2012

A Distinction Without a Difference? An Examination of the Legal and Ethical Difference Between Asset Protection and Fraudulent Transfers Under Virginia Law

Elizabeth Southall
University of Richmond

ESSAYS

A DISTINCTION WITHOUT A DIFFERENCE? AN EXAMINATION OF THE LEGAL AND ETHICAL DIFFERENCE BETWEEN ASSET PROTECTION AND FRAUDULENT TRANSFERS UNDER VIRGINIA LAW

Landon C. Davis III *
Isaac A. McBeth **
Elizabeth Southall ***

I. INTRODUCTION

"A distinction without a difference"—a colloquial expression employed by one wishing to recognize that while a linguistic or conceptual distinction exists between any number of options, any such distinction lacks substantive practical effect.[1] To allege that a situation presents "a distinction without a difference" is to suggest that any difference between a given set of options is a logical fallacy—purely a creature of erroneous perception.[2] When it comes to concepts of asset protection planning and fraudulent transfer law, one must ask whether the law draws a distinction where there is no difference.

---

* Associate, Parrish, Houck & Snead, PLC, Fredericksburg, Virginia. J.D., 2011, University of Richmond School of Law; M.B.A., 2011, University of Richmond School of Business; B.S., 2008, University of Mary Washington.

** Associate, Hirschler Fleischer, P.C., Richmond, Virginia. J.D., 2011, University of Richmond School of Law; B.A., 2008, American Military University.

*** J.D. Candidate, 2013, University of Richmond School of Law; B.A., 2008, University of Virginia.

1. Jessica Ellis, *What Is a Distinction Without a Difference?*, WISEGEEK, http://www.wisegeek.com/what-is-a-distinction-without-a-difference.htm (last visited Oct. 15, 2012).

2. *Id.*

Given the now longstanding economic downturn and the steady increase in Chapter 7 bankruptcy filings since 2009,[3] it is neither uncommon nor unimaginable that an existing or potential client will seek assistance in either "asset protection planning" or "bankruptcy planning" services. These concepts tend to walk hand-in-hand,[4] although an argument could be made that "asset protection planning" is more proactive in nature, while "bankruptcy planning" is more reactive in nature. Such an argument notwithstanding, the desired end goal is the same—structure a client's holdings so as to provide the client with the greatest security from claims of existing or future creditors.[5]

Fraudulent transfer law, however, is designed to achieve a completely contrary goal. It seeks to protect creditors by giving the court power to void a debtor's transfer of assets when such a transfer operates to prevent a creditor from satisfying its claim against the debtor/transferor.[6] Of course, fraudulent transfer law does not bar every movement of assets which may impact a creditor's likelihood of being fully compensated. Rather, under Virginia law, a "fraudulent transfer" is a movement of assets falling into one of two general categories: (i) transfers made by an insolvent debtor for inadequate consideration;[7] and (ii) transfers made by a debtor with the intent to hinder, delay, or defraud creditors.[8]

Although the law and the ethical rules governing its practice certainly recognize a distinction between "asset protection planning" and "fraudulent transfers,"[9] they do little to identify the true difference between an intent to protect one's assets as op-

3. *79% Increase in Chapter 7 Bankruptcy Filers*, PRLOG (July 31, 2009), http://www.prlog.org/10297745-79-increase-in-chapter-7-bankruptcy-filers.html.

4. *See* John E. Sullivan III, *Asset Protection Plans & Bankruptcy: Some Possible Issues*, VMF0616 A.L.I.-A.B.A. 73, 114 (2005).

5. *See* Jack E. Owen, Jr. & Bradley G. Korell, *Joint Ownership of Property as a Method of Asset Protection*, in Duncan E. Osborne & Elizabeth M. Schurig, 1 ASSET PROTECTION: DOM. & INT'L L. & TACTICS § 12.55 (updated through April 2012); Keith S. Kromash, *Fraudulent Transfers and Conversions and Ethical Considerations*, ASSET PROTECTION IN FLORIDA § 1.25 (2d. ed. 2011) [hereinafter Kromash, *Ethical Considerations*].

