ETHICS ESSENTIALS

The Allen Law Firm CLE Series
October 10, 2019

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THE RULES

1. Unauthorized Practice of Law
    a. Giving legal advice (UPR 1-101)
    b. Non-lawyer acting as an attorney (Va. Sup. Ct. R. pt. 6, sec. I, Prac. of Law)
    c. Signing legal documents (UPR 1-101)
2. Diligence (Rule 1.3)
3. Communication (Rule 1.4)
    a. Status updates
    b. Duty to inform and advise client
    c. Communicating settlement offers
4. Dealing with Represented and Unrepresented People
    a. Truthfulness in Statements to Others (Rule 4.1)
    b. Communication with Persons Represented by Counsel (Rule 4.2)
    c. Dealing with Unrepresented Persons (Rule 4.3)
5. Respect for Rights of Third Persons (Rule 4.4)
6. Fairness to Opposing Counsel (Rule 3.4)
7. Confidentiality (Rule 1.6)
8. Conflicts of Interest & Imputed Disqualification
    a. Conflict of Interest: General Rule (Rule 1.7)
    b. Conflict of Interest: Former Client (Rule 1.9)

c. Imputed Disqualification: General Rule (Rule 1.10)

9. Prospective Clients (Rule 1.18)

10. Referral Fees (Rule 7.3)

11. Safekeeping Property (Rule 1.15)

    a. Property

    b. Client Funds

    c. Liens

12. Maintaining the Integrity of the Profession

    a. Candor Toward the Tribunal (Rule 3.3)

    b. Judicial Officials (Rule 8.2)

    c. Trial Publicity (Rule 3.6)

    d. Marketing: Direct Contact with Potential Clients (Rule 7.3)

    e. Marketing: Communication of Fields of Practice and Certification (Rule 7.4)

13. Financial Assistance to a Client (Rule 1.8)

14. Terminating Representation (Rule 1.16)

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PART 1

RULE CHANGES

For more information, see http://www.courts.state.va.us/courts/scv/amend.html

Rules of Supreme Court of Virginia

Va. Sup. Ct. R. & Effective Date	Subject	Notes
Rule 1:5 Amended, 1/01/19[1]	Counsel and Parties Appearing Without Counsel	Adding (f) Limited Scope of Appearance; Notice; Service; Completion or Termination of Appearance
Rule 1A:1 Amended, 12/01/18[2]	Admission to Practice in this Commonwealth Without Examination	Any person who has been admitted to practice law in another jurisdiction may file an application to practice law without an examination provided that the individual: (1) is licensed in a jurisdiction with reciprocity, (2) files an application (with a certificate of good standing and certification that he or she has been in practice for at least 5 years and that he or she has completed at least 12 Virginia CLE hours), (3) takes the oath, and (4) maintains an active membership with the Virginia State Bar.

[1] http://www.courts.state.va.us/courts/scv/amendments/2018_1031_rules_1_5_etc.pdf
[2] http://www.courts.state.va.us/courts/scv/amendments/2018_0914_rule_1a_1.pdf

Ethics Rules and Part 6

Rule and Effective Date	Subject
Rule 1.1, Part 6, Section II, Comment Amended, 10/31/18[3]	Competence [Wellness] Added Comment 7, which states that a lawyer's mental, emotional and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law, and that maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law.
Rule 1.8, Part 6, Section II Amended, 2/15/19[4]	Conflict of Interest: Prohibited Transactions [Financial Assistance to Clients in Contingency Fee Cases] Revised Paragraph 1.8(e)(1) by replacing "provided the client remains ultimately liable for such costs and expenses" with "the repayment of which may be contingent on the outcome of the matter." Also added new Comment [10] (Financial Assistance to Clients).
Part 6, Section III, Canon 3 Amended, 12/12/18[5]	A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently
Part 6, Section III, Canon 4 Amended, 1/10/19[6]	A Judge May Engage in Extra-Judicial Activities Designed to Improve the Law, the Legal System, and the Administration of Justice, and Shall Conduct Any Such Extra-Judicial Activities in a Manner That Minimizes the Risk of Conflict with Judicial Obligations

[3] http://www.courts.state.va.us/courts/scv/amendments/2018_1031_sect_ii_rule_1_1_comment_7.pdf
[4] http://www.courts.state.va.us/courts/scv/amendments_tracked/2018_1212_part_six_sect_ii_rule_1_8.pdf
[5] http://www.courts.state.va.us/courts/scv/amendments_tracked/2018_1212_part_six_sect_iii_canon_3b7.pdf
[6] http://www.courts.state.va.us/courts/scv/amendments/2019_0110_part_six_sect_iii_canon_4.pdf

Rule and Effective Date	Subject
Part 6, Section IV, Para. 3 Amended 1/01/19[7]	Classes of Membership Effective 3/01/2018. Modified Paragraph 3 to allow Emeritus Members to provide pro bono services. The amendments alter the number of years an attorney must have been engaged in active practice before becoming an emeritus member and abolishes the requirement to practice under the direct supervision of legal aid attorneys. Effective 1/01/2019. Amended the rule to allow a lawyer suffering from a permanent impairment, such as an irreversible cognitive decline, to retire with dignity instead of having the lawyer's license suspended on impairment grounds. With this amendment, the impaired lawyer could transfer to the Disabled and Retired class of membership.
Part 6, Section IV, Para. 13 Amended, 6/15/18[8]	Procedure for Disciplining, Suspending and Disbarring Attorneys Added definitions (Court Reporter, Respondent, etc.)
Part 6, Section IV, Para. 13-1.1 New Rule, 6/15/18[9]	Procedure for Disciplining, Suspending and Disbarring Attorneys Burden of Proof in Disciplinary Proceedings is clear and convincing evidence.
Part 6, Section IV, Para. 16 Amended, 7/01/18[10]	Client's Protection Fund Effective 7/01/2018. Reduced the assessed fee on the bar's annual dues statement from $25 to $10.
Part 6, Section IV, Para. 22 New Rule, 12/01/18[11]	Voluntary Pro Bono Publico Legal Services Reporting Added the requirement to report (or choose not to report) pro bono hours or financial contributions to provide legal services to meet the needs described in Rule 6.1(a) of the Virginia Rules of Professional Conduct.

