

A close-up photograph of a hand holding a piece of white chalk, writing the word "Ethics" in a cursive, handwritten style on a blackboard. The chalk is positioned at the end of a long, horizontal stroke that underlines the word. The background is a dark, textured blackboard surface.

Ethics

Ethics Essentials

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ALLEN ALLEN
ALLEN & ALLEN
Protecting the Injured Since 1910

Agenda

Part I. Rule Changes

Part II. Case Law

Part III. Rules to Remember

Part IV. Confidentiality and Privilege

Part V. Conflicts of Interest

Part I.

Rule Changes

Conflict of Interest: Prohibited Transactions

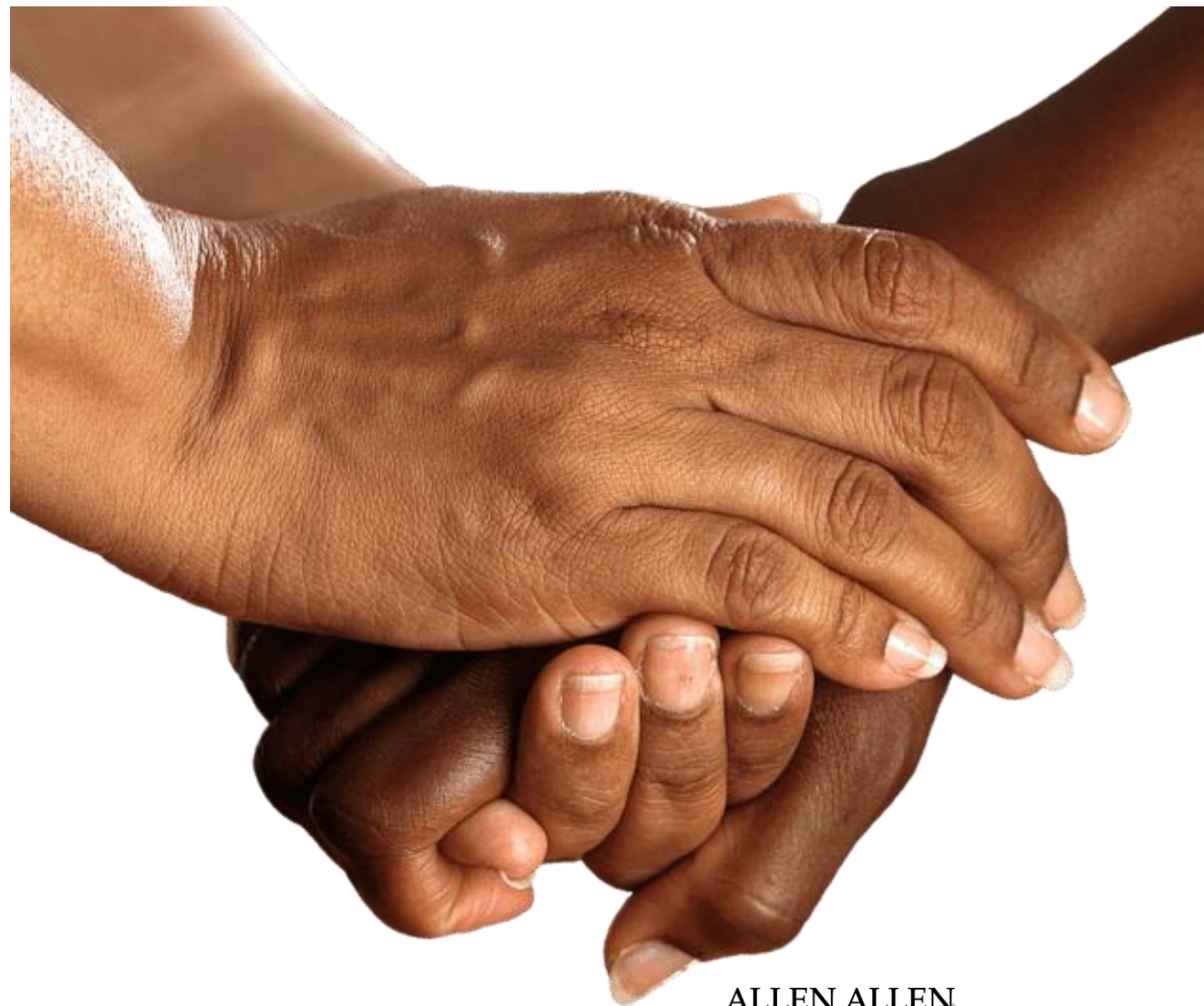
Disciplinary Rule 1.8



Financial Assistance to Clients in Contingency Fee Cases

- lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter

Pro Bono



Pro Bono

(Existing) Rule 6.1

(a) lawyer should render at least **two percent per year** of the lawyer's professional time to pro bono publico legal services