6. *See, e.g.*, VA. CODE ANN. § 55-80 (Repl. Vol. 2012). "All states have laws to protect creditors from fraudulent transfers." Duncan E. Osborne & Elizabeth M. Schurig, *What ACTEC Fellows Should Really Know About Asset Protection*, in Frederick J. Tansill, *Asset Protection Trusts (Apts): Non-Tax Issues*, SR019 A.L.I.-A.B.A. 547, 651 n.2 (2009) [hereinafter Osborne, *ACTEC Fellows*].

7. VA. CODE ANN. § 55-81 (Repl. Vol. 2012).

8. *Id.* § 55-80 (Repl. Vol. 2012).

9. *See infra* Parts III and IV.

posed to an intent to "hinder, delay, or defraud creditors." Indeed, one could argue that any attempt to engage in asset protection necessarily contemplates an intent to hinder, delay, or defraud creditors (even though such creditors might be remote or unforeseeable).[10] Conversely, a proponent of asset protection planning would argue the two are as different as night and day.

Whatever perspective an individual adheres to, one thing is certain: there is a distinction. There is a *legal* distinction. Attorneys assisting their clients in valid asset protection planning reinforce the client's long-term security, while attorneys assisting their clients in effecting fraudulent transfers may very well be harming their client's long-term security. There is an *ethical* distinction. Attorneys assisting their clients in asset protection planning are fulfilling their ethical duty to represent their client skillfully and competently, while attorneys assisting their clients in effecting fraudulent transfers might violate a number of ethical rules.

This essay identifies these distinctions. Part II provides a summary description of asset protection planning and the reasoning behind the same. It also provides a brief discussion of the substance of Virginia fraudulent transfer law and the potential legal effects such transfers may have on a client. More importantly, this essay embraces the unenviable task of enunciating the substantive legal and ethical difference between the two. Part III enumerates the factors an attorney can look to in determining whether a client's desired goals are legitimate asset protection planning or fraudulent transfers. Part IV discusses the ethical implications of an attorney assisting a client in effecting asset protection planning and/or fraudulent transfers. Finally, Part V of this essay provides basic guidance for practitioners to follow in order to help identify ethically questionable situations prospectively and deal with them accordingly.

II. THE LEGAL DISTINCTION

Before it is possible to understand the substantive difference, if any, between asset protection planning and fraudulent transfers,

---

10. *See* Kromash, *Ethical Considerations*, *supra* note 5 ("[I]t would appear that asset protection planning is meant to deceive creditors and courts.").

it is necessary to acknowledge and enunciate the legal distinction between these alternate perceptions of any given transfer.

A. *Asset Protection Planning*

Asset protection planning generally refers to the process by which an individual or legal entity attempts to structure its assets so as to minimize the risk that those assets may be used to satisfy any given present or future liability.[11] Although practitioners employ a wide variety of techniques to assist their clients in asset protection planning, they generally seek to minimize any given creditor's ability to satisfy its claim with a debtor's assets through one of two ways: (i) by shifting ownership of the assets into some "protected" form that still enables the debtor to make beneficial use of the assets;[12] or (ii) by shifting "nonexempt" assets into an "exempt" asset class.[13] Each of these techniques is addressed below.

To understand what it means to shift assets from an unprotected form of ownership to a protected form of ownership, it is worth briefly addressing what it means for an asset to be held in an "unprotected" form of ownership. An asset is "unprotected" when it is subject to the creditor process by creditors of the individual or entity making use of the asset.[14] The most obvious and common form of unprotected ownership is a natural born person or legal entity holding direct title to assets.[15] For example, assets

11. Barry S. Engel, *Using Foreign Situs Trusts For Asset Protection Planning*, 20 EST. PLAN. 212, 213 (1993) ("Asset protection planning is simply the process of organizing one's assets in advance to safeguard them from loss or dissipation by reason of potential risks to which they would otherwise be subject.").

12. Jacob Stein, *Practical Primer and Radical Approach To Asset Protection*, 38 EST. PLAN. 21, 26 (2011) [hereinafter Stein, *Primer*], ("The conceptual goal of all asset protection planning is two-fold: (1) remove the debtor's name from the legal title to the assets, but (2) in such a way so that the debtor could retain some beneficial enjoyment and a degree of control.").

13. Jeffrey A. Baskies, *Recent Court Decision Highlights a Limit To Asset Protection Planning*, 37 EST. PLAN. 36, 36 (2010) ("Estate planners who must frequently navigate through asset protection issues know that most of the essential elements of asset protection planning lie in our state laws, specifically in statutory exemptions from creditors.").