[7] http://www.courts.state.va.us/courts/scv/amendments/2018_1031_part_6_sect_iv_paras_3_and_13.pdf
[8] http://www.courts.state.va.us/courts/scv/amendments/2018_0416_part_6_sect_iv_para_13_1.pdf
[9] http://www.courts.state.va.us/courts/scv/amendments/2018_0416_part_6_sect_iv_para_13_1.pdf
[10] http://www.courts.state.va.us/courts/scv/amendments/2017_0928_part_6_sect_iv_para_16.pdf
[11] http://www.courts.state.va.us/courts/scv/amendments/part_6_sect_iv_para22.pdf

Rule and Effective Date	Subject
Part 6, Section I Amended, eff. 7/01/19[12]	Unauthorized Practice of Law Provides a comprehensive explanation of what it means to practice law in Virginia and identifies exceptions for certain categories of non-lawyers who are permitted to provide certain types of advice and services.
Part 6, Section IV, Para. 17 Amendment, eff. 7/01/19[13]	Mandatory Continuing Legal Education Rule Each active member of the 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 the past 3 years.
Part 6, Section IV, Para. 23 New Rule, eff. 7/01/19[14]	Attorney Wellness Fund Created an Attorney Wellness Fund, to be funded by an assessment from the Virginia State Bar of up to $30 each year from active members. The Fund will be used to fund a judges and lawyers assistance program (JLAP), CLE courses, and other initiatives relating to wellness, behavioral health, and substance abuse.
Part 6, Section III, Canon 4 Amendment, eff. 1/10/19[15]	Canons of Judicial Conduct A judge may engage in extra-judicial activities designed to improve the law, the legal system, and the administration of justice, and shall conduct any such extra-judicial activities in a manner that minimizes the risk of judicial obligations.

[12] http://www.courts.state.va.us/courts/scv/amendments/2019_0426_part_six_sect_i.pdf
[13] http://www.courts.state.va.us/courts/scv/amendments/2019_0426_part_six_sect_iv_para_17.pdf
[14] https://www.vsb.org/pro-guidelines/index.php/bar-govt/attorney_wellness_fund
[15] http://www.courts.state.va.us/courts/scv/amendments/2019_0110_part_six_sect_iii_canon_4.pdf

PART 2

Recent Legal Ethics Opinions

Legal Ethics Opinion & Date	Subject	Details
LEO 1750 4/20/18[16]	Lawyer Advertising and Solicitation	Discusses Rule 7.1 Communications Concerning a Lawyer's Services and Rule 7.3(d) Solicitation of Clients • Actors portraying lawyers is misleading, disclosure required • "No recovery; no fee" is misleading, disclaimer required • Firm Names and Offices • Cannot advise that an attorney must be consulted before speaking with an insurance company • Lawyer Referral Services permissible unless misleading • Specific or Cumulative Case Results/Jury Verdicts/Comparative Statements can be misleading, requires disclosure • Statements by Third Parties (*e.g.*, endorsements from former clients) • The Best Lawyers in America • Use of "Specialist" or "Specializing In" • Use of "Expert" and "Expertise"
LEO 1885 11/08/18[17]	Ethical considerations regarding a lawyer's participation in an online attorney-client matching service	
LEO 1889 11/08/18[18]	Scope of Representation – Duty of Court-Appointed Lawyer to Appeal Termination of Parental Rights Order	

[16] http://www.courts.state.va.us/courts/scv/amendments/2018_0420_leo_1750.pdf
[17] http://www.courts.state.va.us/courts/scv/amendments/2018_1108_leo_1885.pdf
[18] http://www.courts.state.va.us/courts/scv/amendments/2018_1108_leo_1889.pdf

PART 3

Virginia Supreme Court Decisions Concerning Legal Ethics

Rule 5.1(b). Responsibilities of Partners and Supervisory Lawyers
Rule 5.5(c). Unauthorized Practice of Law
Rule 8.4(b). Misconduct
Third Year Practice Certificate

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

Facts

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

- Lawyer violated Rule 8.4 for misconduct because he had sexual relations with a 17-year old minor and was subsequently convicted of contributing to the delinquency of a minor. The Court found that he knowingly broke the law, which violates the integrity of the legal system. The Court held that breaking a law does not always equate to a violation of Rule 8.4. However, under these circumstances (hiring an underage girl to work as a receptionist, initiating a sexual relationship in the office, bragging about it, and then attempting to shift the blame to others), the Court found a Rule 8.4 violation.

Lessons

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

- "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."

Rule 5.5(c). Unauthorized Practice of Law

- A 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.

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."

Rule 3.3. Candor Toward the Tribunal

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

Lesson

- Don't misrepresent what a statute says, and if you are going to add provisions that you find elsewhere, be sure that you don't make it look like you are quoting the statute. Because misleading the tribunal is an ethical violation – Rule 3.3(a)(1), Candor Toward the Tribunal.

Facts

- Personal injury suit. Plaintiff's counsel issued subpoena to nonparty hospital seeking access to plaintiff's electronic health records. The hospital agreed to provide access but because it used an internal provider portal to access patient records, it advised that it would charge a fee for providing a staff member to facilitate access.

- Plaintiff's counsel objected to providing the fee under HIPAA and HHS regulations which prohibit a health care provider from charging a fee to view preexisting health information:

    - "The fee may only (emphasis in the original CFR) include costs of (1) labor for copying; (2) supplies for creating the paper copy or CD, USB drive; (3) postage if requested to be mailed; (4) preparation of an explanation or summary of the PHI, if a summary is requested; (5) transferring (e.g., uploading, downloading, attaching, burning) electronic PHI to a web-based portal (where the **PHI is not already maintained in or accessible through the portal**). See, CFR 164.524(c)(3) and (4)." Cofield v. Va. State Bar ex rel. Second Dist. Comm., 827 S.E.2d 602, 603 (Va. 2019).

- The trial court judge presiding over the malpractice case found that only the first four factors were in the statute and asked for clarification. Plaintiff's counsel said the 5th one was actually from the "Questions and Answers" section of the HHS website.

- The Court reported the lawyer to the State Bar for violating Rule 1.1 and 3.3(a)(1). The Court stated that the way she wrote it made it appear that she was quoting the statute verbatim.