(b) law firm or other group of lawyers may satisfy their responsibility **collectively**

(c) alternative method - direct **financial support** of programs that provide direct delivery of legal services

Voluntary Reporting

Va. Sup. Ct. R. pt. 6, sec. IV, 22

- ✓ 1. Number of Pro Bono hours from July 1 to June 30
- ✓ 2. Amount of Financial Contribution
- ✓ 3. Not Applicable
- ✓ 4. No Report

Rules to Encourage Pro Bono

Va. Sup. Ct. R. 1:5

- Added (f) Limited Scope of Appearance ... Completion or Termination of Appearance

Part 6, Section IV, Para. 3

- Classes of Membership

Wellness

Disciplinary Rule 1.1. Competence

- Encourages lawyers to maintain mental, emotional, and physical ability necessary to represent clients

Mandatory Continuing Legal Education Rule

Each active member of Virginia State Bar shall certify whether they have attended at least one credit hour of lawyer well-being education related to the practice of law within past **3 years**

Attorney Wellness Fund

- Created Attorney Wellness Fund, funded by VSB assessment
- Will fund judges and lawyers assistance program (JLAP), CLE courses, and other initiatives relating to wellness, behavioral health, and substance abuse

Part II.

Case Law

Fees



Roberts v. Va. State Bar (2018)

Rule 1.15. Fees

- Sanctions because attorney violated Rules 1.15(a)(3)(ii) and 1.15(b)(5)
- Even though client clearly seemed to owe the money, there was a dispute, so lawyer was not allowed to appropriate the funds



***Morrissey v. Va. State Bar
ex rel. Third Dist. Comm.
829 S.E.2d 738 (2019)***

Rule 5.1(b)

- Responsibilities of Partners and Supervisory Lawyers

Rule 5.5(c)

- Unauthorized Practice of Law (Third Year Practice Certificate)

Rule 8.4(b)

- Misconduct

Rule 5.1(b). Responsibilities of Partners and Supervisory Lawyers

- 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.

Rule 5.5(c)

Unauthorized Practice of Law

- Lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another lawyer in doing so.

- Partner directed associate attorney who had handled numerous cases with her third-year practice certificate to the court to handle a routine hearing
- Associate had passed the bar exam but not yet taken her oath
- Partner violated Rules 5.1(b) and 5.5(c) for sending associate to court by herself because her **third-year practice certificate expired by operation of law** when she took the bar exam

Rule 8.4(b). Misconduct

- It is professional misconduct for a lawyer to ... commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law.

- Lawyer had sexual relations with a 17-year old minor and was subsequently convicted of contributing to the delinquency of a minor
- Held that attorney knowingly broke the law which violated the integrity of the legal system
- Breaking a law does not always equate to a violation of Rule 8.4
- But it did in these circumstances

Rule 3.3.

Candor Toward the Tribunal

Cofield v. Va. State Bar ex rel. Second Dist. Comm.
827 S.E.2d 602 (2019) (unpub.)

- Plaintiff cited a regulation with five subsections, (a) to (e)
- Only the first four subsections were in the regulation
- Judge asked for clarification
- Plaintiff's counsel said the 5th one was actually from the "Questions and Answers" section of the HHS website

Cofield v. Va. State Bar

Judge reported the lawyer to the State Bar for violating Rule 1.1 [Competence] and 3.3(a)(1) [Candor Toward a Tribunal]

Said the way the lawyer wrote it made it appear that she was quoting the regulation

Cofield v. Va. State Bar

Lawyer did not violate Rule 1.1, Competence

Lawyer did violate Rule 3.3(a)(1), Candor Toward a Tribunal

- Lawyer shall not knowingly “make a false statement of fact or law to a tribunal”

Quasi-Pro Se Case

Signing of a Pleading by an Unrepresented Party

McGinnis v. Commonwealth
296 Va. 489 (2018)



Facts

- Criminal defendant was convicted of larceny
- Was represented by counsel during trial
- On 20th day after conviction, defendant (not his attorney) filed a pro se motion to set aside convictions
- Court of Appeals affirmed convictions without reaching merits of his appeal, held that defendant's assignment of error was not preserved for appeal under Rule 5A:18 because it was not signed pursuant to Va. Code § 8.01-271.1

McGinnis v. Commonwealth

- Va. Code § 8.01-271.1 is not applicable
- Statute does not contemplate a pleading signed by a party who may or may not have authority to do so

Part III.