14. *See* Paula Aiello & Eric K. Behrens, *Student Loans, Chapter 13 of the Bankruptcy Code, and the 1984 Bankruptcy Amendments*, 13 J.C. & U.L. 1, 3 n.12 (1986) (recognizing unprotected assets as those that are "non-exempt" in the context of bankruptcy).

15. *See Asset Protection & Risk Management Planning*, MCGAUNN & SCHWADRON CPA'S, LLC, http://www.mcgaunnschwadron.com/asset-protection-risk-management-planning/ (last visited Oct. 15, 2012).

owned by an individual typically are subject to attachment—i.e., creditors may use the judicial machinery to seize those assets and liquidate them to satisfy the creditors' claims.[16] Another form of ownership generally recognized as unprotected is when assets are held by a revocable living trust.[17] Although, in such a situation, a trust technically holds the assets instead of the trust's beneficiary, the law generally allows the beneficiary's creditors to reach the trust assets to satisfy creditors' claims.[18]

Conversely, holding assets in a "protected" form enables an individual or legal entity to make use of an asset while simultaneously placing the asset beyond the reach of creditors.[19] Stereotypical asset protection planning of this variety involves transferring title of the assets to a form of legal entity owned by the debtor, such as corporations, limited partnerships, or limited liability companies.[20] Moreover, transferring assets to certain forms of domestic or international trusts can serve a similar function.[21]

One of the most common forms of protected ownership employed under Virginia law is real estate held as a tenancy by the entirety but purchased with individual assets.[22] Property held by tenants by the entirety cannot be used to satisfy creditors' claims against either spouse individually.[23] Phrased alternatively, the only creditor capable of reaching property held as a tenancy by the entirety is a joint creditor of both husband and wife.[24] Thus, by using individual funds to purchase assets owned as a tenancy

---

16. *See* HOWARD L. OLECK, DEBTOR-CREDITOR LAW 30 (1953).

17. VA. CODE ANN. § 55-545.05 (Repl. Vol. 2012).

18. *Id.*

19. *See* Stein, *Primer*, *supra* note 12.

20. Amy Lynn Wagenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT'L L. 831, 837 (1999).

21. *Id.*

22. *See, e.g.*, Vasilion v. Vasilion, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951) (holding that property held by husband and wife as tenants by the entirety is immunized from the claims of their individual creditors) (citation omitted); Burroughs v. Gorman, 166 Va. 58, 59–60, 184 S.E. 174, 174 (1936) (same holding); Allen v. Parkey, 154 Va. 739, 745–46, 149 S.E. 615, 618 (1929) (same holding). A tenancy by the entirety is "limited to husbands and wives, who own the property as a unit, not by equal shares." BARLOW BURKE & JOSEPH SNOE, PROPERTY 225–28 (4th ed. 2012).

23. Rogers v. Rogers, 257 Va. 323, 326, 512 S.E.2d 821, 822 (1999) ("We have stated, clearly and without equivocation, that real property held as tenants by the entireties is exempt from the claims of creditors who do not have joint judgments against the husband and wife.") (citing *Vasilion*, 192 Va. at 740, 66 S.E.2d at 602).

24. *Id.*

by the entirety, a buyer successfully shifts those assets from an "unprotected" form of ownership to a "protected" form of ownership.

Alternatively, asset protection is achieved by shifting assets from a nonexempt form of property to an exempt form of property.[25] The term "exempt," in the context of asset protection planning, refers to an asset that is "protected from all forms of creditor process."[26] Similarly, the term "exemption" in such a context refers to the actual nature of the "protection from all forms of creditor process."[27] For example, Virginia law provides a debtor, inter alia, a "homestead exemption,"[28] a "poor debtor's exemption,"[29] and an exemption for proceeds from a personal injury lawsuit.[30] It is important to note, however, that exemptions can be creatures of both state and federal law, and the two might even overlap.[31] One illustration of this interplay is Virginia law's specific exemption of certain retirement accounts to the extent they are exempt under the Bankruptcy Code.[32]

The function of an exemption is to put certain assets beyond the reach of creditors despite those assets being held by the debtor in an unprotected form. By way of illustration, a debtor who owns a pet dog typically does not own the dog in any form of protected ownership. The dog is not property of a legal entity nor owned as a tenancy by the entirety.[33] Thus, absent some exemption to the contrary, creditors could theoretically, albeit heartlessly, subject the dog to the attachment process. In other words, a creditor could take possession of the dog and sell it to satisfy the creditor's claim against the debtor. The Virginia General Assembly, however, enacted a statutory provision providing that pets

25. Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 12 (2008) ("Like all other states, Virginia exempts some of the defendant's personal property from seizure, and these exemptions will protect the meager assets of many defaulting debtors.").