- The three-judge circuit court panel, and later the Supreme Court of Virginia, both found that the lawyer did not violate Rule 1.1 [Competence] but that she did violate Rule 3.3(a)(1) [Candor Toward a Tribunal. A lawyer shall not knowingly" (1) make a false statement of fact or law to a tribunal."]

Judicial Authority and Canons of Judicial Ethics

Sroufe v. Waldron, 829 S.E.2d 262 (Va. 2019)

Lesson

- Trial judges are not allowed to ignore the law in order to "send a message" to one of the parties.

Facts

- In a defamation case against a school division superintendent by an elementary school principal who was reassigned, the circuit judge erred in denying the defendant's motion to dismiss on the grounds that the statement made by him, taken as a whole, was a matter of opinion, not actionable in defamation.

- Although the circuit judge correctly recognized that the allegedly defamatory statement was non-actionable opinion, the judge consciously disregarded the law and permitted the jury to return a verdict and award damages on a statement that he knew was not actionable as defamation as a matter of law. This displays a profound misapprehension of the proper role and responsibilities of a judge

- The trial judge's misinterpretation and misuse of judicial power in this case unnecessarily prolonged trial and led to full appellate review on the merits, which has not only delayed the just adjudication the parties were entitled to, but also imposed very real financial burdens on them. This Court reversed the judgment of the circuit court and entered final judgment the defendant.

Language from the Opinion

- "The attitude expressed in the letter opinion is deeply troubling. It displays a profound misapprehension of the proper role and responsibilities of a judge. There is a difference between self-deprecating acknowledgement of the hierarchy within the judicial branch, and the possibility that one's ruling is erroneous on one hand, and recognition to the point of near-certainty what the correct legal ruling should be but consciously choosing to rule the opposite way—especially to "send a message" to one of the parties—on the other.

The first simply expresses an appreciation of human fallibility. The second is an abdication of the duty of a judge—to the parties, who bring their claims to the court for adjudication at great expense; to the attorneys, whose time and efforts are paid for and expended to present those claims competently and professionally; to the jurors, whose daily lives have been disrupted to aid the court in rendering judgment; and to the people of the Commonwealth, who entrust their judges to correctly apply their legal training, experience, and expertise when resolving the questions put to them for decision."

Rule 1.8(a). Fees

Meuse v. Henry, 296 Va. 164, 819 S.E.2d 220 (2018) (affirmed decision from Fairfax Cir. Ct.)

Lesson

- Contract was not void where the attorney substantially complied with the Virginia Rules of Professional Conduct.

Facts

- The circuit court did not err when it refused to vacate an arbitration award under the Virginia arbitration Act, Code § 8.01-581.010. The attorney involved substantially complied with the Rules of Professional Conduct. Although he failed to obtain consent in writing before entering a business relationship with the client, the failure did not rise to the level of a violation of public policy that requires voiding portions of a contract. The judgment of the circuit court is affirmed.

Rule 1.15(a)(3)(ii). Safekeeping Property
Rule 1.15(b)(5)

Roberts v. Va. State Bar, No. 180122, 2018 Va. LEXIS 166 (Sep. 6, 2018)

Lesson

- Lawyers are not allowed to take a fee from money under dispute

Facts

- A personal injury contingency fee contract had the following terms: (1) 1/3 fee; (2) 40% if recovery is within or after 45 days of first trial date; (3) settlement or award that includes attorney fees shall be paid to the law firm in addition to contingency fees; and (4) client pays all costs and expenses of the firm

- The contract also laid out requirements regarding balances in the lawyer's trust account. The contract required the client to maintain $150 balance in trust with the law firm and said that the firm could draw against the money held in trust for costs and expenses and also for payment of fees for services performed. The contract also said that if the law firm ceased to represent the client, any amount remaining in trust would be returned to the client, after deduction for costs, expenses, fees for service.

- The contract said that if the law firm ceased to represent the client, any amount remaining in trust would be returned to the client, after deduction for costs, expenses, fees for service.

- Finally, the contract said that in the event of termination by the client, that the client would still obligated to pay all bills the firm had incurred in addition to interest, costs and attorney's fees. It stated that there would be quantum meruit for attorney's fees in contingency fee cases and imposed an additional 25% fee if firm had to engage in collection efforts.

- The client terminated the representation. She had $150 in his trust account.

- The firm claimed that it spent $5K of its time representing the client.

- The client contested the amount, requested a breakdown of the $5K lien, and said that she disputed the fee.

- The client hired another lawyer, who requested the file.

- The previous lawyer forwarded the file and deducted $6.70 to cover mailing costs.

- The new lawyer filed a warrant in debt against law firm disputing the lien, but the warrant in debt was dismissed for lack of jurisdiction.

- The previous lawyer transferred the remaining $143.30 into its trust account as partial payment for its fees. The client filed a bar complaint.

- The Committee found that the lawyer violated Disciplinary Rules 1.15(a)(3)(ii) and 1.15(b)(4) & (5) (Safekeeping Property):

    - As to Rule 1.15(a)(3)(ii), the lawyer transferred funds knowing that there was an ongoing dispute regarding fees and that the client had demanded refund of the money in trust.

    - As to Rule 1.15(b)(5), the lawyer transferred the funds without the client's consent or the direction of a tribunal.

- The lawyer appealed because: (1) the client consented to the fee arrangement, and (2) there was no legitimate dispute that the client owed the money.

- But the Virginia Supreme Court unanimously affirmed the Committee's decision that the lawyer violated the rules of ethics. It sanctioned the attorney to a public reprimand with terms.

Virginia Code § 8.01-271.1
Signing of pleadings, motions, and other papers; oral motions; sanctions

Madison v. Bd. of Supervisors, 296 Va. 73, 817 S.E.2d 818 (2018)

Lesson:

- Sanctions awarded against pro se litigant for vexatious filing

Facts

- The circuit court imposed sanctions against the pro se litigant, who had filed numerous frivolous such actions in the past, for the costs and attorney's fees incurred by the county in defending against the litigant's petition. The court also imposed a pre-filing injunction, requiring the litigant to obtain permission from the court before filing, limited to actions filed by the litigant against the county appeared to be an appropriate sanction in addition to the monetary sanctions ordered.

