented person initiates or consents to an ex parte communication.

2. The rule applies only if the communication is about the subject of the representation.

3. The rule applies only if the lawyer actually knows that the person is represented by counsel.

4. The rule applies even if the communicating lawyer is self-represented.

5. Represented persons may communicate directly with each other regarding the subject of the representation, but the lawyer may not use the client to circumvent Rule 4.2.

6. A lawyer may not use an investigator or third party to communicate directly with a represented person.

7. Government lawyers involved in criminal and certain civil investigations may be "authorized by law" to have ex parte investigative contacts with represented

persons.

8. Ex parte communications are permitted with employees of a represented organization unless the employee is in the "control group" or is the "alter ego" of the represented organization.

9. The rule does not apply to communications with former employees of a represented organization.

10. The fact that an organization has in house or general counsel does not prohibit another lawyer from communicating directly with constituents of the organization, and the fact that an organization has outside counsel in a particular matter does not prohibit another lawyer from communicating directly with in house counsel for the organization.

11. Plaintiff's counsel generally may communicate directly with an insurance company's employee/adjuster after the insurance company has assigned the case to defense counsel.

12. A lawyer may communicate directly with a represented person if that person is seeking a "second opinion" or replacement counsel.

13. The rule permits communications that are "authorized by law."

14. The rule allows certain ex parte communications with represented government officials concerning the subject of the representation in a controversy between the lawyer's client and the government.

15. A lawyer's inability to communicate with an uncooperative opposing counsel or reasonable belief that opposing counsel has withheld or failed to communicate settlement offers is not a basis for direct communication with a represented adversary.

LEO 1750—Compendium Opinion on Advertising

This opinion was first issued as a Committee opinion on March 20, 2001. It was revised and reissued by the Ethics Committee on April 4, 2006 and again on December 18, 2008. On April 20, 2018, the Supreme Court of Virginia approved the opinion, giving it the force of law. As of August 2019, further revisions are pending before the Supreme Court of Virginia.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

What's misleading?

- Actors posing as lawyers in firm without disclosure
- "Smith and Associates" when Smith has no associates
- "You must consult a lawyer before settling with the insurance company"
- "Million dollar verdict just won for Mr. Jones!" (When firm turned down $2 million offer)
- "The Most Experienced Lawyers" comparative statements that cannot be factually substantiated.
- Client statements "The Best!"

What's OK?

- Use of trade names
- Case results without specific disclaimer if it is a "complete and true statement of what happened in the case"—ex.: "Five million settlement following a three-day mediation."

LEO 1750—Compendium Opinion on Advertising

What's OK?

- Client soft endorsements "Lawyer always returned my call"
- Lawyer listed in "Best Lawyers in America" or "Super Lawyers"
- Lawyer is "A.V. rated"
- "Specialist" if there is a certifying organization (but not "expert")

LEOs 1886 and 1887—Duties When Another Lawyer is Impaired

LEO 1886 was approved by the Supreme Court of Virginia on December 15, 2016. LEO 1887 was approved by the Supreme Court of Virginia on August 30, 2017.

Impairment means:

"Any physical or mental condition that materially impairs fitness of an Attorney to practice law"[3]

LEO 1886—When a lawyer you supervise is impaired

- Governed by Rule 5.1
- Take reasonable steps to prevent impaired lawyer from violating ethical rules
  - *Paramount obligation is to protect the interests of the clients*
- Intervention to get help
- Limit lawyer's role and duties
- Close supervision
- Require lawyer to get treatment
- Make confidential report to Lawyers Helping Lawyers
- Not required to report to the Bar

[3] Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-1.

LEO 1887-- Duty when a lawyer over whom no one has supervisory authority is impaired

- No ethical duty to proactively address impairment

  -Moral obligation?

- Rule 8.3 duty to report to Bar when you have "reliable information that the impaired lawyer has committed a violation of the Rules that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law."

- *Should* make confidential report to Virginia Judges and Lawyers Assistance Program (formerly "Lawyers Helping Lawyers") and /or encourage impaired lawyer to get help
- *Must* report misconduct that raises a substantial question of lawyer's fitness to practice law

LEO 1885—Online Attorney-Client Matching Service

This LEO was approved by the Supreme Court of Virginia on November 8, 2018.

Lawyer must ensure fee set by service is reasonable under Rule 1.5(a)

This LEO was prompted by entry into the market of lead sharing services such as AVVO. Before this opinion was issued, however, AVVO changed it business model.

Main points:

- Advanced legal fee cannot be held by a lay business firm
    - Rule 1.15—client funds must be held in attorney trust account—attorney cannot surrender ability to refund unearned fee to client
- Lawyer cannot share fees with non-lawyer by paying a portion of the legal fee charged to the client as compensation for the lawyer having received the client from the service which operates the program.
    - This is distinct from a marketing fee, which is not based on the fee the lawyer charges the client.
- A lawyer may limit the scope of the representation provided the limitation does not impair the lawyer's ability to provide competent representation.
    - Client must consent to limited scope after consultation.

LEO 1769—Representing Client with a Disability

This is a Committee opinion issued February 10, 2003. Here, the Ethics Committee was asked to interpret the interaction between Rule 1.7 and Rule 1.14 to answer the following inquiry:

> *You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter*

Rule 1.7 Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

Rule 1.14 Client With Impairment

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The Committee opined that "neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney's office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by the daughter regarding the mother in determining this attorney's duties toward the mother with regard to Rule 1.14. That rule would be the proper source for guidance for this attorney should he believe the mother's competence is questionable."

LEO 1856 Foreign Attorneys Practicing Law in Virginia

This LEO was issued as a Committee opinion on September 19, 2011. On November 2, 2016, the Supreme Court of Virginia approved the opinion, making it law.

This opinion defines the parameters of ethical multijurisdictional practice in Virginia. "This opinion explores the extent to which a lawyer not licensed in Virginia may engage in the practice of law in Virginia, both on a temporary basis and "continuously and systematically" under Rule 5.5 of the Virginia Rules of Professional Conduct. For purposes of the opinion, the foreign lawyer is licensed and in good standing in a jurisdiction other than Virginia."

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice of Law

(a) A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm, or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation.

(b) A lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk, or legal assistant when that lawyer's license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

(c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(d) Foreign Lawyers:

> (1) "Foreign Lawyer" is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of

Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.

(2) A Foreign Lawyer shall not, except as authorized by these Rules or other law:

(i) establish an office or other systematic and continuous presence in Virginia for the practice of law, which may occur even if the Foreign Lawyer is not physically present in Virginia; or

(ii) hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.

(3) A Foreign Lawyer shall inform the client and interested third parties in writing:

(i) that the lawyer is not admitted to practice law in Virginia;

(ii) the jurisdiction(s) in which the lawyer is licensed to practice; and

(iii) the lawyer's office address in the foreign jurisdiction.

(4) A Foreign Lawyer may, after informing the client as required in 3(i)-(iii) above, provide legal services on a temporary and occasional basis in Virginia that:

(i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia or admitted under Part I of Rule 1A:5 of this Court and who actively participates in the matter;

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction,

if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law.

(5) A foreign legal consultant practicing under Rule 1A:7 of this Court and a corporate counsel registrant practicing under Part II of Rule 1A:5 of this Court are not authorized to practice under this rule.

The opinion concludes:

- "Foreign lawyers, i.e., non-Virginia lawyers admitted to practice in the United States or a foreign nation, may practice in a Virginia law firm or may establish an office or other systematic and continuous presence in Virginia if authorized by Virginia or federal law."
- "A lawyer admitted to practice in a foreign nation may establish an office or practice in a law firm in Virginia only if the foreign lawyer is certified as "Foreign Legal Consultant" pursuant to Rule 1A:7 of the Supreme Court of Virginia."
- "Foreign lawyers practicing in a Virginia law firm may not advise clients on matters involving Virginia law except as permitted by Rule 5.5(d)(4)." [temporary and occasional]
- "Foreign lawyers who limit their practice exclusively to federal practices in which admission to the Virginia State Bar is not required [e.g., a patent and trademark lawyer, immigration lawyer] may maintain an office or practice systematically and continuously in Virginia. Likewise, if their practice is limited to matters

involving the law of the state or country in which they are admitted to practice, foreign lawyers may practice in Virginia on a systematic and continuous basis."

- "Contract lawyers not licensed to practice in Virginia who are hired by a Virginia law firm on a temporary basis may practice to the extent permitted by Rule 5.5(d)(4), or on a continuous and systematic basis if Virginia or federal law does not require their admission to the Virginia State Bar."

LEO INDEX: VIRGINIA RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 **Competence:** 1791, 1814, 1798, 1739, 1872, 1853, 1818, 1850, 1823, 1821, 1815, 1865, 847, 1788.

RULE 1.2 **Scope of Representation:** 1840, 1762, 1823, 1816, 1771, 1802, 1737, 1841, 1875, 1836, 1869, 1778, 1791, 1854, 1783, 1803, 1814, 1865, 1838, 1874.

RULE 1.3 **Diligence:** 1857, 1797, 1798, 1853, 1814, 1757, 1818, 1821, 1802, 1817, 1865 1815.

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RULE 1.9 **Conflict of Interest: Former Client:** 1806, 1810, 1762, 1800, 527, 1785, 1819, 1875, 1776, 1767, 1118, 958, 729, 240, 655, 652, 1813, 1794, 1869, 1821, 1320, 1387, 1136, 1394, 1513, 1832, 1866, 1826, 1850, 1853.

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RULE 1.11 **Special Conflicts Of Interest For Former And Current Government Officers And Employees**: 1020, 1841, 1824, 1763, 1773, 1430, 1826, 1241, 1058, 1012, 1008, 303, 686, 1299, 1250, 1004, 1478, 1832, 847.

RULE 1.12 **Former Judge Or Arbitrator:** 1826, 1872.

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51 - **Commonwealth's Attorneys:** 574, 487, 1496, 1854, 1266, 540, 1538, 848, 188, 1203, 763, 636, 789, 285, 416,1043, 288, 205, 1465, 1114, 1533, 1713, 1271, 268, 1578, 522, 702, 1371, 942, 1570, 604, 303, 230, 1250, 358, 1070, 1671, 398, 782, 780, 429, 1012, 840, 351, 1243, 185, 606, 735, 1241, 986, 562, 1463, 696, 451, 600, 1110, 483, 594, 446, 726, 643, 420, 613, 1569, 633, 720, 1018, 731, 1507, 1383, 1050, 1020, 236, 675, 1197, 597, 1008, 624, 673, 1666, 1415, 1594, 1799, 1261, 1682, 1416, 1058, 1619, 1862, 1046, 1767, 1798, 1867, 684, 674, 1746, 1208, 685.

(ABA: 441.)

52 - **Fees in Family Law Cases:** 392, 667, 405, 1174, 1062, 363, 423, 778, 1081, 588, 850, 1298, 1653, 1652, 568, 1229, 189, 1606.

53 - **Office Sharing with Non-Lawyers:** 1341, 1658, 192, 1317, 316, 754, 1405, 1872.

54 - **Insurance Defense Lawyers:** 1661, 1410, 1071, 1629, 294, 1723, 1057, 223, 955, 213, 1223, 360, 1536, 1789, 1377, 1858, 616, 1592, 873, 493, 1169, 1289, 226, 598, 877, 1344, 1310, 1490, 1019, 781, 698, 634, 1142, 1752, 1150, 1476, 1392, 687.

(ABA: 450, 403, 435, 421, 430.)

55 - **Firm Names and Letterhead:** 1341, 828, 1242, 935, 1706, 1659, 264, 851, 230, 970, 589, 277, 767, 1376, 1288, 283, 1143, 1704, 206, 469, 775, 402, 193, 1532, 1275, 1029, 321, 202, 858, 762, 1356, 1108, 937, 1554, 1492, 325, 1380, 959, 1285, 1395, 1026, 1369, 853, 1034, 1873, 326, 660.

(ABA: 430.)

56 - **Duty to Advise the Court:** 1355, 390, 1400, 1361, 486, 1224, 491, 194, 1643, 1731, 1789, 1583, 846, 1495, 1650, 561, 1580, 542, 1476, 1622.

(ABA: 387, 412, 466, 446, 454, 370.)

57 - **In-House Lawyers:** 1172, 1635, 1341, 807, 718, 1419, 1615, 1589, 1601, 328, 509, 226, 598, 983, 1353, 1359, 877, 1272, 1399, 835, 480, 959, 1364, 256, 1838, 1211, 1820.)

(ABA: 392, 415, 424, 453, 430, 443.)

58 - **Real Estate Lawyers:** 1151, 437, 1391, 1393, 966, 1797, 1494, 1609, 1094, 1401, 1840, 457, 1277, 1588, 1153, 1152, 1055, 1097, 753, 281, 1116, 1255, 678, 1072, 1138, 1521, 1535, 539, 1000, 1398, 1149, 1216, 336, 553, 1509, 1032, 332, 1436, 372, 1022, 414, 528, 1435, 814, 1427, 1206, 1720, 267, 1616, 626, 302, 1469, 886, 1518, 744, 656, 1681, 1351, 415, 1564, 383, 425, 663, 1073, 1417, 1220, 196, 1197, 238, 1405, 1089, 1148, 1197, 1742, 464, 1647, 939, 783, 662, 922, 927, 211, 1228, 690, 209, 747, 1705, 982, 1565, 183, 1120, 1373, 1402, 1301, 1644, 424, 900, 824, 1204, 647, 1346, 878.

59 - **Disbarred and Suspended Lawyers:** 1514, 1132, 970, 1260, 809, 1111, 934, 524, 1365, 1218, 694, 1044, 1852.

60 - **Lawyers Acting as Trustees:** 1617, 1387, 515, 1431, 1534, 411, 1590, 554, 573, 1585, 659, 1335, 1358, 1503, 1515.

(ABA: 426.)

61 - **Lawyers Acting as Executors:** 1315, 1617, 1387, 1534, 411, 735, 1720, 1159, 1358, 1515.

(ABA: 426.)

62 - **Representing Joint Ventures:** 1610.

63 - **Lawyers Acting as Corporate Officers or Directors:** 1635, 1587, 1821, 1436, 555, 484, 453.

(ABA: 410.)

64 - **Lawyers Acting as Deed of Trust Trustees:** 1391, 815, 455, 1022, 744, 679, 800, 1301, 824.

65 - **Lawyers Acting as Notaries:** 499, 742, 1006, 1512, 788, 626, 618.

66 - **Lawyers Acting as "Scriveners":** 1464, 1352, 1126, 553, 1368, 1803, 1761, 1792, 824.

67 - **Lawyers Acting as Guardians Ad Litem:** 1844, 1617, 1626, 1810, 608, 957, 1769, 857, 1870, 1463, 1729, 607, 1831, 1725.

68 - **Lawyers Acting as Mediators**: 544, 590, 1684, 849, 1759, 511, 492, 519, 1826.

(ABA: 447.)

69 - **Lawyers Acting as Expert Witnesses:** 1520, 1185, 950.

(ABA: 407.)

70 - **Lawyers Acting as Registered Agents:** 961.

71 - **Representing Corporations:** 1172, 1836, 1066, 1341, 807, 718, 1419, 1638, 1352, 1126, 1615, 785, 1593, 815, 1589, 304, 438, 344, 384, 654, 991, 894, 580, 1325, 1408, 1347, 1499, 1596, 1536, 1340, 400, 1505, 990, 272, 555, 1685, 1517, 1551, 484, 803, 983, 1353, 877, 1399, 835, 313, 1129, 1364, 254, 256, 1838, 930, 772.

(ABA: 381, 390, 410.)

72 - **Representing Partnerships:** 266, 1099, 1458, 1037.

(ABA: 361.)

73 - **Family Law Lawyers:** 1074, 1439, 1390, 1794, 1663, 544, 1631, 1015, 903, 1389, 1378, 1222, 1460, 669, 755, 782, 1546, 667, 1409, 405, 1174, 1062, 363, 423, 276, 884, 535, 778, 707, 792, 1516, 241, 227, 619, 221, 337, 403, 741, 354, 452, 1191, 888, 737, 890, 1081, 588, 850, 1298, 1139, 289, 764, 295, 1180, 445, 520, 538, 369, 1697, 1147, 901, 1653, 822, 1643, 1652, 1032, 1279, 1484, 693, 839, 1349, 1084, 788, 543, 382, 1304, 895, 749, 1468, 1455, 1759, 1685, 774, 766, 677, 575, 1630, 1481, 949, 1463, 600, 969, 594, 420, 613, 770,1229, 511, 492, 519, 661, 1189, 189, 190, 1075, 1193, 1112, 1576, 1472, 1553, 1188, 355, 1700.

74 - **Representing Associations:** 1465, 980, 1306, 739, 1168, 692, 310, 1497.

(ABA: 365.)

75 - **Representing Estates and Executors:** 595, 340, 1599, 1452, 1811, 648, 260, 1472, 1473.

(ABA: 426.)

76 - **Trust and Estate Lawyers:** 285, 1315, 1668, 973, 1283, 370, 1617, 1387, 571, 708, 1048, 387, 1534, 947, 595, 257, 271, 378, 856, 411, 1778, 811, 735, 599, 1590, 1519, 1296, 340, 287, 1599, 1547, 1487, 1452, 1206, 1720, 269, 273, 312, 1811, 648, 309, 1561, 1159, 728, 260, 258, 1358, 1472, 1515, 1473.

(ABA: 380, 426, 434.)

77 - **Communicating with an Individual Adversary:** 848, 482, 1389, 1281, 931, 1431, 1326, 233, 963, 501, 1547, 986, 771, 1525, 1709, 1755, 1870, 550, 1323, 1507, 1415, 1861, 1375, 1752, 521.

(ABA: 362, 461, 445.)

78 - **Communicating with an Employee of a Corporate Adversary:** 353, 1190, 1589, 1749, 347, 533, 1670, 530, 905, 795, 801, 1821, 459, 507, 651, 1524, 523, 1527, 1169, 687, 1863.

(ABA: 359, 396, 443, 461.)

79 - **Communicating with a Governmental Adversary:** 1504, 529, 1537, 777, 964.

(ABA: 408.)

80 - **Communicating with an Adversary's Expert:** 1235, 1678, 1076.

(ABA: 378.)

81 – **Communicating with an Adversary's Health Provider:** 1235, 1042, 1639, 1158, 1409, 204.

82 – **Advertising:** 1164, 917, 1119, 1277, 397, 1052, 395, 1175, 1292, 202, 1321, 211, 1405, 1385, 1297, 1229, 1443, 1872, 1873, 1750.

(ABA: 419, 457, 465.)

83 – **Solicitation:** 1290, 1572, 856, 625, 1515.

84 - **Direct Mail Marketing:** 447, 362, 470, 984, 671, 508, 448, 862, 904, 625, 579, 312, 1001.

85 - **Business Cards:** 349, 338, 504, 775, 1374, 931, 399, 682, 314, 1750.

86 - **Descriptions of Certification and Specialization:** 923, 427, 456, 572, 1107, 1292, 1001, 1425, 979, 1231.

Supreme Court Approved
November 2, 2016
Committee Opinion
November 22, 1994

LEGAL ETHICS OPINION 1606 FEES (COMPENDIUM OPINION).

Inquiry: Because a number of existing opinions pertaining to fee arrangements are sometimes inconsistent or incomplete in the description and definition of those arrangements, this Committee has chosen to review existing opinions and issue a compendium opinion discussing the propriety of fee arrangements. Some of the issues the Committee has decided to consider include the various types of fee arrangements, when the fee is the property of the client and when it can be considered the property of the attorney, and when and under what circumstances a client is entitled to a return of fees paid to an attorney. Specifically, the Committee has chosen to address the following types of legal fees:

Retainers

Advanced Legal Fees

Non-refundable Legal Fees ("Non-refundable Retainers" or "Minimum Fees")

Fixed Fees

Contingent Fees

Applicable Disciplinary Rules: The appropriate and controlling disciplinary rules relevant to the questions raised are:

DR:2-105(A) which requires that a lawyer's fees be reasonable and adequately explained to the client.

DR:2-105(B) which requires that upon request a lawyer shall furnish to the client the basis or rate of the lawyer's fee.

DR:2-105(C) which permits (with exceptions) a fee contingent on the outcome of a matter for which the service is rendered.