Rules to Remember



DILIGENCE

Rule 1.3

Diligence

- Don't let cases languish in our files





COMMUNICATION

Rule 1.4

Communication

Lawyers must:

- Keep clients updated
- Call clients back
- Communicate settlement offers*

It's their case, not ours

Part IV.

Confidentiality and Privilege

Confidentiality (Rule 1.6)

1. Duty of Confidentiality
2. Attorney-Client Privilege
3. Work Product Doctrine

Duty of Confidentiality

Confidentiality

A lawyer shall not reveal:

- Information protected by the attorney-client privilege
- Information gained in the professional relationship that the client has requested be held inviolate ...
- or the disclosure of which would be **embarrassing** or would be likely to be **detrimental** to the client

Purpose

- Encourages open communication between clients and attorneys
- Encourages clients to seek legal assistance

Who Does it Protect?

- Current Clients
- Former Clients
- Prospective Clients
- Deceased Clients

ALL CLIENTS

Attorney-Client Privilege

Attorney-Client Privilege

[Attorney ----- Legal Advice ----- Client]

CONFIDENTIAL

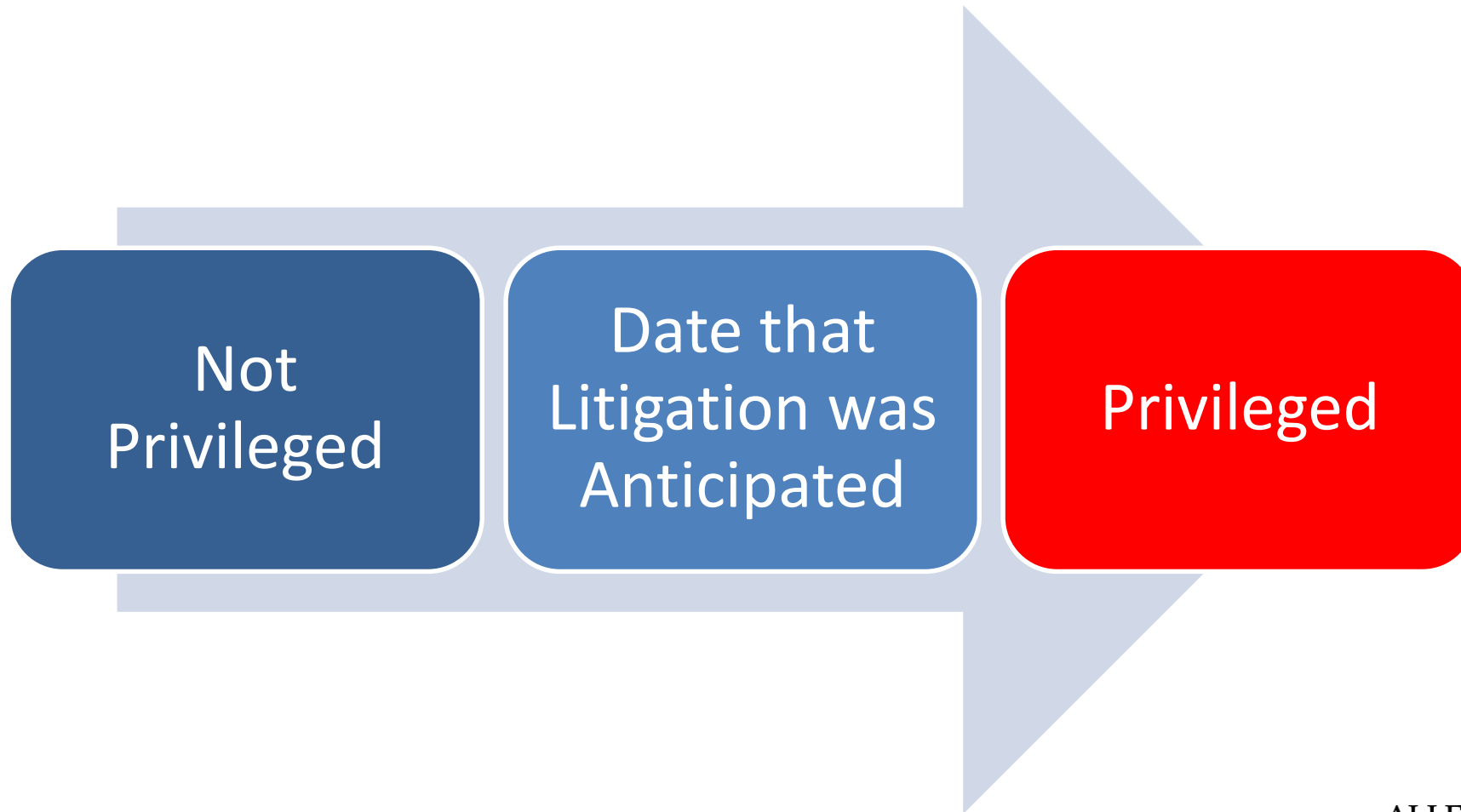
Work Product Doctrine

Work Product Doctrine

- Communications (and documents) created during or in anticipation of litigation

WHEN and WHY were the documents created?

Work Product Doctrine



Comparison

Attorney-Client Privilege	Work Product Doctrine
Attorney required	No attorney required
Confidential information	Information does not have to be confidential
Requires communication	Protects information that has never been communicated to anyone

Not Work Product

Created in the *ordinary course of business*:

- accident reports
- insurance investigation reports
- statements taken by insurance adjusters

“Substantial Need”

- Destruction of evidence
- Missing or deceased witnesses
- Surveillance videotapes

Confidentiality

- ... or the disclosure of which would be embarrassing or would be likely to be detrimental to the client

NO EXCEPTIONS

What is Embarrassing or Detrimental?

- Client's identity
- How the accident happened
- Injuries

EVERYTHING

Even if it is in the
public record
(internet, filings)



Gossip within the Firm



But it's OK if ...

- We have client consent
- It impliedly authorized in order to carry out the representation
- We share with other attorneys in the firm “in the course of the firm’s practice”



WAIVER
(AND HOW TO AVOID IT)

Communicating in the Presence of Third Parties

- Destroys privilege

Exceptions:

- Translators
- Sign language interpreters