Virginia Circuit Court Decisions Concerning Legal Ethics

Virginia Code § 8.01-271.1
Signing of pleadings, motions, and other papers; oral motions; sanctions

Fathi v. Nasir, 2018 Va. Cir. LEXIS 610 (Fairfax 2018)

Lesson:

- Attorney sanctioned for failing to investigate experts

Facts

- Plaintiff had disclosed three treating physicians as experts in personal injury action and had subpoenaed them to appear at trial.
- On the day of trial, none of the physicians appeared and plaintiff took his nonsuit.
- Plaintiff refiled the case and disclosed the same three physicians as experts. Plaintiff issued subpoenas for all three experts, but once again none of them appeared at trial, nor did the plaintiff himself.
- Defendant sought sanctions under Virginia Code § 8.01-271.1. The sanctions motion revealed that the plaintiff's attorney had never personally spoken with any of the physicians and was aware that two of the physicians had explicitly stated that they would not appear because they had no memory of their treatment of the plaintiff.
- The circuit court awarded sanctions against the plaintiff's attorney because the attorney had not conducted a proper inquiry to ensure that what was represented in the expert disclosures was sufficiently well-grounded in fact.

Decision from the Western District of Virginia Concerning Fees

Fed. R. Civ. P. 54(d)((1). Bill of Costs

Latson v. Clarke, 2019 U.S. Dist. LEXIS 18633 (W.D. Va. Abingdon 2019)

Lesson:

- Bill of Costs - plaintiff gets fees at local rate in discovery dispute

Facts:

- In rewarding plaintiff reasonable fees in a discovery dispute, the court used Abingdon rates because there was no showing that counsel from Washington, D.C. were required to litigate the claims.

PART 4

Protecting Your Client's Secrets

I. DUTY OF CONFIDENTIALITY

A. What is it?

A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation (with some exceptions).[19]

The ethical duty covers information that the attorney-client privilege does not protect; for example, the client's identity, the amount of fees paid, information about a client obtained from public records or from some third party. In LE Op. 1540 (1993), the Committee had "substantial question as to the lawyers fitness to practice law" where the attorney revealed a former client's confidences and secrets by providing a former adversary with a complete historical bill detailing and describing services rendered to the former client.

Notes:

- Lawyers in a firm may, disclose information regarding firm clients to each other in the course of the firm's practice, unless the client has instructed that particular information be confined to specified lawyers.[20]
- Lawyers may not reveal protected information, *even if it is in the public record.*[21]

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[19] Va. Sup. Ct. R. pt. 6, sec. II, 1.6 (Confidentiality of Information) (*i.e.*, Virginia Rule of Professional Conduct 1.6).

[20] *Id.*, cmt. 6.

B. Purpose

The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.[22]

A fundamental principle in the client-lawyer relationship is that the lawyer maintains confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. [23]

C. Who does it protect?

- Current Clients[24]
- Former Clients[25]
- Prospective Clients[26]
- Deceased Clients[27]

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[21] LE Op. 1609 (1994).

[22] *Id.*, cmt. 2.

[23] *Id.*, comt. 2b.

[24] The privilege belongs to the client and not to the lawyer (meaning that the client can assert or waive the privilege regardless of the lawyer's desires). *U.S. v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 348 (4th Cir. 1994).

[25] *See* Va. Sup. Ct. R. pt. 6, sec. II, 1.6 cmt. 18; LE Op. 1300 (1989); LE Op. 812 (1986).

[26] *See* Va. Sup. Ct. R. pt. 6, sec. II, 1.18 (Duties to Prospective Client).

D. Who is Subject to the Rules?

- *Attorneys.* However, **staff has an important role.**[28]

E. Exceptions

- Crime Exception
- Fraud

Notes:

- Lawyer has a duty to inform opposing counsel of the client's death in the midst of settlement negotiations because silence is tantamount to "making a false statement of material fact."[29]
- Lawyer has a duty to disclose a client's ***knowingly*** false statement in a deposition even if the false statement is irrelevant to the case's merits; the client is willing to correct the statement at trial; or the case does not go to trial.[30] The Court added a "materiality" element to the analysis in LE Op. 1650 (where an expert lied about his qualifications on the stand).
- A lawyer must amend his client's false interrogatory responses before settlement. The answers were signed under oath.[31]
- A lawyer who learns that a factual assumption underlying a settlement is incorrect must advise the other party to the settlement.[32]
- BUT a lawyer who learns that he accidentally submitted an erroneous medical bill to the insurance company, which then settled the case, does not have to disclose the mistake to

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[27] The privilege extends beyond the client's death and lasts forever. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); LE Op. 928 (1987).

[28] Va. Sup. Ct. R. pt. 6, sec. II, 5.3 (Responsibilities Regarding Nonlawyer Assistants).

[29] ABA 397 (1995).

[30] LE Op. 1451 (1992).

[31] LE Op. 1477 (1992).

[32] LE Op. 293 (1978); same LE Op. 924 (1987).

the insurance company because it was a mistake and not fraud. However, the lawyer must concede the mistake if the insurance company later discovers it.[33]

F. Consequences of Violating the Rules

- *Against the client.* Waiver; harm to the case
- *Against the attorney.* Can lose the client; can be sued for malpractice; can be sanctioned by the Virginia State Bar
- *Against the firm.* Loss of reputation; legal malpractice claims
- *Against the staff member.* Action by the firm

II. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the law's oldest recognized protection from disclosure. The privilege's roots go back at least to Elizabethan times.[34] In Virginia, it is derived from common law. Although the duty of confidentiality and the attorney-client protect similar information, they are not the same. The attorney-client privilege is an evidentiary rule that protects certain limited communications from a disclosure if a third party seeks to discover them.

In general, the following six elements must be present in order for the attorney-client privilege to apply. The attorney-client privilege protects:

1. Communications from a client;
2. To a lawyer;
3. Related to the rendering of legal advice;
4. Made with the expectation of confidentiality;
5. Not in furtherance of a future crime or fraud; and
6. As long as the privilege has not been waived.

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[33] LE Op. 1289 (1989).

[34] *United States v. (Under Seal)*, 748 F.2d 871, 873-74 (4th Cir. 1984).

Who? The communication must involve two types of participants: clients and lawyers.

What? The communication's content must directly involve legal advice.

How? The communication must be made in the context of confidentiality (to avoid waiver).