DR:2-108(A)(3) which requires a lawyer to withdraw from representing a client if the lawyer is discharged by the client.

DR:2-108(D) which requires that upon termination of representation a lawyer shall refund any advance payment of fees that has not been earned.

DR:9-102(A) which requires a lawyer to deposit all funds received on behalf of a client, except reimbursement of costs and expenses, in a separate identifiable account which does not contain funds belonging to the lawyer.

DR:9-102(A)(2) which permits the lawyer to deposit into the trust account funds which belong in part to the client and in part presently or potentially to the lawyer. The portion

belonging to the lawyer must be withdrawn when earned unless the right to receive it is disputed by the client.

DR:9-102(B)(4) requiring a lawyer to promptly pay or deliver to the client or another all funds in the possession of the lawyer which the client is entitled to receive.

Prior Legal Ethics and Court Opinions: The following opinions and court cases have dealt with the issue of legal fees:

Legal Ethics Opinions: LE Op. 189, LE Op. 214, LE Op. 510, LE Op. 528, LE Op. 568, LE Op. 646, LE Op. 681, LE Op. 1062, LE Op. 1246, LE Op. 1322, LE Op. 1370,

Case Law: *AFLAC, Inc. v. Williams*, 1994 Ga. LEXIS 466 (Ga. 1994); *County of Campbell v. Howard*, 133 Va. 19 (1922); *In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994); *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958 (1977); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991); *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y 1994); *Wood v. Carwile*, 231 Va. 320 (1986).

Opinion: 1. Fees in General. An analysis of legal fees begins with the proposition that contracts for legal services are not construed as are other commercial contracts. Citing with approval *Drippner v. Mutz*, 205 Minn. 497, 287 N.W. 19 (1939) the Virginia Supreme Court has noted:

> It is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each. *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 962 (1977).

The Disciplinary Rules set certain restrictions on all legal fees that cannot be avoided by the employment contract. Regardless of the agreed terms, the designation of the fee in the employment contract cannot alter the true nature of the fee and will not be dispositive in determining whether there is a violation of the Disciplinary Rules. Neither will the terminology used to describe the fee determine whether the fee has been earned by the lawyer or into which type of account the fee must be placed. LE Op. 510. A lawyer cannot by contract alter the nature or the ownership of fees received, nor can he legitimize a fee that is otherwise prohibited by the Disciplinary Rules.

DR:2-105 directs that a lawyer's fees be adequately explained to the client, and that the basis of the fee be furnished to the client. EC:2-21 suggests that there be a clear agreement as to the basis of the fee as soon as feasible after a lawyer has been employed. It also encourages the use of written contracts of employment as the preferred means of complying with the requirement of DR:2-105. A lawyer must, upon request, furnish to his client an itemized breakdown of legal fees, costs and related expenses paid by that client. LE Op. 214.

All fees must be reasonable. DR:2-105(A). In determining the reasonableness of the fee, one may take into account the lawyer's experience, ability and reputation, the nature of the

employment, the responsibility and effort involved and the results obtained. EC:2-20. It is also proper to consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances. *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991).

The Committee has previously opined that the fact that a fee is stated and agreed to in a contract is not dispositive of whether it is reasonable under the Code of Professional Responsibility. LE Op. 528. It is also important to note that because of the unique nature of the legal contract, a determination of the reasonableness of the fee is not necessarily limited to the circumstances which existed at the time of the agreement. The occurrence of unusual or extraordinary events not contemplated by the parties at the outset of the representation may effect the ultimate reasonableness of the agreed upon fee.

A client retains the absolute right to discharge the lawyer at any time for any reason or without reason. Disciplinary Rule 2-110 imposes no restriction or condition on the client's right to discharge his lawyer. Even when the discharge constitutes a breach of the employment contract, the lawyer is entitled only to that portion of the fee that has been actually earned prior to the termination. LE Op. 681. When the attorney is discharged prior to the completion of the representation he may only recover the reasonable value of the services which he has rendered. He cannot recover for damages for the breach of the contract, and, in instances where the fee is contingent upon the outcome of the matter, the attorney may not recover the full agreed upon fee. He is entitled only to a recovery in *quantum meruit* for services actually rendered. *Heinzman, supra*. The *quantum meruit* determination must look to the reasonable value of the services rendered, not to the benefit received by the client. *Wood v. Carwile*, 231 Va. 320 (1986); *County of Campbell v. Howard*, 133 Va. 19 (1922).

Finally, if the lawyer is discharged by the client, he must refund to the client all advanced legal fees which have not been earned. DR:2-108(D).

2. Retainers. This Committee has on several occasions addressed the unique features of a retainer. The Committee is mindful, however, that the term is probably misused more often than not (a fault for which the Committee must accept some responsibility), to describe any type of advanced legal fees. As the Committee opined previously in LE Op. 1322, a retainer (or advance periodic payment) 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. A retainer is not a pre-payment for legal services to be rendered in the future, and is thus distinguished from advanced legal fees. A retainer seeks to guarantee the client's right to secure the attorney's employment for representation of his interests in a matter which may arise in the future. This Committee has previously opined, and continues to believe that a retainer is not violative of the Disciplinary Rules. LE Op. 1178.

The Committee is further of the opinion that because retainers are paid to secure the availability of an attorney in the future, and not as payment for future legal services, retainers are earned when paid and become the property of the attorney upon receipt. Such fees are deemed earned by the lawyer at the time of payment in consideration for the lawyer's availability to the client and unavailability to potential adverse parties. LE Op. 1178. Because retainer fees are the property of the lawyer when paid, they may not be deposited into the attorney's trust account. DR:9-102(A).

The Committee recognizes that it is common practice for lawyers to accept fees described as retainers to secure the lawyer's future availability and agree to credit those fees against legal services to be provided in the future. The Committee is of the opinion that while such an arrangement is not improper, if the employment agreement provides for fees, regardless of their designation, to be applied against future services to be rendered by the attorney, the fee is not a retainer, but rather an advanced legal fee and must be handled as discussed below. LE Op. 510.

LE Op. 1178, LE Op. 1322 and LE Op. 1370 properly define and distinguish the terms "retainer" and "advanced legal fees". As noted previously, however, various other opinions have used the term "retainer" in a generic sense which often is inconsistent with its true meaning. Accordingly, to the extent, and only to the extent, that previous opinions, including LE Op. 186-A, LE Op. 558, LE Op. 646, LE Op. 681, LE Op. 1081, LE Op. 1117, LE Op. 1238, LE Op. 1246 and LE Op. 1318, have used the word "retainer" to describe a fee arrangement that is inconsistent with this opinion, they are overruled. *See generally*, L. Brickman and L. Cunningham, Nonrefundable Retainers Revisited, 72 NCL Rev. 1, 3-5 (1993).

3. Advanced Legal Fees. Fees paid in advance for particular legal services not yet performed are advanced legal fees regardless of the terminology used in the employment contract. Advanced legal fees are not violative of the Disciplinary Rules as long as they are properly deposited and identified as belonging to the client until earned. The Committee has consistently opined that the element of payment for future legal services differentiates advanced legal fees from a retainer. LE Op. 1322, LE Op. 1178. The two terms are not synonymous.

Because advanced legal fees do not belong to the lawyer until the services are rendered, it is the opinion of the Committee that they must be deposited in an identifiable account (trust account) and remain the property of the client until they are earned by the attorney. The Committee notes that in some situations, the employment contract may provide that a portion of an advanced legal fee is considered to be earned at the time it is paid. In this case the earned portion becomes the property of the lawyer and may not be deposited in the lawyer's trust account.

Upon termination of the representation it is the duty of the attorney to refund any portion of an advanced legal fee which has not been earned. In addition, all fees charged against the account must be reasonable and must be adequately explained to the client. DR:2-105(A).

4. Non-refundable Legal Fees. The Committee has previously opined and continues to be of the opinion that any fee arrangement involving advanced legal fees and providing for a non-refundable or minimum fee violates the Disciplinary Rules and is thus improper. LE Op. 1322 and LE Op. 1370. If the fee is an advance payment for legal services, as described above, it continues to be the property of the client. The fee must be deposited in a trust account and may only be paid over to the lawyer when and if it is earned. An advanced legal fee cannot, by employment contract or otherwise, be termed non-refundable without violating the Disciplinary Rules. See LE Op. 510, LE Op. 1246 and LE Op. 1322. And, as noted above, using the term "retainer" to describe what is, in reality, an advanced legal fee does not change the true nature of the fee, nor does it allow the fee to be considered non-refundable. *See Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y 1994).

The Committee believes that the concept of a non-refundable or minimum fee paid in advance for specific legal services is violative of the Disciplinary Rules for the following reasons:

A. A non-refundable fee compromises the client's unqualified right to terminate the attorney client relationship and is violative of DR:2-108(A)(3). *See also In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994). The client's absolute right to discharge a lawyer contained in DR:2-108(A)(3) would be of little value if the client must risk paying for services not rendered. Such a situation could force the client to continue the services of an attorney in whose integrity, judgment or capacity the client had lost confidence.

B. If the client discharges the lawyer prior to the fee being earned, the retention of a non-refundable fee would violate the attorney's responsibility to refund to a client any advanced fee that had not been earned. DR:2-108(D).

C. A fee that is not earned is per se an unreasonable fee. Thus the retention of an unearned non-refundable fee would result in the lawyer collecting an unreasonable fee in violation of DR:2-105(A).

5. Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. LE Op. 681. In such circumstances, what portion of the fee has been earned requires a *quantum meruit* determination of the value of the lawyer's services in accordance with *Heinzman* and *County of Campbell v. Howard*, 133 Va. 19 (1922).

6. Contingency Fees. The Committee notes that DR:2-105(C) permits fees that are contingent on the outcome of a matter for which the service is rendered, except in criminal cases or other matters in which such a fee is prohibited by law. Contingent fees are generally ethically permissible in any legal matter that generates a *res* from which the fee can be paid, unless otherwise prohibited. One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. This Committee has previously opined, and continues to believe that ministerial matters that carry no such risk, such as recovering funds that could be obtained by the client without the services of the lawyer, are not matters in which a contingent fee arrangement is proper, nor do they create the type of *res* from which a contingency fee may be paid. It would, therefore be improper for a lawyer to receive a contingent fee to recover medical compensation payments which an insurance carrier is contractually obligated to pay to the client. LE Op. 1461

The Council of the Virginia State Bar has opined that, except in extremely rare situations, it is ethically improper for an attorney to enter into a contingent fee arrangement in family law and domestic relations cases. LE Op. 189. "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." EC:2-22. Thus it would be improper for an attorney to enter into a contingent fee agreement to represent a divorced spouse in a claim against her husband's military retirement pay.

LE Op. 568. It would similarly be improper to enter into a fee agreement where the attorney's fee would consist of a percentage of a lump sum property settlement. LE Op. 423.

This Committee has opined that only where the following four factors exist may a contingent fee agreement be employed in a domestic relations matter:

1. There has been the passage of a sufficient length of time so as to preclude the continued existence of any meaningful human relationship which might be undermined by litigation handled on a contingent fee basis;

2. The client is not able to pay reasonable attorney's fees charged on an hourly or fixed basis;

3. Any attorney's fees awarded by the court will be credited against the contingent fee; and

4. The contingent fee charged would be fair and reasonable under all the circumstances. LE Op. 189, LE Op. 405, LE Op. 423, LE Op. 588, LE Op. 667, LE Op. 850 and LE Op. 1062.

Contingency fee arrangements must state the method by which the fee is determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, expenses to be deducted from the recovery, and whether expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a closing statement showing the fee and the method of its determination.

Supreme Court Approved
November 2, 2016
Committee Opinion
November 22, 1994

Legal Ethics Committee Notes. – Rule 1.5(d)(1) and Comment [3a] codify the circumstances in which lawyers may handle family law matters on a contingent fee basis.

Rule 1.5(e) permits fee sharing between lawyers in different firms provided the client consents and the fee is reasonable. The referring attorney may charge a fee for referring a case to another lawyer without further participation in the client's matter.

Committee Opinion
November 21, 1989

LEGAL ETHICS OPINION 1305

CONFIDENTIALITY – FILES/PROPERTY OF A CLIENT: DISPOSITION OF CLIENTS' CLOSED FILES.

You have advised that you have slightly over 700 closed files in storage, a majority of which concern cases where you were the court-appointed defense counsel in criminal matters which took place between April 1, 1981 and May 15, 1989. You indicate your concern with costs of rental of storage space and of sending notices or complete files to former clients.

You have asked that the Committee consider first the length of time that clients' records need to be retained by an attorney who is no longer engaged in the private practice of law, and second, the propriety of disposal of files by shredding, incineration, or landfill burial.

The appropriate and controlling disciplinary rules relative to your inquiry are DR 2-108(D) which enumerates actions which must be taken upon the termination of a lawyer's representation of a client and DR 4-101(B) which mandates that a lawyer shall not knowingly reveal a confidence or secret of his client. Under the former, the lawyer must take reasonable steps for the continued protection of a client's interests, including, among other tasks, delivering all papers and property to which the client is entitled. The lawyer is permitted to retain papers relating to the client to the extent permitted by applicable law. With regard to the lawyer's trust account information, DR 9-103(A) instructs that such records (including reconciliations and supporting records) be preserved for at least five years following completion of the fiduciary obligation and accounting period. Further guidance as to a lawyer's responsibilities is available through EC 4-6 which instructs that a lawyer must continue to preserve a client's confidences and secrets even after the termination of his employment and also should provide, for example, for the personal papers of the client to be returned to him.

The Committee has previously opined that the mere passage of time does not affect the ongoing requirement of an attorney to preserve the confidentiality of his client. (See Legal Ethics Opinion No. 812) Furthermore, the Committee has also opined that it is not proper, post-death, for an attorney's files to be turned over to an institution since the wishes of the client are still a dominant consideration. (See Legal Ethics Opinion 928) Finally, it has been the view of the Committee that the attorney's responsibility to preserve such confidentiality survives the death of the client. (See Legal Ethics Opinion 1207)

In addressing the issue you have raised, the Committee assumes that no questions have been raised with respect to a lawyer's retaining lien which has arisen as a result of unpaid legal fees or with respect to ownership of the contents of the files you describe. Such questions, if applicable, would raise legal matters beyond the purview of this Committee.

It is the opinion of the Committee that a lawyer does not have a general duty to preserve indefinitely all closed or retired files. Since neither the Code of Professional Responsibility nor any specific Virginia Statute apparently sets forth specific rules addressing the retention of such files by private practitioners, the Committee, in applying DR 2-108(D) and DR 4-101, as

described above, suggests the following guidelines as indicated in ABA Informal Opinion No. 1384. (See also Maine Ethics Opinion 74 (10/1/86), Nebraska Ethics Opinion No. 88-3 (undated), New Mexico Ethics Opinion No. 1988-1 (undated), and New York City Bar Association Ethics Opinion No. 1986-4 (4/30/86)).

Although not required, the Committee suggests the following procedures as cautionary guidelines. Since they are merely cautionary, failure to follow these procedures would not result in any ethical impropriety. The lawyer should screen all closed files in order to ascertain whether they contain original documents or other property of the client, in which case the client should be notified of the existence of those materials and given the opportunity to claim them. Having culled those materials from the closed files, the lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the applicable statutory limitations period has not expired or which may not be readily available to the client through another source. Similarly, the lawyer should be cognizant of the need to preserve materials which relate to the nature and value of his legal services in the event of any action taken by the client against the lawyer. Having screened the files for the removal of any materials as indicated, the lawyer may at the appropriate time dispose of the remaining files in such a manner as to best protect the confidentiality of the contents.

In determining the appropriate length of time for retention or disposition of the remaining materials in a given file, a lawyer should exercise discretion based upon the nature and contents of the file. As instructed in DR 9-103(A), however, all trust account and fiduciary records should be maintained for a period of five years following completion of the fiduciary obligation and accounting period. Finally, the Committee is of the opinion that the lawyer should preserve for an extended period of time an index of all files which have been destroyed.

Committee Opinion
April 20, 1990

LEGAL ETHICS OPINION 1332

PARTNERSHIPS/EMPLOYMENT AGREEMENTS – ADVERTISING AND SOLICITATION – FEES – FILES – LIMITING PROFESSIONAL LIABILITY: CONDUCT REGARDING DISSOLUTION OF LAW FIRM.

You have advised that Partner A, with the concurrence and at the request of the other partners, withdrew from a professional legal corporation which had consisted of three partners and one associate prior to the withdrawal of Partner A. In addition, you advised that all written retainer agreements with clients are in the firm name, although, generally only one attorney performs services or is primarily responsible for a particular client and/or case. Finally, you have indicated that the partners orally agreed to notify, in writing, the withdrawing partner's clients of the dissolution and to offer each the choice of continuing with the firm, continuing with the withdrawing partner, or choosing another lawyer or law firm.

You have asked the Committee to consider ethical implications involving several issues related to the partnership dissolution.

Remaining Partners' Contact with Clients Serviced Primarily by Withdrawing Partner.

You have asked if, prior or subsequent to the dissolution of the partnership, it is ethically permissible for a remaining partner to (a) contact a client serviced primarily, if not exclusively, by the withdrawing partner; (b) attempt to influence the client to remain with the firm by informing the client, in writing, that the firm will continue to represent him; and (c) neglect to inform the client of his right to select counsel of his choice, which may include the departing attorney. You have also inquired as to the propriety of the remaining partner arranging a meeting with the client, possibly in order to attempt to influence the client to retain the firm for representation on a pending matter originated by the withdrawing partner, when the client contacts the firm to advise that his choice is to continue with the withdrawing partner. Finally, you have asked about the propriety of the remaining partner's arranging to meet with a client of the withdrawing partner when that client arrives at the former firm's offices to pick-up certain files as part of a document production in a pending matter.

The appropriate and controlling Disciplinary Rule relative to the above inquiry is DR:2-103(A) which provides that a lawyer shall not, by in-person communication, solicit employment for himself, his partner, or associate or any other lawyer affiliated with him or his firm from a nonlawyer who has not sought his advice regarding employment of a lawyer if (1) such communication contains a false, fraudulent, misleading or deceptive statement or claim; or, (2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct in light of the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the

communication is made. Thus, the Committee believes that if the client contact was made in-person or by telephone and the attorney attempted to influence or persuade the client to remain with the firm, such communication would be improper under the Code of Professional Responsibility's mandates regarding acceptable communication and solicitation of employment. The Committee is of the opinion that such contact is especially unacceptable if couched in terms of giving notice to a client of a change in the firm as in the case of a dissolution, or the departure of an attorney who is directly responsible for the representation of a client.

The Committee directs your attention to State Bar of California Opinion 1985-86 (undated), which provides appropriate guidelines for a firm's notice of dissolution to a client. The opinion states in part that nothing in the written notice should contain false, misleading or deceptive advertising. Also, where feasible, the attorneys should prepare a joint notice which (1) identifies the withdrawing attorneys; (2) identifies the field in which the withdrawing attorneys will be practicing law, gives their addresses and telephone numbers; (3) provides information as to whether the former firm will continue to handle similar legal matters, and; (4) explains who will be handling ongoing legal work during the transition. In addition, the opinion states that "a lawyer . . . may not attempt to influence the client's choice of counsel by communicating with clients in person, by telephone or through agents." (See also LE Op. 381, LE Op. 1113 for other examples of permissible communication or notice to clients.)

Remaining Partners' Contact with Opposing Counsel in Pending Matters.

You have inquired if it is ethically permissible for a remaining partner to contact opposing counsel in a pending matter to inform him that the remaining partner will be the attorney for firm's client after client has informed remaining partner that he wishes to be represented by the withdrawing partner. In addition, you have asked if one of the remaining partners may enter into settlement negotiations with an opposing party and also request that the client, who has sought representation by the withdrawing partner, assign a portion of the proceeds of that settlement to the (remaining) firm to satisfy an outstanding bill for legal services.

The appropriate and controlling Disciplinary Rules relative to this second issue are DR:1-102(A)(4), and DR:2-105(D) governing misconduct and sharing fees between lawyers respectively. The rules provide as follows:

DR:1-102(A)(4)

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

DR:2-105(D)

A division of fees between lawyers who are not in the same firm may be made only if the client consents to the employment of additional counsel; both attorneys expressly

assume responsibility to the client; and the terms of the division of the fee are disclosed to the client and the client consents thereto.