26. VA. CODE ANN. § 34-1 (Repl. Vol. 2011). The Code defines creditor process as "all methods used by creditors to collect unsecured debts." *Id.*

27. *Id.*

28. *Id.* § 34-4 (Repl. Vol. 2011 & Supp. 2012).

29. *Id.* § 34-26 (Repl. Vol. 2011 & Supp. 2012).

30. *Id.* § 34-28.1 (Repl. Vol. 2011 & Supp. 2012).

31. *See, e.g.*, 11 U.S.C. § 522 (2006).

32. VA. CODE ANN. § 34-34(B) (Repl. Vol. 2011).

33. *See supra* notes 20, 22 and accompanying text.

are exempt from the creditor process.[34] Therefore, even though the debtor's dog in this hypothetical is held in an unprotected form of ownership, the debtor's creditors will not be able to seize the dog and sell it to satisfy their claims.

B. *Fraudulent Transfers*

Fraudulent transfer law is designed to protect creditors from certain asset transfers made by a debtor when those transfers have the effect of depriving creditors of recovery to which they are legally entitled.[35] However, not every shift of assets that minimizes some unanticipated creditor's recovery in the distant future constitutes a fraudulent transfer. Rather, under Virginia law, a creditor has the burden of demonstrating by clear and convincing evidence that a specific transfer comports with one of two statutorily defined types of fraudulent transfers.[36] If a creditor is successful in making such a showing, the burden shifts to the transfer's proponent to demonstrate the lawfulness of the transfer.[37] Failure to carry this burden will result in the court avoiding the transfer—meaning the court will restore title of the transferred asset to the debtor so that the asset is subject to the creditor process.[38]

Virginia has two statutes conferring standing on creditors to seek avoidance of any given transfer. Virginia Code section 55-80 enables creditors to challenge transfers of assets made with the intent to hinder, delay, or defraud those creditors from that which they are or may be lawfully entitled.[39] Virginia Code section 55-81 enables creditors to challenge transfers of assets made by insolvent debtors for insufficient consideration—i.e., consideration not deemed valuable in law.[40] Such transfers are often termed "volun-

34. VA. CODE ANN. § 34-26(5) (Repl. Vol. 2011 & Supp. 2012).

35. Osborne, *ACTEC Fellows*, *supra* note 6, at 655.

36. *See* Mills v. Miller Harness Co., 229 Va. 155, 157, 326 S.E.2d 665, 666 (1985) (citing Surratt v. Eskridge, 131 Va. 325, 335, 108 S.E. 677, 680 (1921)); Noramco Int'l v. Charlie's Pizza, Ltd., 55 Va. Cir. 47, 47 (2001) (Fairfax County).

37. Levy v. Kindred, 854 F.2d 682, 685 (4th Cir. 1988) (citing Hutcheson v. Sav. Bank of Richmond, 129 Va. 281, 292, 105 S.E. 677, 681 (1921); Baldwin v. Winfree's Adm'r, 116 Va. 16, 20, 81 S.E. 36, 37 (1914)); Phillips v. Moazzeni (*In re* Tarangelo), 378 B.R. 128, 134 (Bankr. E.D. Va. 2007).

38. *See, e.g.*, *In re Tarangelo*, 378 B.R. at 136–38 (holding that the defense's failure to rebut presumption of fraud resulted in avoidance of transfer/conveyance).

39. VA. CODE ANN. § 55-80 (Repl. Vol. 2012).

40. *Id.* § 55-81 (Repl. Vol. 2012).

tary conveyances."[41] For the purposes of this essay, however, transfers that are avoidable under section 55-81 also will be labeled "fraudulent transfers."