A. Communications from a client

Waiver can result if the client uses another person to communicate with the attorney. There are exceptions for translators or sign language interpreters, etc. Also, the attorney-client privilege generally does protect communications to or from (or in the presence of) a lawyer's agents whose role is to help the lawyer provide legal advice to the client (for example, accountants, translators and private investigators). However, clients and lawyers cannot "launder" an agent's or consultant's advice through the lawyer in order to protect the communications with the attorney-client privilege.[35]

B. Related to the rendering of legal advice (content of the communication)

The attorney-client privilege only protects communications that relate to the request for or rendering of legal advice. Requests for legal advice can be explicit or implicit.

The attorney-client privilege does not apply:

- Just because someone has written "privileged" on the document. On the other hand, some courts point to the absence of such a legend in finding the privilege inapplicable.
- Just because a client communicates with a lawyer;

[35] *See, e.g., Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship), Bankr.* No. 01-12295DWS, Adversary No. 04-1012 (Bankr. E.D. Pa. Nov. 17, 2005) (denying privilege where law firm hired a valuation expert; court used very harsh language and accused Smithfield of using subterfuge in hiring law firm in order to assert the privilege).

- Just because a client copies a lawyer on a communication;
- Just because a non-privileged document is attached to a privileged document;
- Just because a lawyer attends a meeting;
- Where the lawyer is acting in a non-lawyer role[36];
- To facts surrounding the privileged communication (such as where or when the communication occurred, how long meetings lasted, etc.) protected by the ethics rules);
- To the facts themselves. For instance, the stop light was either red or green -- that fact does not become privileged just because a client and a lawyer talk about the light.

It is important to remember that in order for the attorney-client privilege to apply, the *lawyer* must be the one providing the legal advice. If the legal assistant provides legal advice, the information might not be protected.[37] In addition, a legal assistant who provides his or her own legal advice might be engaged in the unauthorized practice of law.

C. Made with the expectation of confidentiality (context of the communication)

Communications made with no expectation of confidentiality deserve no privilege protection from the beginning, while privileged communications or documents may later lose their privilege protection if they are shared with others. The privilege will survive only if clients and lawyers treat privileged communications very carefully.[38]

When considering whether information is protected by the attorney-client privilege, we must evaluate the *audience* of the communication and the *mode of transmission.*

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[36] For example, when the attorney acts in his or her capacity as a corporate officer, business advisor in a company, friend, political advisor, committee member, public relations specialist, lobbyist, technical advisor or expert witness.

[37] *See, e.g., HPD Labs., Inc. v. Clorox Co.*, 202 F.R.D. 410, 417 (D.N.J. 2001).

[38] *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

Audience. The attorney-client privilege does not protect communications conducted in the presence of those outside the attorney-client privilege, and courts have held that the presence of third parties (outside the intimacy of the attorney-client relationship) can prevent the privilege from ever arising. Possible examples of individuals who might defeat the privilege are:

- Friend;
- Family members;[39]
- Spouse;
- Third-party doctor participating in a telephone call between a lawyer and a client;
- Co-worker;
- Ally;
- Witness attending a meeting between a client and lawyer; or
- Court reporter or videographer.

Mode of Transmission. It is important to consider whether the information is being communicated with an expectation of confidentiality, or whether non-essential individuals have access to the information.[40]

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[39] *See, e.g., United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003) (Martha Stewart waived privilege of an email by sharing it with her daughter).

[40] *See, e.g., Chase v. City of Portsmouth*, Civ. No. 2:05cv446, 2006 U.S. Dist. LEXIS 29294, at *20 (E.D. Va. Apr. 20, 2006) (holding that a City Attorney's letter to the City Council and others deserved privilege protection; but finding that the City had lost the privilege protection by not treating the letter carefully enough – pointing to the transmission of the letter in unsealed plain envelopes and through use of a fax machine in a City Council member's home (even pointing to the lack of a written policy on the treatment of privileged documents, and to the lack of any training programs on the privilege); also finding that the letter deserved work product protection, which can survive "[l]imited disclosure to third parties" and therefore continued to protect the letter).

III. WORK PRODUCT DOCTRINE

A. What is it?

The work product doctrine protects communications and documents that were created during or in in anticipation of litigation. The attorney-client privilege and work product doctrine are fundamentally different concepts. There is no such thing as the "attorney work product privilege." This statement contains two errors: (1) the work product doctrine covers more than attorneys; and, (2) is not a privilege.

B. Source

The Work Product Doctrine was created by the Supreme Court of Virginia in the 1940s and was derived from attorney-client privilege principles.[41] Each state has their own approach, as do the federal courts. This has resulted in variation regarding issues including the duration of the protection, and also the type of "anticipation" of litigation required. For example, some states require "imminent" litigation, whereas others merely require that the parties had "an eye toward" possible future litigation.

C. Differences from the Attorney-Client Privilege

The work product doctrine is both narrower and broader than the attorney-client privilege. It is *narrower* because the work product doctrine only applies at certain times (during or in anticipation of litigation); and is not actually a privilege, but rather a qualified immunity that can be overcome under certain circumstances. It is *broader* because anyone can create work product (without a lawyer's involvement); and work product can be shared more easily with third parties without causing a waiver of its protection.

Unlike the attorney-client privilege, the work product doctrine:

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[41] *Robertson v. Commonwealth*, 25 S.E.2d 352 (Va. 1943).

1. Is relatively new;
2. Applies to non-lawyers;
3. Arises only at certain times;
4. Only protects communications made "because of" litigation;
5. May be asserted by the client or the lawyer;
6. May be overcome if the adversary really needs the information; and
7. Is not easily waived.

A party might be able to establish a substantial need for the information where there has been destruction of evidence, there is a missing or deceased witness,[42] or where the necessary evidence cannot be replicated (for example, surveillance tapes).[43]

Attorney-Client Privilege	**Work Product Doctrine**
Requires an attorney	Does not require an attorney
Protects confidential information	Information does not have to be confidential – it can include pictures of accident scenes, measurements of skid marks, interviews with witnesses, etc.
Requires communication	Protects information and materials that have never been communicated to anyone

[42] If a witness cannot be located or has died, courts might order disclosure of any witness interview memoranda prepared by an adversary. *See, e.g., McMillan v. Renal Treatment Ctr.*, 45 Va. Cir. 395 (Va. Cir. Ct. 1998); *Larson v. McGuire*, 42 Va. Cir. 40 (Va. Cir. Ct. 1997).