The Committee is of the opinion that unauthorized communications made to opposing counsel in a pending matter may be deceitful and a misrepresentation. Such deceit and misrepresentation may be determined by an appropriate finder of fact to reflect adversely on the lawyer's fitness to practice law. Assuming that the opposing party was not represented by counsel and, therefore DR:7-103(A) (which prohibits a lawyer's direct communication with a represented party) is not an issue, the Committee is of the opinion that unauthorized settlement negotiations and any assignment of settlement proceeds to the remaining firm may be violative of DR:1-102(A)(4). Furthermore, the committee believes an assignment of settlement proceeds to the former firm may be violative of DR:2-105(D) since, under the facts of the inquiry, there is no evidence that the client requested additional counsel, nor is there any indication that both attorneys agree to assume responsibility to the client or that the client had consented to an agreed upon division of fees between both lawyers. Thus, while the assertion of a lien against the proceeds by the former firm may be permissible, the Committee views any attempt to influence the client to execute an assignment of settlement proceeds as potentially improper. (See also LE Op. 794)

Requirement of Release of Liability for Previous Legal Representation.

You have requested that the Committee opine as to the propriety of the former firm's requirement that the client execute a release of liability to the firm for all previous legal representation and all representations made by the departing partner of the firm prior to the firm's release of that client's files to the withdrawing partner.

The Committee is of the view that such an agreement is *per se* unethical and violative of DR:6-102(A) which provides that a lawyer shall not limit his liability to his client for his personal malpractice. Ethical Consideration 6-6 [EC:6-6] provides further guidance in urging, first, that a lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice, and then goes on to state that a lawyer who has handled the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who has not should not be permitted to do so.

Requiring Payment of Legal Fees Prior to Releasing Client Files.

You have asked if the former firm may require payment of outstanding legal fees prior to releasing the client's files to the withdrawing partner in active pending matters in which court hearings have been scheduled.

Disciplinary Rule 2-108(D) [DR:2-108] is the appropriate and controlling rule regarding this inquiry. That rule provides that upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including giving reasonable notice to the client, allowing time for employment of other

counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers of the client to the extent permitted by applicable law. The Committee is of the opinion that prior LE Op. 1176 is dispositive of this issue. That opinion indicates that, even if applicable law permits the attorney to retain the client's papers, under certain circumstances, retention of papers relating to the client may be inconsistent with taking "reasonable steps for the continued protection of a client's interest," as required by DR:2-108(D). It is thus the opinion of the committee that, in certain circumstances where fees are owing, the attorney must make the file available to the client or his designee for review and possibly for copying, but may not be required to release the file if to do so would defeat the attorney's legal rights to preserve any statutory or common law lien. See also LE Op. 1176. Thus, conditioning the release of client files upon payment of past legal fees when the matter is pending a scheduled hearing would be detrimental to the client and, as such, violative of DR:2-108(D) if the client cannot meet the obligation financially.

Withholding of Departing Partner's Severance Pay for Remittance of Incurred Costs.

You have asked that the Committee consider the propriety of the former firm's withholding, from severance pay due the withdrawing partner, of advanced costs (such as court reporter fees) incurred by the firm on behalf of a client but not yet remitted to the third party by either the firm or the client.

In pertinent part, Disciplinary Rule 5-103(B) [DR:5-103] provides that in contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that he may guarantee the expenses of litigation provided that the client remains ultimately responsible for such expenses. Since a lawyer may not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for his client (DR:5-103(A)), a client must be ultimately liable for expenses such as court reporter fees. Whether the departing attorney advances such costs and later bills the client or whether the former firm chooses to advance the costs and later bill the client, is a business decision and any subsequent responsibility of the withdrawing partner for such fees is a legal matter. Neither situation poses any ethical question and therefore is not within the purview of this Committee.

Restricting Withdrawing Partner's Access to Office, Files, and Personal Possessions.

Finally, you have inquired if the former firm, on the day of the dissolution, may change the locks for the office and deny the withdrawing partner access to office and files. You have also inquired as to the propriety of a remaining partner's culling through the withdrawing partner's files and personal possessions during that time.

The Committee is of the view that if access to office and files of clients was being denied even during office hours, such conduct may be violative of DR:2-108(D) if a finder of fact were to determine that the intention was to preclude access to or to sequester the client files or copies of client files from the withdrawing partner. Whether

the remaining partner was within his rights to search through the departing attorney's personal possessions is a legal question beyond the purview of this Committee.

In conclusion, the Committee directs your attention to DR:1-103(A) regarding a lawyer's obligation to report another attorney's misconduct. The rule mandates that if the ethical violation raises a substantial question as to that lawyer's fitness to practice law in other respects, a lawyer having such information is mandated to report such information to the appropriate professional authority, unless such information is protected by Canon 4 (Preservation of Confidences and Secrets of a Client).

Committee Opinion
April 20, 1990

Legal Ethics Committee Notes. Rule 1.6(e) governs a lawyer's duty to provide files to a former client.

Committee Opinion
April 13, 2000

LEGAL ETHICS OPINION 1739

RULE 1.5(e): DIVISION OF FEE: DEGREE OF RESPONSIBILITY ATTORNEY MUST HAVE IN CLIENT MATTER TO ACCEPT REFERRAL FEE.

You have presented a hypothetical situation in which Law Firm A proposes to advise any referring attorney or firm that any new matters referred to Law Firm A will result in a division of any fees received by Law Firm A from the client referred to Law Firm A. The division of fees paid to the referring attorney or firm will be a percentage of the total fee received by Law Firm A, and Law Firm A will divide a percentage of fees received from the client with the referring attorney or firm on a monthly basis. As required by Rule 1.5(e), the client will be advised in writing in advance of the participation of all lawyers involved, client's consent to the participation of all lawyers involved will be sought after full disclosure to the client, and the fee will be reasonable. It will be disclosed to the client in writing and in advance that the referring attorney or firm will not be assuming any participation in or responsibility for the matter in which Law Firm A will be engaged.

Under the facts you have presented, you have asked the committee to opine as to whether it is ethically permissible under Rule 1.5(e) for Law Firm A to divide a fee received for representing a client referred to Law Firm A by a referring attorney or firm, when the referring attorney or firm assumes no responsibility to the client and will provide no services to the client.

The appropriate and controlling rule applicable to your inquiry is Rule 1.5(e) which states:

A division of a fee between lawyers who are not in the same firm may be made only if:

1. the client is advised of and consents to the participation of all the lawyers involved;

2. the terms of the division of the fee are disclosed to the client and the client consents thereto;

3. the total fee is reasonable; and

4. the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

Also pertinent to your inquiry is the Committee Commentary which follows Rule 1.5 of the Rules of Professional Conduct which states in pertinent part:

> Paragraph (e) eliminates the requirement in the Virginia Code [of Professional Responsibility] that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing

> participation. The requirement in the Virginia Code [of Professional Responsibility] was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

Applying former DR 2-105(D)[1] of the Code of Professional Responsibility, the committee has previously opined that it is improper for an attorney to share legal fees with or pay an attorney merely for referring a client, where the referring attorney has no further responsibility to the client after the referral is made. LE Op. 1488 (1992). See also LE Op. 1111, LE Op. 1160, LE Op. 1232, LE Op. 1380, LE Op. 1459 and LE Op. 1572. The committee believes that these opinions are overruled, in part, by Rule 1.5(e) to the extent that they require the referring attorney to assume responsibility to the client, after referring a client to another lawyer, as a condition to sharing fees with the other lawyer. The committee believes that the drafters of the Rules of Professional Conduct intended to permit a lawyer to receive a share of the legal fees generated by another attorney or law firm to whom a client was referred, provided that the client consents to such an arrangement and the fee is reasonable. Unlike former DR:2-105(D), Rule 1.5(e) does not require the referring attorney to assume responsibility to the client. The new rule, in the committee's view, encourages a lawyer to fulfill other ethical obligations to a client by referring the client to another attorney if he or she believes they lack the required competence or if there is a conflict.

The committee warns, however, that Law Firm A's marketing efforts, which include promises to compensate or reward any lawyer or law firm for a referral of clients to Law Firm A, could be viewed as an attempt[2] to engage in improper solicitation under Rule 7.3(d)[3] or "running and capping" in violation of Chapter 39, Article 7 of Title 54.1 of the Code of Virginia. The

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[1] Former DR2-105(D) of the Code of Professional Responsibility stated:
A division of fees between lawyers who are not in the same firm may be made only if:
(1) The client consents to the employment of additional counsel;
(2) *Both attorneys expressly assume responsibility to the client*; and
(3) The terms of the division of the fee are disclosed to the client and the client consents thereto.
(Emphasis added).

[2] Under the Virginia Rules of Professional Conduct, it is professional misconduct to *attempt* to violate the Rules. Rule 8.4(a).

[3] Rule 7.3(d) — A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1, as appropriate.

committee recommends that Law Firm A publicize its availability for referrals without reference to compensation for the referral being made.

In the facts you present, the committee concludes that it is not improper under Rule 1.5(e) for Law Firm A to divide a fee with a referring attorney as a result of representing a client referred to Law Firm A by a referring attorney or firm, when the referring attorney or firm assumes no responsibility to the client and will provide no further services to the client. When involving another attorney in the client's matter, the referring attorney should take reasonable steps to ensure that competent representation can be provided through the association of a lawyer of established competence in the field in question. Comment [2], Rule 1.1. Thus, a fee division under Rule 1.5(e) is not proper if the referring attorney simply makes a referral without assessing the client's legal matter and without determining whether a referral is appropriate or necessary.

LEGAL ETHICS OPINION 1890—COMMUNICATIONS WITH REPRESENTED PERSONS (COMPENDIUM OPINION)

In this compendium opinion, the Committee addresses numerous issues that have been raised in past legal ethics opinions regarding the application of Rule 4.2 of the Virginia Rules of Professional Conduct, formerly DR 7-103(A)(1) of the Virginia Code of Professional Responsibility. Although the rule on its face seems simple and straightforward, many issues arise in its application.

Rule 4.2 of the Virginia Rules of Professional Conduct states that:

> [i]n 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.

Prior to January 1, 2000, the "no contact rule" was embodied in DR 7-103(A)(1) of the former Virginia Code of Professional Responsibility which stated:

> During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The commentary to Rule 4.2 provides guidance for interpreting the scope and meaning of the Rule. *Zaug v. Virginia State Bar,* 285 Va. 457, 462, 737 S.E.2d 914 (2013). In various places throughout this opinion, the rule is described as the "no contact rule" or simply "the rule." Throughout this opinion "communicate directly" means to communicate *ex parte* with a represented person, that is, without the knowledge or consent of the lawyer representing that person. The term "represented person" means a person represented by counsel. LEO means "legal ethics opinion." The Committee addresses these points in the opinion:

1. The rule applies even if the represented person initiates or consents to an *ex parte* communication.

2. The rule applies only if the communication is about the subject of the representation.

3. The rule applies only if the lawyer actually knows that the person is represented by counsel.

4. The rule applies even if the communicating lawyer is self-represented.

5. Represented persons may communicate directly with each other regarding the subject of the representation, but the lawyer may not use the client to circumvent Rule 4.2.

6. A lawyer may not use an investigator or third party to communicate directly with a represented person.

7. Government lawyers involved in criminal and certain civil investigations may be "authorized by law" to have *ex parte* investigative contacts with represented persons.

8. *Ex parte* communications are permitted with employees of a represented organization unless the employee is in the "control group" or is the "alter ego" of the represented organization.

9. The rule does not apply to communications with former employees of a represented organization.

10. The fact that an organization has in house or general counsel does not prohibit another lawyer from communicating directly with constituents of the organization, and the fact that an organization has outside counsel in a particular matter does not prohibit another lawyer from communicating directly with in house counsel for the organization.

11. Plaintiff's counsel generally may communicate directly with an insurance company's employee/adjuster after the insurance company has assigned the case to defense counsel.

12. A lawyer may communicate directly with a represented person if that person is seeking a "second opinion" or replacement counsel.

13. The rule permits communications that are "authorized by law."

14. The rule allows certain *ex parte* communications with represented government officials concerning the subject of the representation in a controversy between the lawyer's client and the government.

15. A lawyer's inability to communicate with an uncooperative opposing counsel or reasonable belief that opposing counsel has withheld or failed to communicate settlement offers is not a basis for direct communication with a represented adversary.

The purpose of the no-contact rule is to protect a represented person from "the danger of being 'tricked' into giving his case away by opposing counsel's artfully crafted questions," *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983), and to help prevent opposing counsel from "driving a wedge between the opposing attorney and that attorney's client." *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990). The presence of a person's lawyer "theoretically neutralizes" any undue influence or encroachment by opposing counsel. *Univ. Patents, Inc. v. Kligman*, 737 F. Supp. 325, 327 (E.D. Pa. 1990).

Authorities recognize that the no-contact rule contributes to the proper functioning of the legal system by (1) preserving the integrity of the attorney-client relationship; (2) protecting the client from the uncounseled disclosure of privileged or other damaging information relating to the representation; (3) facilitating the settlement of disputes by channeling them through

dispassionate experts; (4) maintaining a lawyer's ability to monitor the case and effectively represent the client; and (5) providing parties with the rule that most would choose to follow anyway. *Simels*, 48 F.3d at 647; *Richards v. Holsum Bakery, Inc.*, 2009 BL 240348 (D. Ariz. Nov. 5, 2009); *Am. Plastic Equip., Inc. v. Toytrackerz, LLC*, 2009 BL 66761 (D. Kan. Mar. 31, 2009); *Lobato v. Ford*, 2007 BL 295553, No. 1:05-cv-01437-LTB-CBS (D. Colo. Nov. 9, 2007); ABA Formal Ethics Op. 95-396, at 4; Model Rules R. 4.2 cmt. 1. See also Comments 8 and 9 to Va. Rule 4.2 ("concerns regarding the need to protect uncounseled persons against the wiles of opposing counsel and preserving the attorney-client relationship").

Rule 4.2 is a "bright line" rule. As the Supreme Court of Virginia noted in *Zaug v. Virginia State Bar,* 285 Va. 457, 737 S.E.2d 914 (2013):

> We agree with the State Bar that attorneys must understand that they are ethically prohibited from communicating about the subject of representation with a person represented by another attorney unless they have that attorney's consent or are authorized by law to do so. The Rule categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications when they are initiated by others.

Zaug, supra, 285 Va. at 465. For the Rule to apply, three elements must be established:

> (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. While the first two facts may occur in any order, both must occur before an attorney violates the Rule.

Zaug, supra, 285 at 463.

1. *The Rule Applies Even if the Represented Person Initiates or Consents to an Ex Parte Communication.*

Comment 3 to Rule 4.2 states:

> The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

As the Supreme Court of Virginia explained in *Zaug*, "immediately" does not mean "instantaneously." If a represented person contacts opposing counsel by telephone, for example, counsel must have an opportunity to ascertain the identity of the caller and to disengage politely from the communication, advise the represented person that the lawyer cannot speak with him directly about his case and should advise the represented person that he should speak with his lawyer.

2. *The Rule Applies Only if the Communication is About the Subject of the Representation.*

To trigger Rule 4.2 the communication must be about the subject of the representation—i.e., the lawyer's representation of his or her client. *Zaug, supra*, 285 Va. at 463; ABA Formal Op. 95-396 at 12.

Comment 4 to Rule 4.2 explains:

> This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.

For example, the Standing Committee on Legal Ethics opined in Legal Ethics Opinion 1527 (1993) that a lawyer/shareholder cannot communicate with officers or directors of a represented corporation regarding sale of lawyer's stock in the corporation if the stock sale is the subject of the lawsuit lawyer filed pro se against the corporation.

The Rule applies to *ex parte* communications with represented persons even if the subject matter of the representation is transactional or not the subject of litigation. LEO 1390 (1989). Comment 8 to Rule 4.2 states:

> This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.

3. *The Rule Applies Only if the Lawyer Actually Knows that the Person is Represented by Counsel.*

As the Supreme Court of Virginia explained in *Zaug v. Virginia State Bar*, a lawyer must *know* that she is speaking with a represented person. As used in Rule 4.2, the term "knows" denotes actual knowledge of the fact in question. Part 6, §II ("Terminology"). However, "[a] person's knowledge may be inferred from circumstances." For example, if a case concludes with a final order, may a lawyer thereafter communicate directly with a person previously represented by counsel during trial, during the time within which an appeal could be taken? In LEO 1389, the Committee concluded that a lawyer cannot presume that a final decree of divorce terminated the opposing party's relationship with his attorney since matters involving support, custody and visitation are often revisited by the courts:

> The Committee believes it would not be improper for an attorney to make direct contact with a previously represented party, following a final Order in that prior litigation, (1) where the attorney knows that the representation has ended through

> discharge by the client or withdrawal by the attorney, or (2) where, as permitted by DR:7 -103(A)(1), the attorney is authorized by law to do so. It is the Committee's opinion that, absent such knowledge or leave of court, it would be improper for an attorney to communicate on the subject of the prior litigation with the previously represented party, irrespective of the substance of the litigation.

The Committee also stated that if the lawyer is without knowledge or uncertain as to whether the adverse party is represented, it would not be improper to communicate directly with that person for the sole purpose of securing information as to their current representation.

The Committee has opined that it is improper for an attorney to send a letter to the opposing party concerning judgment matters during the appeal period following entry of a general district court judgment when the opposing party had been represented by counsel at trial, even though no appeal had yet been filed nor had the opposing party's attorney indicated that any appeal would be filed. Legal Ethics Opinion 963 (1987).

4. *The Rule Applies Even if the Communicating Lawyer is Self-represented.*

Rule 4.2 prohibits a self-represented lawyer from directly contacting a represented person. *See* LEO 1527 (1993) ("Additionally, the committee is of the opinion that neither the fact that the attorney/shareholder is representing himself nor the claim that the corporation's directors are not receiving accurate information about the nature of the attorney/shareholder's claim would constitute an exception to DR:7-103(A)(1)."). Further, the Supreme Court of Virginia has held that a lawyer cannot avoid the duties and obligations under the Rules of Professional Conduct on the basis that the lawyer is representing himself rather than another. In *Barrett v. Virginia State Bar*, 272 Va. 260, 634 S.E.2d 341 (2006) the Court ruled:

> Rules of statutory construction provide that language should not be given a literal interpretation if doing so would result in a manifest absurdity. *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005). Applying these Rules in the manner Barrett suggests would result in such an absurdity. The Rules of Professional Conduct are designed to insure the integrity and fairness of the legal process. It would be a manifest absurdity and a distortion of these Rules if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing himself. [Citations omitted.]
>
> Furthermore, an attorney who represents himself in a proceeding acts as both lawyer and client. He takes some actions as an attorney, such as filing pleadings, making motions, and examining witnesses, and undertakes others as a client, such as providing testimonial or documentary evidence. *See In re Glass*, 309 Or. 218, 784 P.2d 1094, 1097 (1990) (lawyer appearing in proceeding pro se is own client); *In re Morton Allan Segall*, 117 Ill.2d 1, 109 Ill.Dec. 149, 509 N.E.2d 988, 990 (1987) ("attorney who is himself a party to the litigation represents himself when he contacts an opposing party"); *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075, 1079 (1990) (restriction on attorneys contacting

represented parties limited to instances where attorney is representing client, not where attorney represents himself).

> The three Rules at issue here address acts Barrett took while functioning as an attorney and thus the three-judge panel correctly held that such acts are subject to disciplinary action.

Barrett, supra, 272 Va. at 345. *But see Barrett v. Virginia State Bar,* 269 Va. 583, 611 S.E.2d 375 (2005) (holding that Rule 4.3 (b)'s prohibition against giving legal advice does not apply to pro se lawyer in divorce proceedings against his unrepresented wife).

5. Represented Persons May Communicate Directly With Each Other Regarding the Subject of the Representation, but the Lawyer May Not Use the Client to Circumvent Rule 4.2.

Although their lawyer may advise against it, a represented party may communicate directly with a represented adversary. *See* Comment 4 to Rule 4.2. However, a lawyer may not use a client or a third party to circumvent Rule 4.2 by telling the client or third party what to say or "scripting" the communication with the represented adversary. Rule 8.4(a) (a lawyer may not violate a rule of conduct through the actions of another). *See also* Legal Ethics Opinion 1802 (2010) (It would be unethical for a lawyer in a civil matter to advise a client to use lawful undisclosed recording to communicate with a person the lawyer knows is represented by counsel.); Legal Ethics Opinion 1755 (2001) ("Thus, while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party."); Legal Ethics Opinion 233 (1974) (It is improper for an attorney to indirectly communicate with a party adverse to his client giving specific instructions to his client as to what communications to make, unless counsel for the adverse party agrees to such communication.).