Although this essay focuses exclusively on Virginia law, there are at least two bodies of fraudulent transfer law commercial attorneys in Virginia must be familiar with: (1) Virginia fraudulent transfer laws[42] and (2) the Bankruptcy Code's fraudulent transfer laws.[43] Federal bankruptcy law recognizes the same two categories of fraudulent transfers as Virginia—albeit with different governing standards—in addition to several others which tend to be relied upon less frequently by creditors.[44] Virginia attorneys also would benefit from familiarity with the majority uniform law, the Uniform Fraudulent Transfer Act ("UFTA"), due to the number of jurisdictions in the nation that have adopted the exact act or some permutation of it.[45]

The categories of fraudulent transfers provided for in Virginia law are sufficiently broad to ensure that almost any asset protection planning transfer could be deemed a fraudulent transfer under the right circumstances.[46] For example, a debtor attempting to transfer personal assets to a legal entity in order to place them in a protected form of ownership could be found to have done so with the intent to defraud some unknown creditor in the distant future or for inadequate consideration during a period of insolvency. Thus, while identifying the legal distinction between asset protection planning and fraudulent transfers is easy, the actual legal difference between them is unquestionably fact-driven.

III. THE LEGAL DIFFERENCE

If Virginia's fraudulent transfer laws are assigned their broadest possible meaning, it becomes difficult to envision a scenario in which asset protection planning would not be considered a fraud-

---

41. *See, e.g.*, *In re Tarangelo*, 378 B.R. at 131.

42. *See supra* notes 39–40 and accompanying text.

43. *See* 11 U.S.C § 548 (2006).

44. *See id*. § 548(a)(1)(A) to (B).

45. *See* Isaac A. McBeth & Landon C. Davis III, *Bulls, Bears, and Pigs: Revisiting the Legal Minefield of Virginia Fraudulent Transfer Law*, 46 U. RICH. L. REV. 273, 274 (2011) [hereinafter McBeth, *Bulls*]. "Currently, Virginia is one of eight jurisdictions that has not adopted the [UFTA]." *Id*.

46. *See supra* notes 39–40 and accompanying text.

ulent transfer.[47] Indeed, one could argue that an intent to hinder, delay, or defraud some creditor seeking recovery on a claim, whether that creditor is known or unknown, is the only purpose for individuals or entities to engage in asset protection planning.[48] Such an argument notwithstanding, there are internal limitations within section 55-80 and section 55-81 that, if reviewed with a critical eye, enable an attorney to draw a broad, fuzzy line between asset protection planning and fraudulent transfers. Sadly, absent some clear guidance from the courts or the General Assembly, that line always will be rife with plenty of gray area. Nonetheless, the authors of this essay maintain that asset protection planning attorneys should take three factors into account when evaluating the legal and ethical propriety of assisting a client in any given transfer. The first factor is the nature of the debtor's creditors. The second factor is whether any badges of fraud can be identified in relation to the transfer. The third factor is the nature of the client's financial circumstances. The import of these three factors in parsing out whether a client's goals are properly categorized as legitimate asset protection planning or fraudulent transfers is discussed below.

A. *Nature of Creditors*

The first step an attorney should take in attempting to determine whether a client's asset protection goals are tantamount to fraudulent transfers is to determine whether the class of persons or entities protected by Virginia's fraudulent transfer statutes exist vis-à-vis the transferee. Specifically, as a threshold matter, the transferee must have creditors in order for any given transfer to be attacked as fraudulent.[49] The relief for which Virginia's fraudulent transfer statutes provide is not available to a party simply by virtue of membership in the general public.[50] Only creditors, pur-

---

47. *See* John E. Sullivan III, *Future Creditors and Fraudulent Transfers: When A Claimant Doesn't Have A Claim, When A Transfer Isn't A Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 DEL. J. CORP. L. 955, 957 (1997) (observing that if majority fraudulent transfer law were assigned its broadest possible meaning, all asset protection planning would be impermissible).

48. *See id.* ("Simply stated, asset protection planners seek to frustrate plaintiffs who might someday try to collect from the planner's client.").

49. *See* VA. CODE ANN. § 55-80 (Repl. Vol. 2012).