[43] Most courts find that a surveillance videotape deserves work product protection if it was prepared in anticipation of litigation and motivated by the litigation. Courts generally require that a party preparing such a videotape must produce it if the party intends to use the videotape at trial.

D. When Does the Privilege Apply?

In order for the work product doctrine to apply, we must evaluate *when* the materials were created (timing) and *why* the materials were created (motivation).

Timing is everything. Although the attorney-client privilege can protect communications between a lawyer and client at any time, the work product doctrine only protects materials created that were created in connection with, or in anticipation of, litigation. When evaluating whether the work product doctrine applies, it is important to identify the *trigger event*; *i.e.*, the date upon which the party knew or suspected that litigation might ensue. Possible trigger events might include:

- plaintiff's consultation with a lawyer;
- plaintiff's retention of a lawyer;
- defendant's receipt of correspondence from plaintiff's lawyer;
- defendant's retention of a lawyer;
- receipt of a letter from another party that took a litigious tone;
- plaintiff's statement of an intent to retain a lawyer; or
- involvement of a corporation's in-house law department in directing and controlling an accident investigation.

The party asserting protection should be able to identify the trigger event, and the date on which it occurred.

Motivation matters. To deserve work product protection, a document must not only have been created at a time when the preparer anticipated litigation, the document must have been prepared because of the litigation. The work product doctrine generally does not extend to documents prepared pursuant to some law, regulation or internal procedure regardless of whether litigation is anticipated or not.

The work product doctrine also does not apply to documents created in the "ordinary course of business" such as:

- Accident reports;
- Insurance investigation reports;
- Statements taken by insurance adjusters;
- Claims statistics; and,
- Police reports.[44]

IV. WAIVER

Waiving the privilege as to one third party outside the intimate attorney-client relationship almost always waives it as to everyone else, meaning that the protection disappears forever. Most courts recognize the doctrine of *subject matter waiver* doctrine, under which a waiver of some privileged information will require the company to reveal all privileged communications on the same subject matter. This is especially problematic in large-scale document productions especially where electronic information is involved.

In general, waiver usually occurs only if the disclosure is voluntary -- not if it is compelled. Also, most clients do not understand waiver, *so we must explain it to them.*

[44] *Collins v. Mullins*, 170 F.R.D. 132, 135 (W.D. Va. 1996).

PRACTICAL APPLICATIONS

OFFICE PROTOCOLS

- Discussions in common areas (halls, elevators, coffee stations, bathrooms, lobby, conference rooms)
- Discussions outside the office
- Taking files home
- Guests in your office
- Files in the bathroom or break rooms
- "Selfies"
- Attorneys or staff who work in conference rooms or common areas
- "Lock" your computer when you are away from your desk

CLIENT COMMUNICATIONS

Mode of Communication

- Consider how you are communicating with the client. Do they share email, voicemail or a phone with non-clients? Do other individuals have access to their voicemail or emails? If so, consider how to ensure that your communications with the client remain privileged.

Joint Representations

- A "joint representation" is when a lawyer represents more than one client on the same matter. Absent an agreement to the contrary, lawyers representing more than one client on the same matter must share information learned from one client with the other jointly represented client.[45] Jointly represented clients can obtain access to communications that

[45] Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000).

the lawyer had with the other clients even if the client seeking the access was not present at the time.[46]

COMMUNICATING WITH EXPERTS

Testifying Experts. Information shared with a testifying expert might be discoverable. In federal court, testifying experts are required to disclose the "data or other information" considered by the witness in forming their opinions.[47] This could include communications from the attorney.

When communicating with a testifying expert:

- They are allies, but information that you share with them could be discoverable.
- Do not assume that experts understand privilege issues or the need to minimize note-taking and extraneous drafts.
- Do not use email unless it is necessary.
- Encourage experts to use the telephone when possible.
- Beware of what you say to an expert on the telephone or in person.
- Limit the information communicated in emails and letters as much as possible.
- If email, designate as "privileged."
- Before hitting send, think "is an email necessary?"

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[46] *See* LE Op. 1223 (1989) (lawyer could represent the driver and passengers in an accident pursuing a product liability case as long as all the clients consented after full disclosure, but was required to reevaluate the representation if one of the clients indicated a desire to pursue a claim against another client); LE Op. 620 (1984) (lawyer could represent three brothers in an accident case in which one of the brothers was driving and might have been at fault, as long as all three brothers consented and the lawyer believed it is possible to adequately represent the interests of each brother); LE Op. 1377 (1990) (lawyer representing driver and trucking company learned that the driver had a number of tickets that he did not disclose to the company. Lawyer withdrew from representing the driver but could not continue to represent the company without the driver's consent because the lawyer earlier represented the driver).

[47] Fed. R. Civ. P. 26(a)(2)(B).

- Do not put anything in an email that would be embarrassing or harmful to the client, or that could result in waiver (50-Yard Line at the Super Bowl Rule).
- Beware of drafts and revisions going back and forth. Where possible, meet with experts to revise disclosures in person or by telephone.

Non-Testifying ("Consultants"). Information sent to and from a consulting expert is generally not discoverable unless there is a "substantial need." Retention agreements should direct experts to keep information and documents confidential.

Physicians. In most instances, treating physicians should be treated like testifying experts. Even if the physician is not a testifying expert, beware that they are a third party, and that discussions with the physician could result in waiver of the attorney-client privilege.

COMMUNICATING WITH FAMILY MEMBERS, FRIENDS, CO-WORKERS AND FACT WITNESSES

It is important to advise clients about privilege and to remind them of the need to keep information confidential.

Minors and Next Friends. A lawyer must not allow his or her lawyer's duty of loyalty to be compromised by directions from the next friend.[48] Although there is no attorney-client relationship between a lawyer for an infant and a next friend, the lawyer may not represent the infant in an action against the next friend because the next friend might have divulged secrets and confidential information which may present an advantage to the infant in the other litigation.[49]

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[48] LE Op. 1557 (1993).

[49] LE Op. 1559 (1993).

COMMUNICATING WITH ADVERSARIES

Handle communications to adversaries with extreme CAUTION.