6. A Lawyer May Not Use an Investigator or Another Third Party to Communicate Directly with a Represented Person.

In some situations, it may be necessary to determine if a nonlawyer or investigator's contact with a represented person can be imputed to a lawyer supervising or responsible for an investigation. There are two ethical considerations. First, a lawyer cannot violate or attempt to violate a rule of conduct through the agency of another. Rule 8.4 (a). Second, a lawyer having direct supervisory authority over a non-lawyer agent may be responsible for conduct committed by that agent, if the rules of conduct would have been violated had the lawyer engaged in the conduct; and, the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or, the lawyer knows or should have known of the conduct at a time when its consequences could be avoided or mitigated but fails to take remedial action. Rule 5.3.

In Legal Ethics Opinion 1755 (2001), the Committee noted that Rule 8.4(a) prohibits an attorney from violating Rule 4.2 through the acts of others. Consistent with this precept, ABA Formal Legal Ethics Op. 95-396 (1995), in its analysis of an attorney's use of investigators, states as follows:

> Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do.

> [Footnote omitted.] Whether in a civil or a criminal matter, if the investigator acts as the lawyer's "alter-ego," the lawyer is ethically responsible for the investigator's conduct.

See also United States v. Smallwood, 365 F.Supp.2d 689, 696 (E.D. Va. 2005) ("[W]hat a lawyer may not ethically do, his investigators and other assistants may not ethically do in the lawyer's stead.")

7. Government Lawyers Involved in Criminal and Certain Civil Investigations May Be "Authorized By Law" to Have Ex Parte Investigative Contacts With Represented Persons.

Generally, prosecutors, government agents, and informants may communicate with represented criminal suspects in a non-custodial setting up until indictment, information or when the represented person's Sixth Amendment right to counsel would attach. See *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996) (agreeing with other federal circuits, except Second Circuit, that pre-indictment non-custodial interrogations are covered by "authorized by law" exception). The courts have long recognized the legitimacy of undercover operations, even when they involve the investigation of individuals who keep an attorney on retainer. *United States v. Lemonakis,* 158 U.S.App.D.C. 162, 485 F.2d 941 (1973), *cert. denied,* 415 U.S. 989 (1974); *United States v. Sutton,* 255 U.S.App.D.C. 307, 801 F.2d 1346 (1986); *United States v. Vasquez*, 675 F.2d 16 (2d Cir, 1982); *United States v. Jamil,* 707 F.2d 638 (2d Cir. 1984). Comment 5 to Rule 4.2 states:

> In circumstances where applicable judicial precedent has approved investigative contacts prior to attachment of the right to counsel, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

Since government lawyers often rely on investigators to contact persons in the course of an investigation, this excerpt from Comment 1 to Rule 5.3 is also relevant to the discussion:

> The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one's role in a law enforcement investigation or a housing discrimination "test".

8. Ex Parte Communications With Employees or Constituents of a Represented Organization are Permitted Unless the Employee is in the "Control Group" or is the "Alter Ego" of the Represented Organization.

If a corporation or other organization is represented by counsel with respect to a matter or controversy, Rule 4.2 prohibits *ex parte* communications with employees of the represented corporation or organization if the employee is in the entity's "control group" or is the "alter ego" of the entity. Comment 7 to Rule 4.2 states:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

The Committee acknowledged in Legal Ethics Opinion 1670 that its interpretation of Rule 4.2 narrows the scope of employees protected under the "no contact rule":

> The committee is mindful that some circuit courts and federal courts in Virginia have interpreted DR7-103(A)(1) differently. Some courts have applied a Model Rules approach and prohibited *ex parte* contacts not only where the control group or alter ego theory applies, but also where the activities or statements of an employee are part of the focus of litigation or would make the employer vicariously liable as a result of the employee's statements or activity. *Queensberry v. Norfolk & Western Ry.*, 157 F.R.D. 21 (E.D. Va. 1993); *Nila Sue DuPont v. Winchester Medical Center, Inc.* — Winchester Circuit Court Law No. 92-171. The committee also recognizes that a different opinion might result if the facts of this hypothetical were analyzed under Rule 4.2 of the Model Rules which adopts a broader prohibition of *ex parte* contacts than DR7-103(A)(1). Nevertheless, the committee must apply the rules of conduct which Virginia has adopted to this hypothetical and leave specific legal rulings involving other rules of ethical conduct to the presiding trial judges of Virginia based upon the facts presented before them.

See also Pruett v. Virginia Health Servs., Inc., No. CL03-40, 2005 Va. Cir. LEXIS 151, at *12-13 (Va. Cir. Ct. Aug. 31, 2005) (permitting plaintiff's lawyer to initiate *ex parte* communications with a defendant nursing home's current employees, except for current "control group" employees and current non "control group" employees who provide resident care; permitting *ex parte* contacts even with those nursing home employees, as long as the communications "do not relate to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent"; also permitting *ex parte* contacts with former nursing home "control group" and non "control group" employees); LEO 1821 (2006) ("With an entity client, like this company, a lawyer should treat anyone within the entity's 'control group' as within the protection afforded by Rule 4.2.").

9. The Rule Does Not Apply to Communications With Former Employees of a Represented Organization.

Comment 7 to Rule 4.2 states: "[t]he prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's 'control group.'"

In LEO 1670, the Committee stated:

> [O]nce an employee who is also a member of the control group separates from the corporate employer by voluntary or involuntary termination, the restrictions upon direct contact cease to exist because the former employee no longer speaks for the corporation or binds it by his or her acts or admissions. In fact, this committee has previously held that it is ethically permissible for an attorney to communicate directly with the former officers, directors and employees of an adverse party unless the attorney is aware that the former employee is represented by counsel. (See LE Op. 533, LE Op. 905 and LE Op. 1589). Counsel for the corporation represents the corporate entity and not individual corporate employees. (See EC5-18). In the instance where it is necessary to contact unrepresented persons, a lawyer should not undertake to give advice to the person, except to advise them to obtain a lawyer. (See EC:7-15). See also LEOs 347. Counsel for represented employer cannot claim to represent a former employee if the former employee has not freely chosen counsel for employer. LEO 1589 (1994).

The *Restatement* is just as clear, and even provides an explanation:

> Contact with a former employee or agent ordinarily is permitted, even if the person had formerly been within a category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary's search for relevant facts without facilitating the employer's relationship with its counsel.

Restatement (Third) of the Law Governing Lawyers § 100 cmt. g (2000).

Although a lawyer may communicate with a former employee, the lawyer may not ask the former employee about any confidential communications the employee had with the organization's counsel while the employee was employed by the organization. Seeking information about confidential communications would impair the organization's confidential relationship with its lawyer and therefore violate Rule 4.4. LEO 1749. *See also Pruett v. Virginia Health Servs., Inc.,* No. CL03-40, 2005 Va. Cir. LEXIS 151 (Va. Cir. Ct. Aug. 31, 2005) (declining to prohibit a plaintiff's lawyer from *ex parte* contacts with any former employees of the defendant nursing home); *Bryant v. Yorktowne Cabinetry Inc.*, 538 F.Supp.2d 948 (W. D. Va. 2008) (holding that Rule 4.2 generally does not prohibit an *ex parte* interview of a represented company's former employee who is not represented by counsel, unless the interviewing lawyer inquires into matters that involve privileged communications by and between the former employee and the company's counsel related to the subject of the representation).

10. The Fact that an Organization has In House or General Counsel Does not Prohibit Another Lawyer from Communicating Directly With Constituents of the Organization and the Fact that

an Organization has Outside Counsel in a Particular Matter Does not Prohibit Another Lawyer from Communicating Directly with In House Counsel for the Organization.

The fact that an organization has a general counsel does not itself prevent another lawyer from communicating directly with the organization's constituents. *SEC v. Lines*, 669 F.Supp. 2d 460 (S.D.N.Y 2009) (neither organization nor president deemed represented by counsel in a particular matter simply because corporation has general counsel); *Humco, Inc. v. Noble*, 31 S.W.3d 916 (2000) (knowledge that corporation has in house counsel is not actual notice that corporation is represented); Wis. Ethics Op. E-07-01 (2007) (fact that organization has in-house counsel does not make it "represented" in connection with any particular matter).

A lawyer is generally permitted to communicate with a corporate adversary's in house counsel about a case in which the corporation has hired outside counsel. The purpose of Rule 4.2 is to "protect uncounseled persons against being taken advantage of by opposing counsel" and to preserve the client-lawyer relationship; neither of those dangers is implicated when a lawyer communicates with an organization's in-house counsel. It is unlikely that an in-house lawyer would inadvertently reveal confidential information or be tricked or manipulated into making harmful disclosures or taking harmful action on behalf of the organization, and therefore the lawyer does not need to be protected or shielded from communication with an opposing lawyer. ABA Formal Op. 06-443 (2006); D.C. Ethics Op. 331 (2005).

11. Plaintiff's Counsel Generally May Communicate Directly with an Insurance Company's Employee/Adjuster After the Insurance Company Has Assigned the Defense of the Insured to Outside or Staff Counsel.

The question has arisen as to whether Rule 4.2 prohibits a personal injury lawyer from communicating or settling a claim with the insurance company's employee/adjuster once the insurance company has retained counsel to defend the insured. If the insurance adjuster or claims person has authority to offer and accept settlement proposals, that employee would fall within the scope of Comment 5's definition of an "employee of the organization who, because of their status or position, have the authority to bind the corporation." Does this mean that the adjuster may be contacted only with the consent of the lawyer hired by the insurance company to defend the insured?

The answer to this question turns upon factual and legal questions that are beyond the purview of the Committee. Virginia is not a direct action state and the insurance company generally is not a named party to a lawsuit against the insured based upon a liability claim.[1] The plaintiff's claim is against the insured, not the insurance company. Whether the defense lawyer

[1] Unauthorized Practice of Law Opinion 60, approved by the Supreme Court of Virginia in 1985, explains:
> Courts have recognized that a suit against an insurance carrier's insured may in some instances be tantamount to a suit directly against the carrier. In many suits against insured defendants, the carrier's obligation to fully satisfy any judgment is fixed by contract and is unquestioned by the insurer. Such cases, while brought against the insured, are sometimes said to be *de facto* suits against the insurance carrier. Some states permit the insurer to be sued directly by the injured party, and the carrier has been regarded as the "real party in interest." In federal courts interpreting the laws of those states. *Lumbermen's Casualty Company v. Elbert*, 348 U.S. 48, 51 (1954) (diversity of citizenship existed between Louisiana plaintiff and Illinois insurer, even though insured was also a Louisiana resident, since insurance carrier was "real party in interest.").

hired by the insurance company to defend the insured also represents the insurance company is a legal not an ethics issue. In other words, whether or not an attorney-client relationship exists between defense counsel and the insurer is a legal issue beyond the Committee's purview.

The Committee faced this inquiry in Legal Ethics Opinion 1863 (2012). In the hypothetical, a defendant/insured in a personal injury case is represented by a lawyer provided by his liability insurer. The plaintiff is also represented by a lawyer. The defendant/insured's lawyer has not indicated to the plaintiff's lawyer whether he represents the insurer or only the insured. The plaintiff's lawyer asks whether he may communicate directly with the insurance adjuster, an employee of the insurer, without consent from the defendant/insured's lawyer. The Committee's research indicates that the Supreme Court of Virginia has not had the occasion to address directly the question of whether the insurer is also a client of the defendant/insured's lawyer when that lawyer is provided to the defendant/insured pursuant to his contract of insurance with the insurer.[2] In Unauthorized Practice of Law Opinion 60 (1985) the Court approved this language, suggesting that the only "client" in these circumstances is the insured:

> This opinion is restricted to the unauthorized practice of law implications of the question presented and does not attempt to analyze any ethical considerations which might be raised by the inquiry. Staff counsel, in undertaking the representation of the insureds of his or her employer within the guidelines established herein, is clearly bound by the same ethical obligations and constraints imposed on attorneys in private practice. *This includes zealously guarding against any potential erosion, actual or perceived, of the duties of undivided loyalty to the client (the insured)*, independence and confidentiality, to mention on the most obvious areas of potential concern in their relationship.
>
> Finally insurance carriers, in selecting cases for handling by staff counsel which involve potential excess exposure to the insured, should be aware that the *employer-employee relationship between the insurer and the insured's counsel* carries with it certain risks. The opinions of staff counsel in regard to legal liability, potential verdict ranges, and settlement value and his or her decisions concerning trial preparations and trial strategy will be subjected to unusually close scrutiny and subsequent litigation following any excess verdict.

As stated above, the creation of an attorney-client relationship is a question of law and fact. Nevertheless, in prior opinions the Committee has addressed the question in order to resolve

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[2] The Committee reviewed a number of decisions in which the question is addressed obliquely in dicta, i.e., the finding of an attorney-client relationship between defense counsel and insurer was not relevant or necessary to the holdings in those cases. *Norman v. Insurance Co. of North America*, 218 Va. 718, 727, 239 S.E.2d 902, 907 (1978) ("**And an insurer's attorney, employed to represent an insured**, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.") (emphasis added). A similar suggestion appears in *State Farm Mutual Automobile Insurance Co. v. Floyd*, 235 Va. 136, 366 S.E.2d 93 (1988) ("**During their representation of both insurer and insured**, attorneys have the duty to convey settlement offers to the insured "that may significantly affect settlement or resolution of the matter." Code of Professional Responsibility, Disciplinary Rule 6-101(D) [DR:6-101]; Ethical Consideration 7-7 [EC:7-7] (1986)") (emphasis added). *But see General Security Insurance Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 957 (E.D. Va. 2005) ("the Supreme Court of Virginia has never suggested that an insurer, as well as the insured, may be a client of the law firm the insurer retains to defend an insured."). Again, none of the holdings in those opinions turned on whether the attorney and the insurer had an attorney-client relationship.

the ethics inquiry put to it. Legal Ethics Opinion 598 (approved by Supreme Court of Virginia, 1985) ("the client of an insurance carrier's employee attorney is the insured, not the insurance carrier"); *see also* Legal Ethics Opinion 1536 (1993) (stating that insurer is not a client of insurance defense counsel, and that counsel may therefore sue a party insured by the same insurer in later action without a conflict of interest).

In Legal Ethics Opinion 1863, the Committee stated:

> Although the question of whether an attorney-client relationship exists in a specific case is a question of law and fact, the Committee believes that, based on these authorities, it is not accurate to say that the defendant/insured's lawyer should be presumed to represent the insurer as well. On the other hand, in the absence of a particular conflict, it would be permissible for a single lawyer to represent both the insured and the insurer. If the lawyer is jointly representing both the insured and the insurer, then Rule 4.2 would apply to require the lawyer's consent to any communications between the plaintiff's lawyer and the insurer. Conversely, if the lawyer is not representing the insurer, then Rule 4.2 does not apply and the plaintiff's lawyer is free to communicate with the insurer without the defendant/insured's lawyer's consent/involvement.

Rule 4.2 requires that the plaintiff's counsel *actually know* that defense counsel represents both the insured and insurer. Thus, the Committee concluded in LEO 1863, "unless the plaintiff's lawyer is aware that the defendant/insured's lawyer also represents the insurer, the plaintiff's lawyer may communicate with the insurance adjuster or other employees of the insurer without consent from the defendant/insured's lawyer."

12. A Lawyer May Communicate Directly With a Represented Person if that Person is Seeking a "Second Opinion" or Replacement Counsel.

Comment 4 to Rule 4.2 allows a lawyer to communicate with a person seeking a second opinion or replacement counsel concerning the subject of the representation even if a lawyer currently represents that person:

> A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

In Legal Ethics Opinion 369 (1980) the committee stated that it is not improper for an attorney to give advice of a general nature or express an opinion on a matter to an individual already represented by an attorney on that same matter. The legal right of such individual to select or discharge counsel makes such general advice "authorized by law." However, it is improper for an attorney to accept employment on that same matter unless the other counsel approves, withdraws, or is discharged.

13. The Rule Permits Communications that are "Authorized by Law."

Unfortunately, in most jurisdictions, including Virginia, the precise reach and limits of the "authorized by law" language in Rule 4.2 is not clear. As a starting point, ABA Formal Ethics Op. 95-396 (1995) explains that the "authorized by law" exception in Model Rule 4.2 is

satisfied by "constitutional provision, statute or court rule, having the force and effect of law, that expressly allows particular communication to occur in the absence of counsel." ABA Formal Op. 95-396, at 20. Statutes, administrative regulations, and court rules grounded in procedural due process requirements are also a common place to find *ex parte* communications that are "authorized by law."

As Comment g to Section 99 of the Restatement (3d) of the Law Governing Lawyers explains:

> Direct communication may occur pursuant to a court order or under the supervision of a court. Thus, a lawyer is authorized by law to interrogate as a witness an opposing represented non-client during the course of a duly noticed deposition or at a trial or other hearing. It may also be appropriate for a tribunal to order transmittal of documents, such as settlement offers, directly to a represented client.
>
> Contractual notice provisions may explicitly provide for notice to be sent to a designated individual. A lawyer's dispatch of such notice directly to the designated non-client, even if represented in the matter, is authorized to comply with legal requirements of the contract.

See also Legal Ethics Opinion 1375 (1990) (opining that the provision of legal notices does not constitute the communication prohibited by DR:7-103.)

Therefore, a lawyer may arrange for service of a subpoena, or other process, directly on an opposing party represented by counsel because controlling law or court rule requires that process must be served directly. See, e.g., Va. Code § 8.01-314 ("... in any proceeding in which a final decree or order has been entered, service on an attorney shall not be sufficient to constitute personal jurisdiction over a party in any proceeding citing that party for contempt ... unless personal service is also made on the party.").

See also LEO 1861 (2012) (Rule 4.2 does not bar a Chapter 13 trustee from communicating with a represented debtor to the extent that the communications are authorized or mandated by the statute requiring trustee to assist debtor in performance under the plan).

14. The Rule Allows Certain Ex Parte Communications with Government Officials Concerning the Subject of the Representation in a Controversy Between the Lawyer's Client and the Government.

In general, a government entity and its relevant constituents are protected by Rule 4.2 in the same way any private client is. However, that protection must in some respects yield to the First Amendment right to petition the government, as well as statutory rights such as the Freedom of Information Act which grant members of the public certain rights to access information, participate in public meetings, and communicate with government representatives. Communications that are authorized by such statutes are "authorized by law" for purposes of Rule 4.2, and a lawyer may communicate with otherwise represented government entities or persons when authorized by such a law. Further, as the Committee explained in LEO 1891, a lawyer may communicate with a represented government official when the communication is

made for the purpose of addressing a policy issue, and when the government official has the authority to take or recommend action on that policy issue. The lawyer may, but is not required to, give advanced notice of such a communication to the government lawyer.

15. A Lawyer's Inability to Communicate with Opposing Counsel or Reasonable Belief that Opposing Counsel has Withheld or Failed to Communicate Settlement Offers is not a Basis for Direct Communication With a Represented Adversary.

Sometimes lawyers ask if there are reasonable excuses or justification for bypassing a lawyer and communicating directly with a represented adversary. Generally, the answer is "no." For example, a lawyer's inability to contact opposing counsel and a client's emergency is not a basis for *ex parte* contacts with a represented adversary. LEO 1525 (1993).

In LEO 1323 (1990), the Committee indicated that a prosecutor's belief that defense counsel may not have communicated the plea agreement offer to the defendant does not constitute sufficient reason for an exception. In that opinion, the Committee concluded that the prosecutor violated the no contact rule by copying the defendant in a letter sent to defense counsel reiterating a plea offer and deadline for acceptance. See also Pennsylvania Ethics Op. 88-152 (1988) (concluding that a lawyer may not forward settlement offers to an opposing party even if the opposing counsel failed to notify the client about the offer); Ohio Ethics Op. 92-7, at *1 (1992) (finding it inappropriate for a lawyer to send copies of settlement offers directly to a government agency even if the original is served on the government's attorney).