- Individuals whose role is to help the lawyer provide legal advice to the client (investigators, legal assistants)

Third Parties Who Destroy Privilege

Third Parties Who Destroy Privilege

- Friends
- Family members
- Parents (Child >18)
- Spouses
- Doctors
- Coworkers
- Witnesses
- Court Reporters and Videographers



Inside the Office

Outside the Office

- Hallways
- Elevators
- Coffee Stations
- Bathrooms
- Lobby
- Conference Rooms

Handling Client Information

- Taking files home
- Guests in your office
- Files in restrooms and break rooms
- “Selfies”
- Files in conference rooms
- Lock computer when away from your desk

Communicating with Clients

1. Shared Phone?
2. Shared Email?
3. Work Email or Phone?

Should the client get a new email account?

Communicating with Experts

Two Types of Experts:

- Testifying Experts
- Non-Testifying Experts (Consultants)

Testifying Experts

- Use email carefully.
- Encourage using the telephone.
- Is an email necessary?
- Communications are potentially discoverable. Be careful of what you say or write to an expert.



EMAILS



“REPLY ALL”



Before Hitting “Send”

- Double-check the “to” and “cc” line
- Auto-fill function
- Designate “privileged”

Open and check all email attachments

Before Hitting “Send”

- Be careful when forwarding emails!
- Delete emails “down the chain” if needed
- Do you need to rename the subject of the email or the title of the attachment?

G.D.C. cases can be appealed to Circuit Court!

Part V.

Conflicts of Interest



Duty of Loyalty



Duty of Loyalty

Attorneys can't represent 2 clients whose interests are adverse to each other

Duty of Loyalty

- We can't use information that we learn through the attorney-client relationship against the client (or former client) who gives us that information

CONCURRENT CONFLICTS

Pure Conflict

- When your client is a defendant in a case that you are handling

Former Clients

Can you take a case against a former client?

YES

Unless you obtained harmful information about the client during the prior representation

Joint Representations

- Employer and Employee?

Maybe Not

But **YES** with informed consent **in writing**

Wrongful Death Cases

Can you represent all of the beneficiaries in a wrongful death case?

Generally **NO**

But **YES** with informed consent **in writing**



Imputed Disqualification



PROSPECTIVE CLIENTS

Prospective Clients – Rule 1.18

Who?

- Anyone who talks to us about hiring you

Even if they don't hire you

- Information you discussed is confidential
- You can't take a case against them or use the information against them

Ethnics



Questions?