When communicating with an adversary:

- Open every email attachment before you send it to the adversary.
- Always check the "to" and "cc" line before hitting "send."
- Be careful when forwarding emails or attachments to the adversary. Delete attachments and emails that are "down the chain" if necessary. Do you need to rename the subject of the email, or the title of the attachment?
- Do not use "Reply All" unless necessary.
- Avoid including substantive information in the body of your email. Preferred: "Please see the attached communication from Attorney ____."
- Rename email attachments if necessary.
- Document version numbers
- Send PDFs or scrubbed documents attachments.

PART 5

ETHICAL DUTIES

I. CONFLICTS OF INTEREST

A. What is a Conflict?

Lawyers are ethically prohibited from engaging in representations, business transactions, and relationships that can compromise the lawyer's duty of loyalty or objectivity during the representation of the client. Some conflicts of interest can be cured by written informed consent from the client. Others cannot. The specifics of conflicts of interest can be found in Virginia Model Rules of Professional Conduct 1.7-1.10 and ABA Model Rules 1.7-1.10.

In personal injury cases, conflicts often arise in two situations: (1) where the client and the lawyer have conflicting interests; (2) where representing one client presents a conflict in representing a different client.

A client's interest may be directly adverse to the interests of his or her lawyer when the lawyer advances the costs of a case to the client. A lawyer must not put her own interests of recovering those costs ahead of what's best for her client. For this reason, Virginia Rule of Professional Conduct 1.8(e) prohibits lawyers from providing financial assistance to clients and advancing court costs and the expenses of litigation unless the client ultimately remains responsible for the costs and expenses, or unless the client is indigent. Subject to certain exceptions, Virginia also prohibits lawyers from entering into business relationships with clients, soliciting substantial gifts from clients for themselves or their family members, and obtaining literary or media rights relating to the representation.

A well-known conflict in any attorney/client representation is that a lawyer may not represent two clients whose interests are directly adverse to each other. A less obvious conflict

may arise when a driver and passenger injured in the same vehicle both want the lawyer to represent them individually. If an investigation reveals that the driver possibly contributed to the crash, and therefore may be liable to the passenger, the driver and passenger are now in direct conflict. If the conflict is discovered prior to representation, the attorney may be able to represent one client and refer the other to a different attorney. If the conflict is discovered only after representation of both clients begins, and the attorney has obtained confidential information that would harm one of the clients, the attorney would need to withdraw from both clients so as not to inadvertently harm one by using confidential information to aid the other, unless the attorney obtained a waiver before beginning the representation.

Conflicts can also arise as to defense lawyers who represent multiple defendants in a case, for example, when an attorney represents a commercial driver and the driver's employer. If the employer contends that the driver was not acting in the course and scope of employment at the time of the crash, there is a conflict between the defendants and the attorney cannot represent both.

Another conflict that defense counsel might encounter arises when one defendant tenders its defense to another defendant through an indemnity clause in a contract. Although the defendants might desire a single attorney to represent them both, in order to save money, the attorney cannot represent both defendants if their interests are not aligned.

With conflicts of interest, it is best to play it safe. If the attorney suspects that a potential or current client would need to sue one of the attorney's current clients, even if it would be in two different matters, the attorney should strongly consider declining the potential or later-engaged client. For example, Pitbull hires Enrique to represent him in his claim against Daddy

Yankee. Two weeks later, Shakira wants Enrique to represent her in her claim against Pitbull for an unrelated incident. Enrique cannot represent Shakira since Pitbull is Enrique's current client.

Finally, in cases where insurance may apply, clients may have conflicts given the amount of available insurance. In cases where there may not be enough insurance for each claimant to be individually and wholly compensated, a personal injury lawyer must take care not to put the interests of one client ahead of any other client. This situation may be able to be cured by a written waiver signed by all potential clients, but each must make her own, well-informed, decision.

B. Imputed Disqualification

Rules regarding imputed disqualification vary from state to state. Virginia Rule of Professional Conduct 1.10 provides that if a lawyer has a conflict of interest, then all lawyers within that firm are deemed to share the conflict. This can be challenging when a lawyer who has existing clients joins a different firm, some of whom are adverse to the lawyer's former clients.

Virginia allows clients to waive the conflict if the client gives informed consent for the representation. However, unlike other jurisdictions, Virginia does not allow the law firms to "screen" the lawyer who has the conflict unless the client consents.

In the Personal Injury arena, imputer disqualification may arise where attorneys switch which side of the 'v.' they represent; Plaintiff lawyers become defense lawyers or defense lawyers become Plaintiff lawyers. Care must be taken when an attorney joins a new firm that she often found was opposing counsel in prior cases.

II. ATTORNEY FEES

A. Fees and Clients

"A lawyer's fee shall be reasonable." What is reasonable differs depending on jurisdiction. In Virginia, reasonableness is based on the following factors:

1. Time and labor required
2. Difficulty of the questions involved
3. Skills needed to perform the job properly
4. Likelihood that acceptance of this client will prevent the lawyer from taking other employment
5. Prevailing rates for similar work in the locality
6. Amount involved and results obtained
7. Any time limits imposed by the client or the circumstances
8. Nature and length of the professional relationship with the client
9. A lawyer's experience, reputation, and ability
10. Whether the fee is fixed or contingent

This list is not exhaustive, nor will each factor be relevant in each instance. Further, under the Model Rules, contingent fees are also subject to the reasonableness standard of the rule. Statutes may also govern the reasonableness of fees in certain types of cases, including contingency fees. Clients must make informed decisions regarding fee arrangements and should be able to consider reasonable alternatives. Alternative forms of payment may be accepted provided it is reasonable and subject to certain qualifications. Lawyers may not accept a proprietary interest in the cause of action or subject matter of the representation. Fees paid in property may be subject to increased scrutiny.

B. Contingency Fees

A contingent fee arrangement allows the lawyer to accept a fixed percentage of a recovery, rather than an hourly rate or fixed fee. Contingency fee agreements must be in writing and that writing must state the method by which the fee is to be determined. This includes the percentage(s) that the lawyer is to earn based on how the case is resolved. The fee agreement must also detail how expenses are to be calculated and whether they are deducted before or after the fee is determined. At the conclusion of a case involving a contingency fee, lawyers must provide clients a written statement of the outcome of the matter and, if there is a recovery, showing the transmittal to the client and method of its determination.