In LEO 1752 (2001), the Committee said that even if plaintiff's counsel believes insurance defense counsel has failed to advise, or wrongfully withheld information regarding the underinsured client's right to hire personal counsel, plaintiff's counsel may not communicate that advice directly to defense counsel's client.

Committee Opinion
March 20, 2001
Committee Revised Opinion
April 4, 2006
Committee Revised Opinion
December 18, 2008
Supreme Court Approved
April 20, 2018

LEGAL ETHICS OPINION 1750. LAWYER ADVERTISING AND SOLICITATION.

The Standing Committee on Lawyer Advertising and Solicitation reviewed all of its previous opinions, and issued a compendium opinion March 20, 2001, summarizing many of the existing advertising opinions and incorporating previously issued legal ethics opinions on the subject of lawyer advertising. The Committee updated this opinion in 2005 and 2008 to reflect rule amendments and lawyer advertising amendments that had been adopted since 2001. The Standing Committee on Legal Ethics is now further updating the opinion to incorporate the significant rule changes effective July 1, 2017.

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 of specific or cumulative case results; participation in a lawyer referral service; communications involving listing of inclusion in publications such as *The Best Lawyers in America*; and the use of the terms "Specialist" or "Specializing In." The prohibition in Rule 7.1 concerning advertising which is false or misleading applies to all public communications and includes communications over the internet.

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.

Opinion

The appropriate and controlling rules of professional conduct relevant to the questions raised are Rules 7.1 and 7.3(d):

RULE 7.1 Communications Concerning A Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Committee Opinion
March 20, 2001
Committee Revised Opinion
April 4, 2006
Committee Revised Opinion
December 18, 2008
Supreme Court Approved
April 20, 2018

RULE 7.3 Solicitation of Clients.

* * *

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

* * *

(2) pay the usual charges of a legal service plan or not-for-profit qualified lawyer referral service.

A. Use of Actors in Lawyer Advertising.

The Committee considered the issue of whether a television advertisement is misleading when an attorney or law firm uses an actor to portray an attorney associated with the law firm without disclosing that fact in the advertisement.

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. For example, some advertisements feature actors who use first person references to themselves as lawyers or as members of the law firm being advertised. When the advertisement implies that an actor is actually a lawyer or client of the law firm, a disclosure that the actor is not associated with the firm, or that the depiction is a dramatization, is necessary to prevent the advertisement from being misleading.[1] *See also* LAO-0101.

B. Use of "No Recovery, No Fee."

The Committee considered whether the language "no recovery, no fee" or language of

[1]There may also be legal requirements to disclose compensation given in exchange for endorsements or testimonials in advertising. These requirements are beyond the purview of the Committee. *See*, e.g., Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

similar import contained in advertising or other public communication soliciting claims for cases in which contingent fees are permissible was false or misleading pursuant to Rule 7.1, 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 when there is no 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 disclosed"). 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 false and misleading in violation of Rule 7.1 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). *See also* LAO-0102.

C. Firm Names and Offices.

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. Comments 5 and 6 to Rule 7.1 allow a firm to use a trade or fictitious name as long as it is not misleading. For example, a firm may use the name or names of lawyers associated with the firm or a predecessor of the firm, or the name of a member of the firm who is deceased or retired from the practice of law. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. The firm name also may only state or imply a partnership between lawyers when that is the fact. A firm may not call itself "Smith and Jones" unless Smith and Jones are actually associated as partners in the firm.

It is also misleading under Rule 7.1 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 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 comply with applicable laws, including Sections 13.1-542 *et seq.* or Sections 59.1-69 *et seq.* of the Code of Virginia.

It is also potentially misleading under Rule 7.1 for a lawyer to advertise the use of a non-exclusive office space, including an executive office rental, if that is not actually an office where the lawyer provides legal services. *See* LEO 1872, which cautions that:

> [A] lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case.

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. *See also* LAO-0104.

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 or misleading. *See* Rule 7.1. Lawyers may pay the "usual charges" of a legal service plan or not-for-profit lawyer referral service. *See* Rule 7.3(d) and LEO 1751. The Committee is concerned that some advertising concerning lawyer referral services and joint marketing arrangements are misleading. As noted in LEO 910, statements which violate the Rules of Professional Conduct and which are used in advertisements by lawyer referral services would create automatic rules violations by the participating attorneys. The following practices of lawyer referral services are misleading:

1. 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;
2. 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;
3. 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;
4. 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; or
5. Advertising participation in a Lawyer Referral Service which is not a true, qualifying

Lawyer Referral Service as defined in this opinion, based on the American Bar Association Model Supreme Court Rules Governing Lawyer Referral Services.[2]

In order to qualify as a lawyer referral service for purposes of these rules, the service must: be operated in the public interest for the purpose of providing information to assist the clients; be open to all licensed lawyers in the geographical area served who meet the requirements of the service; require members to maintain malpractice insurance or provide proof of financial responsibility; maintain procedures for the admission, suspension, or removal of a lawyer from any panel; and not make any fee-generating referral to any lawyer who has an ownership interest in the service, or to that lawyer's law firm. *See also* LAO-0105 and LEOs 910, 1014, and 1175.

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 can be 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 can be 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 may 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

[2]Available at www.americanbar.org/groups/lawyer_referral/policy.html

could accurately cite in advertising a verdict of one million dollars, yet the public would be misled 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 misleading 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 may mislead the consumer "if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." Rule 7.1, Comment 2.

The 2017 amendments to Rule 7.1 shifted the focus from a mandatory disclaimer with a number of technical requirements for language and placement to an assessment of whether a particular statement is misleading, and if so, whether there is a disclaimer or additional information that would put the statement in the proper context and avoid any misleading implications. Rule 7.1 no longer requires a specific disclaimer to precede any statement of case results, although Comment 2 does clarify that the inclusion of "an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public."

For example, the above statement of a "one million dollar verdict" obtained after a two million dollar settlement offer was refused would need to include the full context in order not to be misleading. Nor would the boilerplate disclaimer language previously required by Rule 7.1 be sufficient to avoid the misleading implication – the communication would have to state the fact that a two million dollar settlement offer was made prior to the trial in which the one million dollar verdict was obtained. Another example of a misleading statement of case results would be a statement that a lawyer obtained an $8 million jury verdict in a medical malpractice case, when the court reduced the award to the statutory cap of $2.25 million. A lawyer advertising such a result must include the fact that the award was reduced by the court.

On the other hand, a lawyer who advertises that she has obtained pre-trial dismissal of criminal charges after prevailing on a motion to suppress evidence, when that is a complete and true statement of what happened in the case, may do so without including any disclaimer or limiting language. Similarly, a lawyer may truthfully advertise that he obtained a $5 million settlement following a three-day mediation.

The Committee has repeatedly opined that the use of claims such as "the best lawyers," "the biggest earnings," and "the most experienced" are self-laudatory and amount to comparative statements that cannot be factually substantiated, in violation of Rule 7.1. *See also* Comment 2 to Rule 7.1. This Committee continues to adhere to the belief expressed in Comment 2 that statements that use extravagant or self-laudatory words that cannot be factually substantiated are designed to and in fact mislead laypersons to whom they are directed and, as such, undermine public confidence in our legal system. *See also* LEOs 1229 and 1443.

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 prohibits statements comparing attorneys' services, unless the comparison can be factually substantiated. *See* Comment 2 to Rule 7.1. The Committee has previously opined that a lawyer's advertising of specific case results may be misleading, if the communication does not include an appropriate disclaimer or other context for the case results. 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. 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 of Philadelphia Ethics Opinion 91-17; while prohibiting testimonials regarding results and/or comparisons, it does allow "soft endorsements." Examples of "soft endorsements" from the Philadelphia opinion include statements such as "the lawyer always returned phone calls" and "the attorney always appeared concerned."

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 rule and the spirit behind it. *See also* LAO-0113.

H. Communications Involving Listing in Publications such as *The Best Lawyers in America.*

The Committee addressed this issue and stated that a lawyer may advertise the fact he/she is listed in a publication such as *The Best Lawyers in America*, or a similar publication, and include additional statements, claims or characterizations based upon the lawyer's inclusion in such a publication, provided such statements, claims or characterizations do not violate Rule 7.1. If, for some reason, the lawyer is delisted by a publication, the statement in the advertisement must accurately state the year(s) or edition(s) in which the lawyer was listed.

Further, the lawyer may not ethically communicate to the public credentials that are not legitimate, such as one that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee. Such a communication is

misleading to the public and therefore prohibited.

Similarly, statements that explain, and do not exaggerate the meaning or significance of professional credentials, in laymen's terms are permissible. For example, if the lawyer is communicating his "A.V." rating by Martindale-Hubbell, the lawyer may properly include a description that states that "A.V." represents "the highest rating" that particular service assigns. Also, if the lawyer is recognized and listed in the book *The Best Lawyers in America*, that lawyer may properly note he is among those lawyers "whom other lawyers have called the best." The lawyer should be mindful to exercise discretion when communicating this information, that it be objective and not misleading. For example, although the lawyer may properly characterize inclusion in the book *The Best Lawyers in America*, he cannot properly characterize that inclusion into statements such as "since I am included in the book, that means I am the best lawyer in America," nor can the lawyer impute any such endorsement to others in the law firm not so recognized.

The Committee's decision includes objective and factual statements and claims of such inclusions and warns that descriptive characterizations and other qualitative statements must meet the requirements of Rule 7.1. *See also* LAO-0114.

I. Use of "Specialist" or "Specializing In."

Rule 7.1 permits a lawyer to hold herself out as limiting or concentrating the lawyer's practice in a particular area or field of law as long as that is a true and accurate statement.

Comment 4 to Rule 7.1 (formerly comment 1 to Rule 7.4) provides that a lawyer can generally state that she is a "specialist," practices a "specialty," or "specializes in" particular fields, as long as the statement is not false or misleading in violation of Rule 7.1. The 2017 amendments to the Rules removed the longstanding requirement that a lawyer who claims to be certified as a specialist include a disclaimer stating that no certifying organization has been recognized by the Supreme Court of Virginia. Instead, the lawyer is required to identify the name of the organization that purportedly conferred the certification, so that a prospective client or other member of the public can verify the validity of the certification and the criteria for

conferring the certification. Any claim of certification as a specialist is still subject to the requirement that it is not false or misleading – the certifying organization must undertake some bona fide evaluation of lawyers rather than just awarding the certification to anyone who pays a required fee or joins an organization.

J. Use of "Expert" and "Expertise."

Rule 7.1 prohibits a lawyer from using or participating in the use of any form of public communication which contains a false or misleading statement or claim. The Committee opines that a lawyer's use of the words "expert" or "expertise" in public communications, if the claim cannot be factually substantiated, amounts to a misleading comparative statement and is therefore prohibited. *See* Comment 2 to Rule 7.1. *See also* LEOs 1292, 1406 and 1425.

Approved by the Supreme Court of Virginia
December 15, 2016

LEO 1886 - DUTY OF PARTNERS AND SUPERVISORY LAWYERS IN A LAW FIRM WHEN ANOTHER LAWYER IN THE FIRM SUFFERS FROM SIGNIFICANT IMPAIRMENT

Introduction

In this advisory opinion, the Committee analyzes the ethical duties of partners and supervisory lawyers in a law firm to take remedial measures when they reasonably believe another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public.[1] The applicable Rule of Conduct is Rule 5.1[2] which requires partners or other lawyers in the firm with managerial authority to make reasonable efforts to ensure that all lawyers in the firm conform to the Virginia Rules of Professional Conduct.[3] Lawyers in a firm may have an obligation under Rule 8.3 to report an impaired lawyer to the Virginia State Bar if the impaired lawyer has engaged in misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law. However, this opinion addresses the obligations of partners and supervisory attorneys to take precautionary measures *before* a lawyer's impairment has resulted in serious misconduct or a material risk to clients or the public. This opinion relies upon ABA Committee on Ethics and Professional Responsibility, Formal Opinion 03-429 (2003)

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[1] This opinion seeks to address only the ethical obligations of lawyers in a law firm when faced with an impaired lawyer working in the firm. There may also be legal obligations to address in dealing with an impaired lawyer under the Americans with Disability Act, the Family and Medical Leave Act and the Health Insurance Portability and Accountability Act, for example. These issues are beyond the purview of this committee and outside the scope of this opinion.

[2] Rule 5.1 Responsibilities of Partners and Supervisory Lawyers

> (a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[3] The Committee is mindful that this opinion only addresses the duties of partners and supervisory lawyers pursuant to Rule 5.1 and does not consider a lawyer's ethical duties, if any, when dealing with a solo practitioner who suffers from a significant impairment.

[hereinafter ABA Formal Op. 03-429] for its approach to the issues raised by the mental impairment of a lawyer in a firm.

Scope of the Lawyer Impairment Problem

Studies report that lawyers experience depression, alcohol and other substance abuse at a rate much higher than other populations and 2 to 3 times the general population.[4] The incidence of alcohol abuse is higher among lawyers aged 30 or less.[5] Besides the potential lawyer impairment caused by substance abuse, the aging of the legal profession presents an increased incidence of cognitive impairment among lawyers. As of 2016, Virginia State Bar membership records revealed that of the 23,849 active members located in the Commonwealth, 8,366 or 35% are ages 55 or older. Fifteen percent of these attorneys or 3,584 members are 65 or over. These numbers reflect that Virginia's lawyers, like lawyers nationally, are moving into an older demographic profile, and they continue to practice as they age. Moreover, in the years ahead, the number of lawyers that will continue to practice law beyond the traditional retirement age will increase dramatically.[6] The substantial percentage of aging lawyers presents both opportunities and challenges for the state bars, and the scope and nature of the challenges and the best way to manage the challenges have been examined by bars around the country.

Question Presented

What are the ethical obligations of a partner or supervisory lawyer who reasonably believes another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public?

Hypotheticals

James practices in a mid-sized law firm in a large metropolitan area. One day, a junior associate informs James that Bill, a senior associate, has a serious cocaine and alcohol problem. The information is credible, detailed, and alarming; it also points to the potential for trust fund violations or other misconduct associated with substance use. James has also received calls from several clients complaining that Bill has missed appointments, appeared in court late, disheveled and smelling like alcohol, and has failed to return phone calls. Another client complains that Bill missed a filing deadline and placed the client in default. James has observed

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[4] Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,* 10 J. Addiction Medicine, Issue 2 (March/April 2016). See also ABA Formal Op. 03-429 (2003) (citing George Edward Bailly, Impairment, the Profession, and Your Law Partner, 11 No.1 Prof. Law. 2 (1999)).

[5] *Id.* The Hazelton Betty Ford Foundation survey reported that one in five lawyers (20%) suffers from alcoholism and approximately 30% of the lawyer population suffer from depression.

[6] Report, National Organization of Bar Counsel, Association of Professional Responsibility Lawyers Joint Committee on Aging Lawyers (May 2007) at 3.

that Bill has problems remembering instructions, has difficulty completing familiar tasks, is challenged in problem solving at meetings, and experiences changes in mood and personality. When James confronts Bill about these issues, Bill denies having any substance abuse problems, attributes his work performance to stress caused by marital discord, and promises to improve.

George is a sixty-year old partner in a small, two lawyer firm. He has been honored many times for his lifelong dedication to family law and his expertise in domestic violence protective order cases. He has suffered a number of medical issues in the past several years and has been advised by his doctor to slow down, but George loves the pressure and excitement of being in the courtroom regularly. Recently, Rachelle, his long-time law partner, has noticed some lapses of memory and confusion that are not at all typical for George. He has started to forget her name, calling her Mary (his ex-wife's name), and mixing up details of the many cases he is currently handling. Rachelle is on very friendly terms with the J&DR court clerk, and has heard that George's behavior in court is increasingly erratic and sometimes just plain odd. Rachelle sees some other signs of what she thinks might be dementia in George, but hesitates to "diagnose" him and ruin his reputation as an extraordinarily dedicated attorney. Maybe he will decide to retire before things get any worse, she hopes.

Analysis

The Rules of Professional Conduct do not explicitly require lawyers to deal with an impaired lawyer in the law firm. However, Rule 5.1(a) requires that a firm have in place measures or procedures to ensure that *all* lawyers, not just impaired ones, comply with the Rules of Professional Conduct. The measures required depend on the firm's size, structure and nature of its practice. Cmt. [3], Rule 5.1. It follows, therefore, that Rule 5.1 requires that the partner or supervisory lawyer make reasonable efforts to ensure that an impaired lawyer in the firm or under their supervisory authority does not violate the Rules of Professional Conduct. In addition to the requirement that the firm establish appropriate preventive policies and procedures, Rule 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the supervised lawyer conforms to the Rules of Professional Conduct. When a partner or supervising lawyer knows or reasonably believes that a lawyer under their direction and control is impaired, Rule 5.1(b) requires that they take reasonable steps to prevent the impaired lawyer from violating the Rules of Professional Conduct.

Impaired lawyers have the same ethical obligations as any other lawyer. Like all lawyers, an impaired lawyer owes a duty to represent a client competently and with diligence and to communicate with the client. A lawyer's impairment does not excuse the lawyer from compliance with the Rules of Professional Conduct. The lawyer's impairment may very well be the reason for the lawyer's failure to act competently or with diligence, or to communicate with

the client. However, the lawyer's impairment is neither a defense to, nor an excuse for, those ethical breaches.[7]

A lawyer whose physical or mental health "materially impairs" his capacity to represent clients has a duty to refrain or withdraw from representation. Rule 1.16(a)(2).[8] Unfortunately, the impaired lawyer may not be cognizant of the scope and nature of the impairment, and does not recognize the need to withdraw from the representation.

As the ABA's Standing Committee on Ethics and Professionalism observed in ABA Formal Op. 03-429:

> The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.

The law firm may be able to work around or accommodate some impairment situations. For example, the firm might be able to reduce the impaired lawyer's workload, require supervision or monitoring, or remove the lawyer from time-sensitive projects. The impaired lawyer may not be capable of handling a jury trial but could serve in a supporting role performing research and drafting documents. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, the firm may have an obligation to supervise the work performed by the impaired lawyer or may have a duty to prevent the lawyer from rendering legal services to clients of the firm, until the lawyer has recovered from the impairment. The impaired lawyer's role might be restricted solely to giving advice to and

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[7] ABA Formal Op. 03-429 (2003) (A lawyer's impairment does not excuse failure to meet a lawyer's duty to a client.). *See also Columbus Bar Ass'n v. Korda*, 760 N.E.2d 824 (Ohio 2002) (impaired lawyer who filed a brief on behalf of her clients but failed to take any further actions in the case suspended for failing to act diligently); *Attorney Grievance Comm'n v. Wallace*, 793 A.2d 535 (Md. 2001) (lawyer who claimed to be undergoing personal and psychological problems was disbarred for being negligent in his representation in six cases); *In re Sheridan*, 813 A.2d 449 (N.H. 2002) (impaired lawyer who failed to successfully file the articles of incorporation for his client and did not notify the client of his failure suspended for failing to communicate with his client); *In re Francis*, 4 P.3d 579 (Kan. 2000) (depressed lawyer failed to respond to client's request for information, misrepresented the status of the client's case to her, and failed to communicate the problems he was experiencing in providing representation); and *State v. Southern*, 15 P.3d 1 (Okla. 2000) (lawyer with B-12 deficiency publicly censured after failing to respond to requests for information from client and bar association).

[8] *See, e.g., In re Taylor*, 959 P.2d 901 (Kan. 1998) (alcoholic lawyer failed to withdraw from representation although he had failed to appear in court on behalf of his clients or otherwise provide competent counsel); *see also State v. Southern,* 15 P.3d. at 8.

drafting legal documents only for other lawyers in the firm who in turn can evaluate whether the impaired lawyer's work product can be used in furtherance of a client's interests.

In order to protect its clients, the firm should have an enforceable policy that would require, and a partner or supervising lawyer should insist, that the impaired lawyer seek appropriate assistance, counseling, therapy, or treatment as a condition of continued employment with the firm. For example, the firm could recommend, encourage or direct that the impaired lawyer contact Lawyers Helping Lawyers[9] for an evaluation and assessment of his or her condition and referral to appropriate medical or mental health care professionals for treatment and therapy. Alternatively, making a confidential report to Lawyers Helping Lawyers may be an appropriate step for the firm. The firm or its managing lawyers might instead find it necessary or appropriate to consult with a professional medical or health care provider for advice on how to deal with and manage an impaired lawyer, including considering options for an "intervention" or other means of encouraging the lawyer to seek treatment or therapy.