50. *Id.* § 55-81 (Repl. Vol. 2012) (identifying voluntary conveyances void as to "creditors" and "purchasers"); Efessiou v. Efessiou, 41 Va. Cir. 142, 144 (1996) (Fairfax County)

chasers, or other similarly situated persons have standing to invoke the statutes' protection.[51] Moreover, the scope of creditors, purchasers, or others persons who may bring an avoidance action varies by statute. Section 55-80 is available to a broader group of creditors than section 55-81.[52] Thus, to determine whether any members of the statutorily protected class are present in relation to any given transfer, an attorney must be armed with certain background knowledge: (i) the definition of a "creditor" under applicable fraudulent transfer laws, and (ii) the scope of protected creditors under any given fraudulent transfer law.

The term "creditor" is not defined in title 55 of the Virginia Code, although some guidance is provided on how the term is to be construed.[53] Relying on this guidance, the learned Judge Ledbetter observed that "[t]he term 'creditors' embraces all creditors who but for the transfer would have had a right to subject the property to their debts."[54] Judge Ledbetter's statement, which focused on the "right" of a party as opposed to whether that party has reduced a claim to judgment,[55] appears consistent with other judicial discussions of the issue. Namely, the Supreme Court of Virginia explained that a "creditor" may be a party whose claim is contingent, immature, or not yet reduced to a judgment as of the time of the purported fraudulent transfer.[56]

("The three classes of parties who have standing to bring an action under Code § 55-80 are 'creditors,' 'purchasers,' and 'other persons.'").

51. *Efessiou*, 41 Va. Cir. at 144 (citing Estate Const. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 219 (4th Cir. 1994)).

52. *Compare* VA. CODE ANN. § 55-80 (Repl. Vol. 2012) (including "creditors, purchasers, or other persons"), *with id.* § 55-81 (Repl. Vol. 2012) (including "creditors" and "purchasers").

53. *See id.* § 55-103 (Repl. Vol. 2007) ("The words 'creditors' and 'purchasers' . . . shall not be restricted to the protection of creditors of and purchases from the grantor, but shall also extend to and embrace all creditors and purchasers who, but for the deed or writing, would have had title to the property conveyed or a right to subject it to their debts.").

54. Richie v. Grammer, 15 Va. Cir. 418, 419 (1989) (Spotsylvania County). This definition appears to be consistent with the definition of "creditor" provided for by the UFTA, which defines a creditor as a person who has a "claim." UNIF. FRAUDULENT TRANSFER ACT § 5, 7A, pt. 2 U.L.A. 14 (2006). A claim, in turn, is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.*

55. *Richie*, 15 Va. Cir. at 419.

56. *See* Luria v. Bd. of Dirs. of Westbriar Condo. Unit Owners Ass'n, 277 Va. 359, 366, 672 S.E.2d 837, 840 (2009) (citations omitted); Buchanan v. Buchanan, 266 Va. 207, 213, 585 S.E.2d 533, 536 (2003).

Virginia law further separates creditors into two classes: existing creditors and future creditors.[57] The relevant point for distinguishing the two is the time the allegedly fraudulent transfer is made.[58] An existing creditor is one whose claim existed at the time of the transfer.[59] A future creditor is one whose claim arose after the transfer.[60] For the purposes of asset protection planning and this essay, the distinction between existing creditors and future creditors is relevant because section 55-80 confers standing on both existing and future creditors, whereas section 55-81 confers standing only on existing creditors.[61]

Any given client's pool of future creditors may be divided further into two subcategories: (i) future creditors who are foreseeable to the transferee ("foreseeable future creditors"); and (ii) future creditors who are not foreseeable to the transferee ("unforeseeable future creditors").[62] An example of a foreseeable future creditor is a doctor's patient who is scheduled to undergo surgery after the subject asset transfer.[63] An example of an unforeseeable future creditor is a motorcyclist the doctor injures in a motor vehicle accident after the subject asset transfer.[64] Admittedly, there does not appear to be any Virginia statute or case law employing the particular phraseology of "foreseeable future creditors" or "unforeseeable future creditors." Nonetheless, particularly in the context of asset protection planning, dividing future creditors into the subcategories of foreseeable future creditors and unforeseeable future creditors is consistent with court opinions from other jurisdictions, as well as scholarship on the topic of fraudulent transfer law.[65]

---

57. Balzer & Assocs., Inc. v. The Lakes on 360, Inc., 250 Va. 527, 530–31, 463 S.E.2d 453, 455 (1995).

58. Wiebel v. Hunt, 68 Va. Cir. 191, 193 (2005) (Greene County).

59. *Id.*

60. *See id.*

61. *Compare id.* (explaining that conveyances under section 55-80 may be challenged by future creditors), *with* Battle v. Rock, 144 Va. 1, 15, 131 S.E. 344, 348 (1926) ("The principle upon which voluntary conveyances are held void as to *existing* creditors is that a man should be just before he is generous." (emphasis added)).