Contingent fees are often used in cases involving money, such as personal injury or worker's compensation. This allows clients of lesser means to see the recovery to which they are entitled without having to come up with a large retainer or keep up with hourly billing. Some attorneys require a different percentage as a fee depending on the type of case or the way in which the case is resolved. For example, a lawyer may determine to charge twenty-five percent if a personal injury case is settled before having to file suit but if the case has to go to trial, the fee may rise to thirty-five percent of the recovery., This shifting fee schedule is allowed, provided the agreement is determined prior to representation. Contingency fees are never allowed in domestic relations cases or criminal matters, since those don't often involve a monetary recovery from which the attorney could take her fee.

C. Referral Fees

When an attorney is approached by a client but she cannot take on the case for whatever reason, the attorney may refer that case to another attorney. Virginia does not allow lawyers to take a fee for referring a case to another law firm unless the client consents. Virginia Rule of

Professional Conduct 1.5 states that lawyers should not divide a fee with lawyers who are in a different firm unless:

1. The client is advised of and consents to the participation of the lawyers involved;
2. The terms of the division of the fee is disclosed to the client and the client consents;
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 writing.

III. OBLIGATIONS TO CLIENTS

A. Competence

A fundamental legal duty is the duty of competence. In fact, it is the first rule in both the Virginia Rules of Professional Conduct and the ABA Model Rules. In general, a lawyer should not assume representation of a client unless the lawyer is competent to handle the matter. Competence does not require that the lawyer have handled that particular type of case before. It merely requires that the lawyer do the work that is necessary to gain relevant knowledge in order sufficiently represent the client in that particular matter. A lawyer who is not competent to handle that particular case, and who is unwilling to do the work that is required to bring herself up to speed, should decline representation.

Lawyers should engage in continuing study and education. The Rules of the Supreme Court of Virginia set only the minimum requirements of annual Continuing Legal Education hours. Lawyers have an ongoing duty to remain informed. This requirement also applies to those who do not seek to practice law but still wish to maintain their bar license.

B. Diligence

Lawyers must be diligent in their representation of clients. It is unethical to allow files to languish. Although lawyers do not have to handle cases quickly, they need to push files forward to obtain resolution for their clients. Diligence does not require solely an adversarial approach, but an approach that serves the client's best interests. One need not be aggressive to be a zealous advocate.

The duty of diligence also requires that a lawyer control her workload so that she may competently and diligently serve each client and matter. This prevents unreasonable delay which can often adversely affect the client and her interests. Even if a client will not be adversely affected by the passage of time, it can often raise a client's anxieties.

Finally, this duty extends to protecting a client's interests should a lawyer not be able to complete her representation of a client. Lawyers must have a plan in place should she be impaired, disabled, or deceased.

C. Communication

Lawyers have an ethical duty to communicate with their clients. Specifically, lawyers have an ethical duty to:

1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;
2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;
3. keep the client reasonably informed about the status of the matter;
4. promptly comply with reasonable requests for information; and
5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

To the extent that it is necessary, a lawyer has a duty to explain the matter or issue, so as to permit the client to make informed decisions regarding the representation.

There may be situations where a lawyer is justified, or required even, to keep information from clients. This may include a psychiatric diagnosis that, if the client was made aware of it, could harm the client. Lawyers may also be directed not to disclose information to a client by a rule or court order.

D. Safekeeping Property

Lawyers have an ethical duty to safeguard their client's property. Lawyers cannot commingle the client's property with their own. In fact – doing so is one of the quickest and most efficient ways for a lawyer to be sanctioned, or even disbarred. Often, the property an attorney holds for her client is money.

Lawyers must keep an accounting of their client's property, as well. States have different rules about what a lawyer must do when it receives payments for the client and there are liens and other obligations upon the client's money (bankruptcy, child support obligations, garnishments, etc.). It is imperative to know the rules of your particular jurisdiction before receiving, storing, or distributing property that belongs to a client.

Client funds must be maintained in a separate, identifiable escrow account in a bank located in the same state as the law firm. This not only protects the client but also allows the lawyer to avoid even the appearance of impropriety. Lawyers must keep detailed records of these accounts and ensure a periodic reconciliation is done.

E. Financial Assistance to Clients

As noted above, lawyers in Virginia are ethically prohibited from offering financial assistance to their clients. This rule is grounded in the premise that a lawyer who offers financial

assistance to a client can develop a conflict of interest, which can compromise his or her judgment.

There are some exceptions to this Rule. First, Virginia allows lawyers to advance court costs and expenses to a client in certain situations, such as contingency fee personal injury cases. Virginia also allows lawyers to pay court costs and litigation expenses for indigent clients.

F. Terminating Representation

No one likes to be terminated from representing a client. Likewise, it is equally discomforting to have to "fire" a client. However, when it happens, it is crucial to consult the ethics rules to ensure that the termination and (if applicable) the transfer of the file – is handled appropriately.

Lawyers have a duty to withdraw from representing a client if continuing to represent the client will cause the lawyer to violate ethical rules, or to engage in illegal activity. Lawyers also have a duty to cease representation if the lawyer's physical or mental condition impairs the lawyer's ability to represent the client, or if the lawyer is fired.

However, lawyers might not be permitted to withdraw if withdrawal would have a material adverse effect upon the client. This is particularly true if the case is already in litigation. Other circumstances where a lawyer may wish to withdraw but may not be able to include a client not taking the lawyer's advice or a client has stopped paying her bills. In such cases, the lawyer might need to seek the court's permission in order to withdraw.

If the case is in litigation, even if the client is amenable to her attorney's withdrawal, it is a good idea to file a Notice of Withdrawal with the court. This protects the attorney, as a judge granting the withdrawal ends the attorney's duties and obligations to the client.

When the representation ceases, the lawyer must take reasonable steps to protect the client's interests, and to ensure that the withdrawal and transition do not have a negative impact upon the client. For example, the lawyer should give the client notice of his or her withdrawal, allow the client time to find other counsel, and give the client his or her file and property. The attorney must also refund the client's unused retainers.

G. Duties Owed to Non-Clients

Even if the client does not hire the lawyer, or if the lawyer does not agree to represent the client, lawyers have a duty of confidentiality to prospective clients. Subject to certain exceptions, lawyers are supposed to maintain the confidentiality of information that was obtained during the consultation and may not use that information to the detriment of the prospective client.