In the first hypothetical, it is clear that James, as a managing partner in a law firm, and any other lawyer that has supervisory authority over the impaired lawyer, are required by Rule 5.1 to promptly make reasonable efforts to ensure that the impaired senior associate does not engage in any further conduct that breaches ethical duties owed to his clients. While the senior associate's past conduct might be considered violations of the Rules of Professional Conduct, only violations that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported. Rule 8.3(a). If James and any other supervising attorney have taken appropriate action to prevent the senior associate from engaging in further conduct that may violate the Rules of Professional Conduct, and the senior associate is in recovery from his impairment, i.e., the condition that caused the violations has ended, there is nothing to report to the bar. If, for example, the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Rules of Professional Conduct through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation. On the other hand, if the past conduct of the impaired lawyer involves dishonesty, i.e., embezzlement of client funds, or stealing firm funds or assets, James and any other lawyer in the firm that knows of such misconduct must report it to the bar under Rule 8.3(a). This would be required even if

[9] Lawyers Helping Lawyers ("LHL") is an independent, non-disciplinary and non-profit organization that has been assisting legal professionals and their families since 1985 deal with depression, addiction and cognitive impairment. LHL can assist law firms dealing with an impaired lawyer through a confidential environment by planning and implementing intervention, providing a free clinical evaluation, referral to appropriate medical and mental health care providers, peer support and group counseling, establishing contracts to monitor and report recovery and rehabilitation and assist and identify financial resources for treatment. LHL is not affiliated with the Virginia State Bar and does not share information with anyone except and unless the participating lawyer expressly consents in writing to share information with third parties.

the violating lawyer was participating with Lawyers Helping Lawyers and in recovery.[10] The reporting duty under Rule 8.3(a), however, does not diminish the importance of making a confidential report to a lawyer assistance program such as Lawyers Helping Lawyers. Both reports fulfill important objectives. The report to the lawyer disciplinary agency is necessary to address the misconduct and protect the public. The report to the lawyer assistance program is necessary to address the underlying illness that may have caused the misconduct. In the end, both reports protect and serve the public interest.

If, on the other hand, the impaired lawyer's condition raises a substantial question about his ability to comply with the Rules of Professional Conduct, James and any lawyer with supervisory authority must make reasonable efforts to ensure that the clients' interests are protected. This could require removal of the senior associate from their cases, or restricting his role and placing him under close supervision.

Further, if reasonable measures or precautions have been taken by James and any other lawyers in the firm to ensure that the impaired lawyer complies with the Rules of Professional Conduct, neither the partners or supervisory lawyers in the firm are ethically responsible for the impaired lawyer's professional misconduct, unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action. Rule 5.1(c).

In the second hypothetical, it is not clear that George has committed any violation of the Rules of Professional Conduct. Obviously, George's impairment, unaccompanied by any professional misconduct, does not require any report to the bar under Rule 8.3(a). Yet his mental condition, as observed by his partner, Rachelle, would require that Rachelle make reasonable efforts to ensure that George does not violate his ethical obligations to his clients or violate any Rules of Professional Conduct. This would include, as an initial step, Rachelle or someone else having a confidential and candid conversation with George about his condition and persuading him to seek evaluation and treatment.

Approved by the Supreme Court of Virginia
December 15, 2016

[10] N. C. State Bar Ethics Op. 2013-8 (2014), Inquiry No. 3 (If an impaired lawyer has committed misconduct that a lawyer must report under Rule 8.3(a), a lawyer may not fulfill that reporting duty by reporting the impaired lawyer to a lawyers assistance program, but not the Attorney Grievance Committee of the State Bar).

Supreme Court Approved
August 30, 2017

LEO 1887 – DUTIES WHEN A LAWYER OVER WHOM NO ONE HAS SUPERVISORY AUTHORITY IS IMPAIRED

QUESTIONS PRESENTED

1. Is there a duty to report a lawyer who continues to represent clients while suffering from an impairment?

2. What other options are available, instead of or in addition to filing a bar complaint?

HYPOTHETICAL

Legal Ethics Opinion 1886 (approved by the Supreme Court of Virginia, December 15, 2016) addressed the duties of supervisory lawyers in a firm to take preemptive action when a lawyer in the firm is suffering from an impairment that might affect her ability to represent clients. Supervisory lawyers are in a unique situation because of their duties under Rule 5.1 to take steps to ensure that other lawyers in the firm are complying with their ethical duties, which naturally raises the question of whether lawyers who are not in a supervisory capacity have any duty to act when they become aware of another lawyer's impairment. These situations most often arise when the potentially-impaired lawyer is either a solo practitioner or the sole managing partner/owner of a firm that employs associates but no other partners.

In one hypothetical scenario, a solo practitioner practices primarily criminal defense; he has been practicing in the same community for decades and is well-respected within the legal community. Recently, judges, prosecutors, and other lawyers have noticed that his representation of his clients is not up to his previous standards, but he still appears to be competent – he sometimes comes across as scattered and disorganized but is still able to manage a court proceeding appropriately.

A different scenario involves a lawyer who is the sole owner and managing partner of a law firm that employs associates and nonlawyer assistants. After a car accident, she becomes increasingly moody and forgetful, sometimes lashing out at the other employees of the firm or opposing counsel when they have to correct her or remind her of something. The associates are aware of a number of near-misses where the partner would have missed a significant deadline if someone else in the firm had not intervened to remind her, and they have also noticed that she overlooks important, and obvious, issues in conversations with clients and with members of the firm. Based on their interactions with her, the associates believe the managing partner is not able to competently and diligently represent clients on her own. She is also not receptive to any help or input from the associates, and no one in the firm has any authority to require her to accept oversight or assistance since she is the sole partner.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

The applicable Rules of Professional Conduct ("RPCs") are Rules 1.16(a)(2) and 8.3(a) and (d). Rule 1.16(a)(2) provides that, "Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if...the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]"

Relevant sections of Rule 8.3 provide that:

> (a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.
>
> * * *
>
> (d) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.

ANALYSIS

Other than a lawyer who is a partner or in a supervisory role in a law firm, lawyers do not have a duty to proactively address the impairment of other lawyers. *See* Rule 5.1 and LEO 1886. The Rules of Professional Conduct only require action when the reporting lawyer has reliable information that the impaired lawyer has committed a violation of the Rules that raises a *substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law.* [Emphasis added] Rule 8.3(a). Certainly, not every violation of the RPCs meets that standard, and a lawyer's impairment, on its own, does not necessarily violate the RPCs at all. In a specific instance where other lawyers believe that a lawyer is impaired, there might not be specific misconduct that the lawyers know about and that is subject to Rule 8.3(a). This scenario is presented by the first hypothetical, above, where other lawyers believe that the solo lawyer's cognitive abilities are visibly declining but have not seen any evidence of any specific misconduct by the lawyer.

Rule 1.16(a)(2) (requiring a lawyer to withdraw/decline representation if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client") is violated in many cases where an impaired lawyer continues representing clients, and that rule violation will often trigger a reporting duty under Rule 8.3(a) since a "material impairment" in a

lawyer's ability to represent the client almost by definition raises a substantial question as to the lawyer's fitness to practice law. Again, in a situation like the first hypothetical in this opinion, there may be cases where a lawyer believes it is clear that another lawyer is mildly impaired, and that clients are at risk in the future if no action is taken, although there is no evidence that the lawyer's ability to represent clients is *currently* compromised. In these situations, the lawyers have no *duty* to take any action to address the solo lawyer's impairment.

In the second hypothetical, where associates of an impaired lawyer have reliable information that the impaired lawyer is currently materially impaired in her ability to represent clients, and is continuing to represent those clients in violation of Rule 1.16(a)(2), Rule 8.3(a) requires them to report the impaired lawyer's conduct to the Bar. The duty to report is subject to the associates' duty of confidentiality to clients of the firm under Rule 8.3(d), but in many cases a report may be accomplished without disclosing information that would be embarrassing or detrimental to the firm's clients. The associates may also choose to seek guidance from Lawyers Helping Lawyers[1] or another lawyer assistance program to try to convince the impaired partner to seek treatment to manage her impairment or transition out of the practice of law without awaiting the conclusion of the disciplinary process. As LEO 1886 emphasized, reporting a lawyer's impairment to both the Bar and to LHL is important, and each report serves different purposes. Neither report removes the need for the other; together they can address both the misconduct that has already occurred and the underlying situation that contributed to the misconduct.

As North Carolina concluded in 2013 Formal Ethics Opinion 8:

> as a matter of professional responsibility, attendant to the duties to seek to improve the legal profession and to protect the interests of the public that are articulated in the Preamble to the Rules of Professional Conduct, the lawyers in the community are encouraged to assist the potentially impaired lawyer to find treatment or to transition from the practice of law. A mental health professional, the LAP [lawyer assistance program], or another lawyer assistance program can be consulted for advice and assistance.

Accordingly, regardless of whether a bar complaint is warranted, a lawyer who is concerned about another lawyer's possible impairment could also encourage the impaired lawyer to contact LHL, or contact LHL herself, for guidance on how best to address the situation. *Supreme Court Approved/August 30, 2017*

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[1]Lawyers Helping Lawyers ("LHL") is an independent, non-disciplinary and non-profit organization that has been assisting legal professionals and their families since 1985 to deal with depression, addiction, and cognitive impairment. LHL is not affiliated with the Virginia State Bar and does not share information with anyone except and unless the participating lawyer expressly consents in writing.

Approved by the Supreme Court of Virginia
November 8, 2018

LEGAL ETHICS OPINION 1885

Proposed LEO 1885 — Ethical considerations regarding a lawyer's participation in an online attorney-client matching service.

This opinion provides guidance to a lawyer who is considering participating in an online program conducted by a lay for-profit entity operating as an attorney-client matching service (ACMS). Under the hypothetical presented to the Committee, the lawyer

a) provides a client with limited scope legal services advertised to the public by the ACMS for a legal fee set by the ACMS;

b) allows the ACMS to collect the full, prepaid legal fee from the client, and to make no payment to the lawyer until the legal service has been completed;

c) authorizes the ACMS to electronically deposit the legal fee to the lawyer's operating account when she completes the legal service; and

d) authorizes the ACMS to electronically withdraw from the lawyer's bank account a "marketing fee" which, by prior agreement between the ACMS and the lawyer, is set by the ACMS and based upon the dollar amount of the legal fee paid by the client.

The prospective client selects the advertised legal service and chooses a lawyer identified on ACMS's website as willing to provide the selected service. The prospective client pays the full amount of the advertised legal fee to the ACMS. Thereafter, the ACMS notifies the selected lawyer of this action, and the lawyer must call the prospective client within a specified period. After speaking to the prospective client, and performing a conflicts check, the lawyer either accepts or declines the proposed representation.

QUESTION PRESENTED

Would a lawyer's participation in the program described above violate any Virginia Rules of Professional Conduct?

ANSWER

As discussed below, a lawyer who participates in an ACMS using the model identified herein violates Virginia Rules of Professional Conduct because she

a. cedes control of her client's or prospective client's advanced legal fees to a lay entity;

b. undertakes representation which will result in a violation of a Rule of Professional Conduct;

c. relinquishes control of her obligation to refund any unearned fees to a client at the termination of representation;

d. shares legal fees with a nonlawyer; and

e. pays another for recommending the lawyer's services.

A lawyer who participates in an ACMS does not violate Rules of Professional Conduct governing limited scope representation, reasonableness of legal fees, and the exercise of independent professional judgment, if she adheres to the Rules governing those aspects of every representation.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

The analysis of the question presented involves the application of Virginia Rules of Professional Conduct 1.2(b)[1],1.5(a)[2], 1.15(a)(1) and (2)[3], 1.16(a)(1) and (d)[4], 2.1[5]5.4(a)[6],

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[1] **RULE 1.2 Scope of Representation**

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

[2] **RULE 1.5 Fees**

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

[3] **RULE 1.15 Safekeeping Property**

(a) Depositing Funds.

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

[4] **RULE 1.16 Declining Or Terminating Representation**

7.3(d)[7], and 8.4(a).[8]

ANALYSIS

Ethical Considerations Regarding Limited Scope Representation

It is ethically permissible for a lawyer to limit the scope of her representation of a client, provided the limitation does not impair the lawyer's ability to provide competent representation and is otherwise consistent with the Rules of Professional Conduct. The client must consent "after consultation" to the limited scope representation. *See* Rule 1.2(b). The Rules of Professional Conduct do not prohibit a lawyer's representing a client on a matter appearing on

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(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law[.]

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

[5] **RULE 2.1 Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

[6] **RULE 5.4 Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client.

[7] **RULE 7.3 Solicitation of Clients**

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1, including online group advertising;

(2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

[8] **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do

the ACMS's online menu of available services *provided* the lawyer explains the nature and scope of the service to be rendered to the prospective client *before* the attorney-client relationship is established. A lawyer does not violate Rule 1.2(b) merely because her contact with a prospective client flows from a proposed limited scope legal representation advertised by a non-lawyer business firm. Indeed, there are several contexts in which a third-party nonlawyer defines the scope of a lawyer's representation of a client. In pertinent part, Comments [6] and [7] to Rule 1.2 state that

> [6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or **by the terms under which the lawyer's services are made available to the client**. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. ***.
>
> [7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. **Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [Competence]**. [Emphasis supplied throughout.]

Regardless, the lawyer and client must have agreed to the scope of representation, with an understanding of the scope of services being provided for the fixed fee. Moreover, Rule 2.1 requires the lawyer to "exercise independent professional judgment," which means that she cannot permit the ACMS's description of the legal services to be provided to the client to control if the client's legal matter requires services which differ in nature or scope from the description. The lawyer's obligation is to ensure that the description of the legal services to be provided to a client is complete and accurate.

The Lawyer Must Consider Whether the Advertised Fixed Legal Fees are Reasonable

The ACMS presents an online menu of limited scope legal services available to the public at fixed legal fees from lawyers who are willing to provide those services. Virginia Legal Ethics Opinion 1606 defines "fixed fee" and states that the use of fixed fees is to be encouraged:

> Fixed Fee. The term fixed fee is used to designate a sum certain

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so through the acts of another[.]

> charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

Notwithstanding the foregoing considerations, fixed fees, like every other type of legal fee, must be reasonable. The eight factors set forth in Rule 1.5(a) must be considered when determining the reasonableness of legal fees. Factor (3) calls for a consideration of "the fee customarily charged in the locality for similar legal services." Factor (7) refers to "the experience, reputation, and ability of the lawyer or lawyers performing the services."

Lawyers traditionally set their own fees—including fixed fees—whether set forth in their advertising, or after conferring with clients who are seeking representation. Lawyers know the "going rates" for particular services in their localities, and every lawyer certainly knows her level of "experience, reputation, and ability."

A lay business firm which dictates to lawyers what they must charge clients as fixed fees as a condition of participation in the online program may not have conducted the reasonableness-of-fee analysis required of lawyers by Rule 1.5(a). It is therefore incumbent upon the participating lawyer that she agrees to represent a client only if the fixed fee set by the ACMS is reasonable for the contemplated legal service. Indeed, if the fee identified for each menu item of limited scope services is the same for all participating lawyers—*irrespective of their experience*, and *irrespective of the locality in which the services are to be performed*—then the matter of reasonableness of fee is a subject which the lawyer must very carefully consider before agreeing to a proposed representation.

The client's actual needs are an important consideration in setting a fixed fee and limiting the scope of legal services, regardless of the rubric given the legal service identified on the ACMS's online menu of services. For example, in determining whether a fixed fee is reasonable the lawyer and the prospective client must understand what is involved regarding a menu item such as "Document review: Residential purchase and sale agreement $495."

A fixed fee of $495 might be perfectly reasonable were the prospective client, either as purchaser or seller, to require review of a proposed contract custom-tailored to a transaction and prepared by the other party's lawyer. The same fee might be unreasonable if the lawyer is being asked to review a standard form contract in universal use by real estate agents and brokers in the community where the home is being sold. There may be very little value the reviewing lawyer

adds to the transaction. In the latter instance, the lawyer may determine that she is exposed to virtually no risk that the task will consume more than a minimal amount of her professional time.

In addressing a menu item such as "File for uncontested divorce $995," a lawyer must determine whether $995 is a reasonable fee if her colleagues with like experience customarily charge $500 for such a service in the locality in which she is practicing. Charging almost twice the customary fixed fee for a like service in the lawyer's locality might be unreasonable under the factors set forth in Rule 1.5(a). The Committee notes that the fixed fee of $995 appears only for filing for the divorce, and not completing the representation by obtaining a final decree. Further, this limited scope representation may not include a property settlement agreement that may be necessary for obtaining an uncontested divorce. The "reasonableness" of the $995 fee should be considered in light of these limitations. A lawyer abdicates her ethical obligation to exercise the independent professional judgment required by Rule 2.1 if she defers to the ACMS in determining the legal fees she will charge her clients.[9] *See also* Rule 1.8(f) indicating that a lawyer may accept compensation from a person other than the client provided "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Thus, the lawyer's acceptance of payment from the on-line "matchmaking" company is subject to this requirement.

In sum, a lawyer participating in the ACMS's program must conduct an independent assessment of whether the fee identified for the limited scope representation is reasonable, and exercise independent professional judgment in light of the nature of the legal service to be rendered and the prospective client's needs.

A Lawyer's Obligations Regarding Safekeeping Clients' Advanced Legal Fees

Many lawyers routinely handle legal matters for clients whose legal fees are paid by

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[9] In Opinion 2016-3, the Supreme Court of Ohio Board of Professional Conduct sharply observes, with respect to a proposed business model such as is under discussion here that

> ***the company, not the lawyer, controls nearly every aspect of the attorney-client relationship, from beginning to end. The company, not the lawyer, defines the type of services offered, the scope of the representation, and the fees charged. The model is antithetical to the core components of the client-lawyer relationship because the lawyer's exercise of independent professional judgment on behalf of the client is eviscerated.

third parties. Sources of payment may be insurance companies or legal services plans.[10] While the client may have paid premiums to an insurance company or a legal services plan which entitles him to legal representation funded by that third party, the premiums, themselves, are not advanced legal fees, and Rule 1.15 is not implicated.

The ACMS business model presented in this hypothetical, however, calls for the prospective client to advance full payment of the fixed legal fee for the selected menu item of legal service directly to the ACMS. The ACMS is an intermediary between the client and the lawyer, with no obligation to place the advanced legal fees in a trust or escrow account for safekeeping as required of a Virginia lawyer. The lawyer who accepts the client's case is foreclosed from safekeeping the advanced fixed legal fee paid by the client as she receives payment from those advanced fees only when the representation has been completed.

In Virginia Legal Ethics Opinion 1606[11], the Committee opined that

> **A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account.** If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. *** [Emphasis supplied.]

A Virginia lawyer has the obligation to safeguard her client's advanced legal fees during the course of the representation. A Virginia lawyer cannot ethically "opt-out" of the obligations imposed by Rule 1.15 by consenting to a third-party lay ACMS's collection and retention of the client's advanced legal fees. The ACMS is not a law firm, cannot maintain an IOLTA account, and is not subject to professional regulation by the Virginia State Bar, nor a financial institution approved by the bar subject to overdraft reporting requirements and covered by FDIC protection. A client's advanced legal fees must remain intact and in trust in a financial institution approved by the Virginia State Bar until they are earned by the lawyer. Unearned fees must be returned to the client in the event the lawyer's services are terminated by the client or terminated by the lawyer for any reason, including her death, impairment, or license

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[10] *See, e.g.*, Sec. 38.2-4400 of the 1950 Code of Virginia, as amended.

[11] Legal Ethics Opinion 1606 was approved by the Supreme Court of Virginia on November 2, 2016, and has the dignity of a decision of the Court.

suspension or revocation. The duty to safekeep client funds and property contained in Rule 1.15 are intended, in part, to protect clients from the risk of having unearned legal fees become part of the lawyer's estate, and thus subject to the reach of the lawyer's other creditors via garnishment or as part of a bankruptcy or probate proceeding. Unearned legal fees must thus stand to the credit of the client by remaining on deposit, in trust, in a financial institution identified in Rule 1.15(a)(2) if the lawyer or law firm is located in Virginia. It should be noted, as well, that the business model under discussion calls for advancement of a *legal fee* to the lay business entity *before* any lawyer has agreed to represent the prospective client. A Virginia lawyer, whether or not she comes to represent a particular client obtained through the online service, must not promote, via her participation in, a program operated by a lay entity which solicits advanced legal fees from the public when the lawyer knows that those fees will not be protected as required by Rule 1.15. *See* Rule 8.4(a).

The importance of a lawyer's keeping her client's advanced legal fees secured in a trust account cannot be overstated. The lawyer may not avoid this significant client protection requirement by delegating the handling of a client's legal fees to a lay third party. The ACMS collects advanced legal fees from a prospective client before the prospective client has had any contact with the lawyer whom she might engage. Thus, the prospective client, in most instances, will not have been informed by a lawyer that her advanced legal fees will be handled by the ACMS in a manner that differs from how a lawyer would have been required to handle those fees. The ACMS is the recipient and custodian of the client's unearned legal fees under the program here presented. The approach is contrary to the requirements of Rule 1.15 and inconsistent with the purposes of the Rule. The firm is neither a financial institution nor a bonded trustee or other fiduciary regarding the legal fees collected from the prospective client. The client, pending completion of the legal services for which he has paid in advance, stands as a general creditor of the ACMS, and is not protected from risk of pecuniary loss occasioned by the firm's cash-flow problems, insolvency, bankruptcy, or mismanagement.

It is no answer to the problem of the client's potential risk of loss that the business model presented here is for "limited scope" representation, permitting the Virginia lawyer to side-step her ethical obligation to preserve an advanced legal fee by ceding complete control of that incident of the representation to a third-party lay business. Comment [7] to Rule 1.2, *supra*, states unambiguously that "An agreement concerning the scope of representation must accord

with the Rules of Professional Conduct and other law." Rule 1.15 is a Rule of Professional Conduct, and a lawyer's attempt to avoid its application through the acts of another itself violates Rule 8.4(a).

Rule 1.16(d) requires that a lawyer refund to a client at the termination of representation "any advance payment of fee that has not been earned." A Virginia lawyer who participates in the service rendered by the ACMS cannot comply with this Rule of Professional Conduct because she is not, and has never been, the custodian of the advanced fee. She has ceded control of that fee to the ACMS, which decides how to dispose of the client's fees, both earned and unearned. A lawyer must not accept a legal matter under an arrangement which requires that she delegate the function of holding and disposing of the client's advanced legal fees to a lay entity. In accepting such representation, the lawyer also violates Rule 1.16(a)(1), which prohibits any representation which would result in the lawyer's violation of the Rules of Professional Conduct.

Ethically Impermissible Sharing of Legal Fees with a Nonlawyer

Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer. The Rule is violated by a lawyer when there is direct linkage between the amount of the lawyer's fee revenue derived from a marketing firm's operations, and the firm's entitlement to compensation. Lawyers may, however, pay a lay business entity sums which represent the reasonable costs of advertising. *See* Rule 7.3(d)(1). There are legal ethics opinions which differentiate between the reasonable costs of advertising and ethically impermissible fee-sharing.

The North Carolina State Bar has issued a legal ethics opinion which approves a lawyer's participation in an online for-profit service which has both the attributes of a lawyer referral service and a legal directory.[12] The business model under review in that opinion is described, in pertinent part, as follows:

> A commercial Internet company (the company) operates a website that matches prospective clients with lawyers. A prospective client logs onto the website where he registers and is given an identification number to preserve anonymity. The prospective client posts an explanation of his legal problem on the website and consents to

[12] North Carolina Ethics Op. 2004-1 (2004) **"Participation in On-Line Legal Matching Service"** http://www.ncbar.com/ethics/ethics.asp.

> contact from participating lawyers. There is no charge to the prospective client for the standard service but, for more individualized and faster service, there is a fee.
> The company solicits lawyers to participate in its service. To participate, a lawyer must be licensed and in good standing with the regulatory agency of his state of licensure. A participating lawyer is charged a **one-time registration fee** that covers expenses for verifying credentials, technical system programming, and other set-up expenses. An **annual fee** is charged to each participating lawyer for ongoing administrative, system, and advertising expenses. The **amount of the annual fee varies by lawyer based on a number of components, including the lawyer's current rates, areas of practice, geographic location, and number of years in practice.** ***
> If a client-lawyer relationship is formed between a participating lawyer and a user of the service, it is done without the participation of the company. **The company does not get involved in the lawyer-client relationship or in related financial matters such as fees, retainers, invoicing, or payment.** [Emphasis supplied throughout.]

In answer to the question of whether a lawyer may ethically participate in such a program, the opinion states:

> Yes, **provided there is no fee sharing with the company in violation of Rule 5.4(a)**, and further provided the participating lawyer is responsible for the veracity of any representation made by the company about the lawyer or the lawyer's services or the process whereby lawyers' names are provided to a user. [Emphasis supplied.]

A Rhode Island legal ethics opinion[13] specifically approved lawyers' participation in a program run by an Internet company called "Legal Match.com." In addressing whether the arrangement violated the prohibition on fee sharing, the opinion draws the important distinction between ethically permissible advertising costs and impermissible fees charged to a lawyer based upon legal fees generated:

> The fee to LM.com is a flat fee which buys advertising and access to requests for legal services posted by consumers. **Unlike the fees in [Rhode Island] Ethics Advisory Opinion No. 2000-04, the annual fee is not a percentage of, or otherwise linked to, a participating attorney's legal fees.** [Emphasis is supplied.]

Rhode Island Ethics Advisory Opinion No. 2000-4, referred to above, found linkage between a

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[13] Rhode Island Supreme Court Ethics Advisory Panel Opinion No. 2005-01
https://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/2005-01.pdf.

consulting company's fee and the attorney's fee to be unethical fee-sharing with a nonlawyer *and* ethically impermissible payment for recommending a lawyer's services:

> In the arrangement proposed by the inquiring attorney, **there is a direct relationship between the consulting fees paid to the consulting company and the attorney's fees earned through the website**. A participating attorney agrees to pay $15,000 to the consulting company for every $100,000 in gross fees he/she earns as a result of the site. In essence, the fee paid to the consulting company is a fifteen percent commission of the gross attorney's fees. As such, **the consulting fee is payment for recommending the lawyer's services** and is violative of Rule 7.2(c).
>
> The proposed arrangement is problematic in other respects. It runs afoul of Rule 5.4(a) **which prohibits attorneys from sharing fees with nonlawyers**.*** [Emphasis supplied.]

The Committee believes that in contrast to the business models identified with approval in the North Carolina and first-cited Rhode Island legal ethics opinions, the model here under review calls for legal fee sharing which is ethically impermissible under Rule 5.4(a). A legal fee is shared with a nonlawyer when a fixed portion of it is given by the lawyer to her Internet advertiser, whose entitlement to the fee occurs only when the lawyer has earned her legal fee, and when the amount of the advertiser's fee is based on the amount of that legal fee. Calling the online service's entitlement a "marketing fee" does not alter the fact that a lawyer is sharing her legal fee with a lay business. As stated, the amount of the "marketing fee" is itself linked directly to the amount of the lawyer's fee earned on each legal matter obtained by the lawyer through the intermediary ACMS. The fact that the ACMS executes a separate electronic debit from the lawyer's bank account for its "marketing fee" following the firm's electronic deposit of the full legal fee to the lawyer's bank account does not change the ethically impermissible fee-sharing character of the transaction. If the ACMS were to withhold its "marketing" fee from the legal fee due the lawyer, the "fee sharing" element might appear more pronounced. However, the firm's debiting the lawyer's account following transmission of the full legal fee is but a technical nicety which does not change the substance of the transaction. The form of the transaction cannot mask the substance of it: the legal fees are shared with a nonlawyer in direct violation of Rule 5.4(a).

The Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee in Formal Opinion 2016-200 flatly declared that "[a] lawyer who participates in [a

program such as is detailed here] in which the program operator collects 'marketing fees' from that lawyer that vary based upon the legal fees collected by the lawyer, violates RPC 5.4(a)'s prohibition against sharing legal fees with a non-lawyer."

The Opinion identifies other jurisdictions' like conclusions on the subject of ethically impermissible fee-sharing with a nonlawyer, stating:

> Ethics opinions that have considered similar compensation arrangements have concluded that marketing, advertising, or referral fees paid to for-profit enterprises that are based upon whether a lawyer received any matters, or how many matters were received, or how much revenue was generated by the matters, constitute impermissible fee sharing under RPC 5.4(a). For example, Ohio Opinion 2016-3, which addresses the same types of FFLS [acronym for "Flat Fee Limited Scope"] programs discussed in this Opinion, states that "a fee-splitting arrangement that is dependent upon the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct." S.C. Opinion 16-06, which also addressed a FFLS program, reached the same conclusion. Other ethics opinions which have, in various contexts, concluded that advertising, marketing, or referral fees calculated on the basis of matters received or legal fees generated violate Rule 5.4(a) include: Arizona Opinion 10-01; Alabama State Bar Ethics Opinion RO 2012-01 ("Alabama Opinion 2012-01"); Indiana State Bar Association Legal Ethics Committee Opinion 1 of 2012 ("Indiana Opinion 1 of 2012"); Kentucky Bar Association Ethics Opinion E-429 and South Carolina Ethics Advisory Opinion 93-09.

In addition, on June 21, 2017, three Committees of the New Jersey Supreme Court issued a Joint Opinion (ACPE Opinion 732, CAA Opinion 44, UPL Opinion 54) which addresses the ethical implications of a lawyer's participation in an ACMS such as is discussed herein. The Joint Opinion concluded that such a program is an impermissible lawyer referral service, in violation of New Jersey Rules of Professional Conduct 7.2(c) and 7.3(d), and comprises improper fee sharing with a nonlawyer in violation of New Jersey Rule of Professional Conduct 5.4(a).

Ethical Restriction on Giving Anything of Value to One Who Recommends the Lawyer's Services

Subject to the exceptions set forth below, Rule 7.3(d) prohibits a lawyer from giving "anything of value" to a person who recommends the lawyer's services. Whether the referring person is a lawyer or nonlawyer is not relevant to an analysis of conduct covered by Rule

7.3(d).[14] A lawyer may violate Rule 7.3(d) without at the same time violating the fee-sharing prohibition contained in Rule 5.4(a) because the source of the compensation given to the referring person need not be a legal fee.

Rule 7.3(d) lists only four specific exceptions under which a lawyer may give something of value to another (who is not an employee or lawyer in the same law firm) for recommending a lawyer's services, only two of which are applicable to a lawyer's participation in the for-profit business firm's operations here under review:

> 1. payment of "the reasonable costs of advertisements or communications;" and/or
> 2. payment of the "usual charges of a legal service plan or a not-for-profit qualified lawyer referral service."

A "marketing fee" based upon a lawyer's having been actually hired to perform legal services for which a fee has been earned, with the amount of the "marketing fee" based upon the amount of the lawyer's fee is not a reasonable cost of advertisement. It is in form and function the payment of a referral fee to a nonlawyer. Payment of the so-called "marketing fee" is not required unless and until the lawyer finishes a legal matter for a client the lawyer has obtained as a result of the ACMS's efforts. The ACMS which identifies available lawyers on its website is neither a "legal service plan" nor a "not-for-profit qualified lawyer referral service." It is a for-profit lay entity with a business model whose revenue is derived by sharing the lawyers' earnings derived specifically from clients and fees generated to the lawyers by the program.

In discussing a rule analogous to Virginia Rule 7.3(d), the South Carolina bar deemed it a violation of its rule to compensate an Internet service which advertises lawyers' services by paying the Internet service based on fees obtained from clients whom the lawyer receives via participation in the service:

> South Carolina Rule of Professional Conduct 7.2(c)[15] prohibits lawyers

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[14] There is one exception: Rule 1.5(e) permits a lawyer to share legal fees, under certain conditions, with *another lawyer* who has referred a case to her. A note to Virginia Legal Ethics Opinion 1130 states:

> **Legal Ethics Committee Notes.** – This LEO was overruled by Rule 1.5(e), which does not require that a lawyer sharing in fees also share responsibility, thus allowing "referral fees" if the client consents after full disclosure.

[15] **RULE 7.2: ADVERTISING**

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

> from giving "anything of value to a person for recommending the lawyer's services" but includes an exception for the "reasonable cost of advertisements." A lawyer may ethically make payments to an Internet service for advertising the lawyer's services based either on a set monthly or yearly fee or based on the number of hits or referrals from the service to the lawyer. **Lawyers could not ethically pay the service any portion of the fees received from clients obtained through the service.** See S.C. Rule Prof. Cond. 5.4(a). This opinion deals only with services that are open to attorneys generally. Services that restrict or screen attorney participation may violate Rule 7.2(c). [Emphasis is supplied.]

See, South Carolina Bar Ethics Advisory Opinion 01-03.[16]

South Carolina Bar Ethics Advisory Opinion 16-06, issued in 2016, analyzed the ethical implications of a lawyer's participation in a service precisely as described here. It concluded that the marketing fees charged are not the ethically permissible reasonable costs of advertising:

> The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or "click." In essence, the service's charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services.
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> Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services of one type of case versus another. For example, a newspaper or radio ad would cost the same whether a lawyer was advertising his services as a criminal defense lawyer or a family law attorney. The cost of the ad may vary from publication to publication, but the ad cost would not be dependent on the type of legal service offered.

PA Formal Opinion 2016-200, cited above, addresses the "reasonable cost of advertisements" issue from the perspective of the differing marketing fees charged, as tethered to the legal fees

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(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and

(3) pay for a law practice in accordance with Rule 1.17.

[16] *See, also,* New York State Bar Association Committee on Professional Ethics Opinion 1132 (8/8/17), which concluded that a lawyer's payment of a marketing fee charged by an ACMS as discussed herein would be an improper payment for a

themselves:

> *** The cost of advertising does not vary depending upon whether the advertising succeeded in bringing in business, or on the amount of revenue generated by a matter. One FFLS [Flat Fee Limited Scope] program charges participating lawyers "marketing fees" ranging from $10 for a $39 "Advice Session" to $400 for a "Green Card Application," which generates $2,995 in legal fees. Clearly, there cannot be a 4000% variance in the operator's advertising and administrative costs for these two services, particularly since the operator does not, and cannot, have any role in the actual delivery of legal services.***

There are a variety of forms in which lawyers may advertise, one being via Internet services which identify lawyers available to handle particular types of legal matters. Comment [4] to Rule 7.3 speaks approvingly of services available to lawyers:

> [4] Lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. However, Paragraph (d)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the **costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising**. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as **publicists, public-relations personnel, business-development staff, and website designers[.]*** [Emphasis supplied.]

A Virginia lawyer may certainly participate in a for-profit lay business firm's Internet advertising platform from which members of the public are matched with Virginia lawyers who are identified as willing and available to handle particular matters for fixed legal fees *if the cost of doing so* complies with Rule 7.3(d)(1) and if the lawyer complies with the other Rules of Professional Conduct discussed above. The "reasonable costs of advertising or communications" may be based on any number of factors which the advertising lawyer may assess for herself: quality of presentation, market exposure, demography, and measurable levels of interest evoked (through Internet "clicks" or "hits"). However, a Virginia lawyer violates

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recommendation in violation of New York Rule 7.2(a).

Rule 7.3(d) when she pays another—including an Internet marketer—a sum tethered directly to her receipt, and the amount, of a legal fee paid by a client.

CONCLUSION

The Virginia Rules of Professional Conduct do not prohibit a lawyer from participating in an Internet program operated by a for-profit ACMS which identifies limited scope services available to the public for fixed fees. Before accepting a legal matter from a prospective client, the lawyer must consult with the client regarding the limited scope of the proposed legal services and be satisfied that the services can be competently performed consistent with the Rules of Professional Conduct.

Before accepting a prospective client's legal matter, the lawyer must exercise independent professional judgment and assure herself that the fee set by the ACMS is reasonable for the legal task to be undertaken for the client, taking into consideration the factors enumerated in Rule 1.5(a).

It would be ethically impermissible for a lawyer to participate in a program whereby a client's advanced legal fee is to be held by a lay business firm, contrary to the lawyer's obligations under Rule 1.15. A lawyer who permits a lay business entity to retain and dispose of a client's advanced legal fees surrenders her ethical obligation to refund unearned legal fees to the client at the termination of representation as required by Rule 1.16(d).

A lawyer must not participate in a program whereby the lawyer pays a for-profit business entity a portion of the legal fee charged to the client as compensation for the lawyer's having received the client from the firm which operates the program. The payment constitutes an impermissible sharing of fees with a nonlawyer, and violates the rule prohibiting a lawyer from giving anything of value to one who recommends the lawyer's services.

Approved by the Supreme Court of Virginia
November 8, 2018

Committee Opinion
February 10, 2003

LEGAL ETHICS OPINION 1769

CONFLICT – WHETHER AN ATTORNEY CAN REPRESENT THE DAUGHTER IN GAINING GUARDIANSHIP OF INCOMPETENT MOTHER WHO IS CURRENTLY A CLIENT IN AN OTHER MATTER.

You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Under the facts you have presented, you have asked the committee to opine as to whether the acceptance of the daughter as a client for this guardianship petition would trigger an impermissible conflict of interest for the legal aid office.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7, which governs concurrent conflicts of interest, and Rule 1.14, which addresses representing a client with a disability. Rule 1.7 squarely addresses the conflict triggered by an attorney representing adverse parties in the same matter:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely effect the relationship with the other client; and
>
> (2) each client consents after consultation.

The committee notes that under Rule 1.10(a), any conflict arising under Rule 1.7 for one attorney would be imputed to every other attorney in the office.

Applying Rule 1.7(a) to the attorney in the present hypothetical presents insurmountable problems. This committee does not see how that attorney could fulfill either of the two requirements listed under paragraph (a), above. As for the first requirement, that the representations not be adversely affected, it seems unlikely that the representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence. Even were that hurdle cleared, the second requirement can not be met. This committee sees no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

Should the attorney in this hypothetical actually consider his client to be incompetent, that attorney can look to Rule 1.14 for guidance. That rule specifically addresses the difficulties in representing a client under a disability. The rule does suggest that the lawyer should, "as far as reasonably possible, maintain a normal client-lawyer relationship" However, should the lawyer reasonably believe that "the client cannot adequately act in the client's own interest," then the lawyer "may seek the appointment of a guardian or take other protective action." Rule 1.14(a)

and (b). Thus, should the attorney in this hypothetical reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

This committee's two conclusions in this matter - that there would be an impermissible conflict of interest for the attorney to represent the daughter in seeking a guardian and that, under certain circumstances, the attorney may permissibly seek appointment of a guardian under Rule 1.14 - are not contradictory. This committee believes that in addressing this same dilemma regarding Rule 1.7 and Rule 1.14, the ABA correctly made a critical distinction. *See*, ABA 96-404 (1996)[1]. In its opinion on this same question, the ABA distinguished between an attorney representing a third party petitioner and filing the petition himself:

> Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to this client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a)...

[1]The ABA, in this opinion, is interpreting Model Rules 1.7 and 1.14, which are substantially similar to Virginia's corresponding rules.

This committee concurs with the ABA's analysis of the interplay between Rule 1.7 and Rule 1.14 in the present context. Neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney's office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by the daughter regarding the mother in determining this attorney's duties toward the mother with regard to Rule 1.14. That rule would be the proper source for guidance for this attorney should he believe the mother's competence is questionable.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
February 10, 2003

Supreme Court Approved
November 2, 2016
Committee Opinion
September 19, 2011

LEGAL ETHICS OPINION 1856 SCOPE OF PRACTICE FOR FOREIGN LAWYER IN VIRGINIA

Lawyers frequently find it necessary to engage in cross-border legal practice to represent their clients. Multi-jurisdictional practice is on the increase and this trend is not only inevitable, but necessary. Globalization, the explosion of technology, and the increasing complexity of law practice require lawyers to cross state borders to afford clients competent representation.[1]

This opinion explores the extent to which a lawyer not licensed in Virginia may engage in the practice of law in Virginia, both on a temporary basis and "continuously and systematically" under Rule 5.5 of the Virginia Rules of Professional Conduct. For purposes of the opinion, the foreign lawyer is licensed and in good standing in a jurisdiction other than Virginia. The importance of these issues to contemporary law practice cannot be overstated.

A hypothetical will help develop the questions presented:

> A law firm is located only in Virginia. Some of the lawyers in the law firm are active members of the Virginia State Bar and in good standing. However, several of the firm's partners and associates are licensed to practice law in other U.S. jurisdictions, but not in Virginia. These foreign lawyers are: based in the Virginia law firm; use the law firm's Virginia address in their communications with clients, third parties and the general public; and have established an office and a "systematic and continuous presence in Virginia for the practice of law." The firm and these foreign lawyers provide legal services to clients in Virginia, throughout the U.S. and abroad. Some of the foreign lawyers in the firm work on matters involving Virginia clients governed by Virginia law. Others work only on matters involving the law of their admitting jurisdiction. Still others limit their practice exclusively to matters involving areas of federal practice, international law or third country law.[2]

The initial question raised is, are the foreign lawyers practicing in this firm engaged in the unauthorized practice of law? In this hypothetical, the foreign lawyers are practicing "continuously and systematically" in a Virginia law firm. Whether they are authorized to do so is controlled by state and federal law.

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[1] Report of the American Bar Association's Multijurisdictional Practice Commission to the ABA House of Delegates (August 2002) at 12; found at http://www.abanet.org/cpr/mjp/intro-cover.pdf

[2] For purposes of this opinion, federal practice excludes bankruptcy practice but refers to practice before agencies of the United States government. Third country law means the law of a foreign nation in which the foreign lawyer is not admitted or otherwise authorized to practice. International law means practice in which international laws, treaties, compacts, conventions, etc., are applicable to a legal matter.

Later, this opinion will also discuss foreign lawyer practice in the context of a Virginia law firm hiring a contract lawyer who is not admitted to practice in Virginia, but is admitted to practice in another United States jurisdiction or a foreign nation. If this firm were to hire a contract lawyer to assist with one specific matter involving Virginia law, would the contract lawyer have to be licensed to practice law in Virginia? Does it matter how long the project / matter lasts? Finally, what if the firm hired the contract lawyer to work over a period of time on several different Virginia matters? In this part of the opinion, the Committee will discuss contract lawyers whose activity might be either "temporary and occasional practice" or a "continuous and systematic" practice.

Applicable Rules and Prior Opinions

The controlling authority for these inquiries is Rule 5.5(c) and (d)(4)(i-iv) of Virginia's Rules of Professional Conduct:

> (c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (d) Foreign Lawyers:
>
> (1) "Foreign Lawyer" is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.
>
> (2) A Foreign Lawyer shall not, except as authorized by these Rules or other law:
> (i) establish an office or other systematic and continuous presence in Virginia for the practice of law, which may occur even if the Foreign Lawyer is not physically present in Virginia; or
> (ii) hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.
>
> (3) A Foreign Lawyer shall inform the client and interested third parties in writing:
> (i) that the lawyer is not admitted to practice law in Virginia;
>
> (ii) the jurisdiction(s) in which the lawyer is licensed to practice; and

(iii) the lawyer's office address in the foreign jurisdiction.

(4) A Foreign Lawyer may, after informing the client as required in 3(i)-(iii) above, provide legal services on a temporary and occasional basis in Virginia that:

(i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia or admitted under Part I of Rule 1A:5 of this Court and who actively participates in the matter;

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law.

Comment [4] to Rule 5.5 provides guidance in the application of the foregoing portions of the Rule:

> ...Despite the foregoing general prohibition, a Foreign Lawyer may establish an office or other systematic and continuous presence in Virginia *if the Foreign Lawyer's practice is limited to areas which by state or federal law* do not require admission to the Virginia State Bar. (Emphasis added).

To apply these Rules and Comment [4] in this opinion, the Committee examines how Virginia law addressed foreign lawyer practice prior to their adoption.

Foreign Lawyer Practice Before Rules 5.5 and 8.5 were Amended

Before the Virginia Supreme Court amended Rule 5.5 in March 2009, Virginia's Unauthorized Practice of Law Rules regulated the practice of law in Virginia by non-Virginia lawyers.

UPL Opinions 195 and 201 addressed foreign lawyers practicing in a Virginia law firm. In UPL Opinion 195, the Committee observed that although Part 6, §I (C) would authorize some temporary transactional work by a foreign lawyer in Virginia,[3] it did not allow the foreign lawyer to establish a regular practice in Virginia of advising clients on matters involving Virginia law. The Committee opined that if a foreign lawyer was employed in a law office in Virginia, the foreign lawyer's practice must be limited to advising clients on matters involving the law of the jurisdiction where the lawyer is admitted. If the foreign lawyer provides legal services to clients on matters involving Virginia law, the foreign lawyer may do so only under the direct supervision of a Virginia licensed lawyer before any of the foreign lawyer's work product is delivered to the client.

In UPL Opinion 201, the Committee addressed the issue of a foreign lawyer maintaining an office in Virginia, i.e., practicing in the Virginia office of a multi-jurisdictional law firm and found that this would *not* be unauthorized practice if: 1) the lawyer advised clients on matters involving the law of the jurisdiction in which he/she was admitted to practice; or 2) the lawyer advised and prepared legal documents for a client concerning matters involving federal law for cases before a federal court or agency to the extent the federal matter did not impact Virginia law and to the extent Virginia legal issues were not involved; and provided "any law firm letterhead stationery or other public communications identifying the lawyer as practicing in the Virginia firm [denoted] the limitations on that lawyer's practice," i.e. where the lawyer is licensed to practice. UPL Op. 201 (2001). Outside of the limits of these specific exceptions, "a non-Virginia licensed lawyer practicing in the Virginia office of a multi-jurisdictional law firm cannot meet with clients in Virginia to give legal advice involving the application of the law of a jurisdiction in which the lawyer is not admitted to practice." *Id.*

Foreign Lawyer Practice in Virginia Under Rules 5.5 and 8.5

Rule 5.5 recognizes a similar scope of permissible practice; however neither the rule nor its comments address specifically whether the prohibition against establishing an office or continuous, systematic presence in Virginia applies when a lawyer is practicing only the law of the jurisdiction in which he/she is licensed. Comment [4] to Rule 5.5 provides that a foreign lawyer can maintain/establish "an office or other systematic and continuous presence in Virginia if the foreign lawyer's practice *is limited to areas which by state or federal law do not require admission to the Virginia State Bar.*" (Emphasis added). The italicized language invites the Committee to consider the state law that had authorized a foreign lawyer to practice in Virginia before the adoption of the amendments to Rules 5.5 and 8.5. The cited prior opinions of the UPL Committee were approved and

[3] "However the term 'non-lawyer' shall not include foreign lawyers who provide legal services in Virginia to clients under the following restrictions and circumstances: (1) such foreign lawyer must be admitted to practice and in good standing in any state in the United States; (2) the services must be on an occasional basis only and incidental to representation of a client whom the lawyer represents elsewhere; and (3) the client must be informed that the lawyer is not admitted in Virginia." *See* order entered September 18, 1996, by the Supreme Court of Virginia.

adopted by the Supreme Court of Virginia and, therefore, represent the state law in effect at the time the Virginia State Bar's Multijurisdictional Task Force drafted the amendments to Rules 5.5 and 8.5.

The Committee concludes that the foreign lawyers who are licensed to practice in other U.S. jurisdictions and based in the multi-jurisdictional law firm in Virginia would not be engaging in unauthorized practice of law in violation of Rule 5.5 so long as they limited their practice to the law of the jurisdiction/s where they are licensed, to federal law not involving Virginia law, or to temporary and occasional practice as authorized by Rule 5.5(d)(4)(i)-(iii). The UPL opinions cited herein, approved by the Virginia Supreme Court, defined the scope or permissible foreign lawyer practice and the Multijurisdictional Task Force's proposal to amend Rule 5.5 did not overrule, but rather embraced, the Virginia law that was in effect at that time.

A foreign lawyer may also maintain an office in Virginia to practice the law of a foreign nation in which the lawyer is admitted if the foreign lawyer is certified to practice as a "Foreign Legal Consultant" under Rule 1A:7 of the Supreme Court of Virginia. The Foreign Legal Consultant may also engage in practice in Virginia to the extent authorized by Rule 5.5(d)(4)(i)-(iv). As Comment [13] to Rule 5.5 explains, the general safe-harbor provision found in Rule 5.5(d)(4)(iv) applies to foreign lawyers who are admitted to practice only in a foreign nation.

However, foreign lawyers who are based in Virginia may not practice Virginia law on a "systematic and continuous" basis. Rule 5.5(d)(2)(i). Such activity would be conduct in violation of the rules regulating the practice of law in Virginia. Rule 5.5(c). The foreign lawyer would also be subject to the disciplinary authority of the Virginia State Bar as provided in Rule 8.5.

Foreign Lawyers Whose Practice is Limited to Matters Involving Federal Law

Foreign lawyers who practice exclusively federal law need not be licensed in Virginia to maintain an office in Virginia. In *Sperry v. Florida ex rel. Florida Bar,* 373 U.S. 379 (1963), the U.S. Supreme Court addressed the question of whether a non-lawyer practitioner duly registered and authorized to practice before the United States Patent and Trademark Office, but not licensed as an attorney in any jurisdiction, could engage in a patent practice in a jurisdiction other than the jurisdiction in which the Patent Office is located, even though the conduct could be considered the practice of law in the other jurisdiction. The Court's answer was a clear "yes," based on the authority granted in the Supremacy Clause of the U.S. Constitution and the authority granted to the Commissioner of Patents, in 35 U.S.C. §31, to "prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office." The Court recognized that pursuant to the Supremacy Clause of the U.S. Constitution:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress." *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 566.

Id. at 385. Virginia has applied the federal supremacy doctrine in its UPL Opinions and Unauthorized Practice Rules. *See, e.g.*, UPL Op. 210 (2006) and UPR 9 ("Administrative Agency Practice").[4] In UPL Opinion 210, the requestor asked whether it is the unauthorized practice of law for a foreign lawyer who is a member of a Virginia law firm, to render U.S. patent advice and render patent law opinions in Virginia to clients who may be located anywhere in the world. The Committee responded "no," this conduct would not be the unauthorized practice of law, citing the *Sperry* decision:

> Based on this authority, an attorney who is licensed other than in Virginia, who is registered and authorized to practice before the U.S. Patent Office and who is a member of a Virginia law firm can provide all legal services and representation related to a patent law practice to all clients needing such services and representation regardless of where the clients are located. These services and representation may include rendering legal advice and/or written opinions for clients on issues such as patent infringement, patent claim construction, patent validity, or enforceability of a patent. The patent attorney may provide such advice and opinions to a client whether related to a matter the patent attorney is actually handling for the client before the USPTO or not. The patent attorney can conduct this practice and provide these services while physically in Virginia and without the supervision or association of a Virginia licensed attorney, so long as the patent attorney limits his/her activity to the practice of patent law and is not in any manner attempting to practice Virginia law. Provided the patent attorney's practice is limited as described herein, he or she may also maintain an office in Virginia to conduct that limited practice. If the patent attorney is a member of a law firm with offices in Virginia and elsewhere, the extent to which the patent attorney can conduct his/her practice outside of Virginia will depend upon the unauthorized practice rules and/or rules of professional conduct in those other jurisdictions. If the patent attorney provides advice and counsel regarding patent law to a Virginia client from a location outside of Virginia, this would not be the unauthorized practice of law in Virginia because the attorney is not

[4] Code of Virginia, Vol. 11, Va. S. Ct. R., pt. 6, §I (Unauthorized Practice Rules) (2010)

physically in Virginia and because he/she is otherwise authorized to practice patent law.

Comment [4] to Rule 5.5 explains that a foreign lawyer may establish an office or other systematic and continuous presence in Virginia if the foreign lawyer's practice is limited to areas which by state or federal law do not require admission to the Virginia State Bar. Examples include those lawyers with practices limited to immigration or military law or who practice before the Internal Revenue Service, the United States Tax Court, or the United States Patent and Trademark Office. See also *Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005) (federal law controls whether a lawyer not licensed in state may represent claimant and recover statutory fees in federal administrative proceeding).[5]

Therefore, the foreign lawyers in the Virginia law firm may engage in their limited scope practice on a "continuous and systematic" basis, and may engage in temporary and occasional practice as permitted by Rule 5.5(d)(4)(i)-(iv), as applicable. Within the scope of their limited practice, these foreign lawyers may advise clients and render legal opinions to clients located in other states or countries without violating Virginia's prohibition against the unauthorized practice of law.

Note, however, that a "federal practice" does not in itself exempt foreign lawyers from the reach of state disciplinary authorities or unauthorized practice laws. For example, the Ninth Circuit made clear in *Gadda v. Ashcroft*, 377 F.3d 934 (9th Cir. 2004), that federal law did not preempt a state from disbarring a foreign lawyer over conduct that occurred in the lawyer's federal immigration practice. Rejecting the foreign lawyer's preemption argument, the court pointed out that the Board of Immigration Appeals' regulations not only "leave room" for supplementary state regulations, but in fact condition a lawyer's ability to practice in immigration court on the lawyer's continued good standing as a member of a state bar. To be sure, Rule 8.5 of the Virginia Rules of Professional Conduct states that "[a] lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia."

In addition, not all types of practices that a lawyer might characterize as a federal practice fit entirely within the *Sperry*[6] "federal practice" exemption. For example, a bankruptcy practice may involve the application of Virginia law to resolve particular legal issues, i.e., such as the debtor's homestead exemption and status or priority of claims or liens. In addition, the local rules of the bankruptcy courts sitting in Virginia

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[5] See generally *Restatement (Third) of the Law Governing Lawyers* §3(2) (2000) (lawyer may represent client before federal tribunal or agency in another jurisdiction in accordance with requirements of tribunal or agency).

[6] *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

require a lawyer to be admitted to the Virginia State Bar to practice regularly in that court.[7]

Although a foreign lawyer is not required to be admitted to practice in Virginia to practice before the United States Patent and Trademark Office, not all issues regarding patents fall within the *Sperry* exemption. For example, the assignment of the patent to a third party or the organization of a corporate entity to market or franchise the invention may be subject to the law of Virginia. This could also be the case regarding contracts with investors in the subject patent. If the legal work related to the patent is outside the scope of practice before the Patent Office, the lawyer must either be admitted in Virginia to perform that work or associate with an active member of the Virginia State Bar.

Similarly, a federal procurement practice may involve contractual agreements with third parties governed by state rather than federal law. Thus, a federal procurement practitioner may need to be admitted to practice in Virginia to perform this work on a "continuous and systematic" basis.

Foreign Lawyers Practicing the Law of a Jurisdiction in which They Are Not Admitted

The facts in the hypothetical state that "the firm and these lawyers provide legal services to clients throughout the U.S. and abroad." UPL Opinions 158, 195 and 201 would hold that the foreign lawyers could not advise clients on a "systematic and continuous" basis with respect to matters governed by the law of a jurisdiction in which the lawyer is *not* admitted to practice. Applying the cited UPL Opinions, a Maryland-licensed lawyer working in this Virginia firm could not practice "continuously and systematically" in Virginia advising clients on matters those clients have pending in New York that are governed by New York law.

The Committee believes that the conclusion reached in the prior UPL Opinions is overruled by the adoption of Rule 5.5 in at least this respect: whether a foreign lawyer violates Rule 5.5(c), by advising clients on matters involving the law of a jurisdiction where the foreign lawyer is not authorized to practice, should be determined by examining the host jurisdiction's rules and regulations instead of Virginia law or the law of the jurisdiction where the foreign lawyer is admitted. Rule 5.5 (c) states:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in *that* jurisdiction, or assist another in doing so. (Emphasis added).

Virginia's rules are not dispositive of whether the foreign lawyer is engaged in the unauthorized practice of law in another jurisdiction. The Committee believes that this language looks to the law of the host state or country to determine if the foreign lawyer is

[7] E.D. Va. Local Bankruptcy Rule 2090-1(B) (eff. 12/10/10); W.D. Va. Local Bankruptcy Rule 2090-1(B) (2010).

practicing in violation of the regulation of the legal profession in *that* jurisdiction. For example, New York law should govern whether a foreign lawyer not authorized to practice in New York may advise New York clients on matters involving New York law. The foreign lawyer's physical presence in Virginia may not be a sufficient basis to apply Virginia's rules over New York's rules governing foreign lawyer practice. Similarly, whether the Maryland lawyer could advise and counsel a client on a matter pending in New York on a "temporary or occasional" basis would be up to the rules and regulations of the legal profession in New York governing temporary practice by foreign lawyers.

Temporary Practice for Contract Lawyers

The scope of practice permitted of a contract lawyer who is not admitted in Virginia is subject to the foregoing analysis. If a Virginia law firm hires a contract lawyer to work on a matter involving Virginia law, the contract lawyer either must be licensed in Virginia or work in association with a Virginia licensed lawyer in the firm on a temporary basis as permitted under Rule 5.5(d)(4)(i), for transactional work; or Rule 5.5(d)(4)(ii) for pre-litigation activity in a matter in which the contract lawyer reasonably expects to be admitted *pro hac vice*. Rules 5.5(d)(4)(iii) and (iv)[8] are generally not applicable to contract lawyers. If the foreign contract lawyer is hired to work only on matters involving federal law or the law of the jurisdiction in which the foreign contract lawyer is admitted, the foreign lawyer does not need to be licensed to practice in Virginia.

How do the rules define "temporary and occasional practice?" Comment [6] to Rule 5.5 states:

> There is no single test to determine whether a Foreign Lawyer's services are provided on a "temporary basis" in Virginia, and may therefore be permissible under paragraph (d)(4). Services may be "temporary" even though the Foreign Lawyer provides services in Virginia on a recurring basis, or for an extended period of time, as when the Foreign Lawyer is representing a client in a single lengthy negotiation or litigation. "Temporary" refers to the duration of the Foreign lawyer's presence and provision of services, while "occasional" refers to the frequency

[8] Subparagraph (d)(4)(iv) does provide a "safe harbor" which allows a foreign lawyer who is admitted to practice only in a foreign nation to engage in any nonlitigation practice on a temporary basis when that activity arises out of or is "reasonably related" to the foreign lawyer's current practice. The rule does not define "reasonably related," but suggests in the comments that a matter is reasonably related if: (1) there is an ongoing relationship with a client; (2) the client has "substantial contacts" with the jurisdiction where the foreign lawyer is admitted; or (3) the foreign lawyer has developed a recognized expertise in matters involving a particular body of federal, foreign, or otherwise nationally uniform law. As stated in the text of this opinion a foreign contract lawyer hired by a law firm from a temporary placement agency would not likely be able to invoke this "safe harbor."

with which the Foreign lawyer comes into Virginia to provide legal services.

For example, if a firm hires a contract lawyer who is not licensed in Virginia to work solely on one specific Virginia matter/case in association with a Virginia-licensed lawyer, this should be considered "temporary and occasional practice" and allowed under Rule 5.5(d)(4)(i). If a firm hires a foreign contract lawyer to work on several and various Virginia matters/cases over a period of time, then the foreign lawyer's practice could be regarded as "continuous and systematic," and beyond the scope of temporary practice contemplated by Rule 5.5 (d)(4), thus requiring this contract lawyer to obtain a Virginia license.

Conclusion

Foreign lawyers, i.e., non-Virginia lawyers admitted to practice in the United States or a foreign nation, may practice in a Virginia law firm or may establish an office or other systematic and continuous presence in Virginia if authorized by Virginia or federal law. A lawyer admitted to practice in a foreign nation may establish an office or practice in a law firm in Virginia only if the foreign lawyer is certified as "Foreign Legal Consultant" pursuant to Rule 1A:7 of the Supreme Court of Virginia. Foreign lawyers practicing in a Virginia law firm may not advise clients on matters involving Virginia law except as permitted by Rule 5.5(d)(4). Foreign lawyers who limit their practice exclusively to federal practices in which admission to the Virginia State Bar is not required may maintain an office or practice systematically and continuously in Virginia. Likewise, if their practice is limited to matters involving the law of the state or country in which they are admitted to practice, foreign lawyers may practice in Virginia on a systematic and continuous basis. Contract lawyers not licensed to practice in Virginia who are hired by a Virginia law firm on a temporary basis may practice to the extent permitted by Rule 5.5(d)(4), or on a continuous and systematic basis if Virginia or federal law does not require their admission to the Virginia State Bar.

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