62. Duncan E. Osborne & Mark E. Osborne, *Asset Protection Trust Planning*, ST041 A.L.I.-A.B.A. 1, 12 (2012) [hereinafter Osborne, *Asset Protection*].

63. Jacob Stein, *Asset Protection May Risk Fraudulent Transfer Violations*, 37 EST. PLAN. 12, 15 (2010) [hereinafter Stein, *Violations*].

64. *Id.*

65. *See id.*; *see also* Osborne, *Asset Protection*, *supra* note 62.

Based on the foregoing, an asset protection attorney can categorize a client's status vis-à-vis creditors into one of the following: (a) the client maintains no existing creditors nor foreseeable future creditors, but may have unforeseeable future creditors ("Category A"); (b) the client maintains no existing creditors, but does have foreseeable future creditors, and may have unforeseeable future creditors ("Category B"); (c) the client maintains existing creditors but no foreseeable future creditors, and may have unforeseeable future creditors ("Category C"); or (d) the client maintains existing creditors as well as foreseeable future creditors, and may have unforeseeable future creditors ("Category D"). Because of section 55-80's intent requirement[66] and section 55-81's grant of standing only to existing creditors,[67] asset protection planning has a higher risk of being deemed fraudulent for certain client categories than for others.

For example, a Category A client faces the least risk that any given asset protection planning transfer is, in reality, a fraudulent transfer. The absence of any existing creditors at the time of the transfer eliminates all risk of a subsequent challenge based on section 55-81.[68] Although section 55-80 permits future creditors to bring an avoidance action, the statute provides that a debtor making a transfer with the intent to hinder, delay, or defraud creditors shall be void "as to such creditors, purchasers, or other persons."[69] This qualification within the statutory language seems to indicate that a creditor not contemplated by the debtor at the time of transfer would not have standing to invoke the protections of section 55-80. Given that a Category A client's only creditors are unforeseeable future creditors whose existence is not known even to the client, it would be a strained argument for any such creditor to assert that the client effected the subject transfer with the intent to hinder, delay, or defraud that creditor.

Although categories B, C, and D can be analyzed in similar fashion, such an analysis conducted in a vacuum would be both misleading and incomplete. The mere fact that a client has identifiable existing creditors or foreseeable future creditors, standing alone, does not automatically merit the conclusion that all asset

66. *See* VA. CODE ANN. § 55-80 (Repl. Vol. 2012).
67. *See id.* § 55-81 (Repl. Vol. 2012).
68. *See id.*
69. *Id.* § 55-80 (Repl. Vol. 2012).

protection planning transfers made by that client are fraudulent transfers. For example, a true millionaire who regularly makes retirement contributions despite having a $500 Visa credit card bill certainly has an existing creditor. However, given her financial condition, the millionaire likely is not making retirement contributions with the intent to hinder, delay, or defraud Visa from recovering amounts owed to it—eliminating risk of avoidance of the retirement contributions under section 55-80.[70] Moreover, the millionaire is not insolvent—eliminating risk of avoidance of the retirement contributions under section 55-81.[71] Indeed, such a client would be able to carry out asset planning protection transfers with a strong sense of security that those transfers would not be subject to subsequent challenge by way of section 55-80 and/or section 55-81. Therefore, for an asset protection planning attorney to make a true analysis of a client's future risks of fraudulent transfer litigation (as well as the attorney's risks for future ethical reprimand), she must consider whether the transfer is accompanied by badges of fraud in addition to evaluating the client's current financial situation.

B. *Badges of Fraud*

In assessing a client's asset protection planning goals for risk of future fraudulent transfer litigation, an attorney must determine whether the desired transfer will be accompanied by any badges of fraud. In essence, a "badge of fraud" is a specific type of circumstantial evidence that courts have branded as indicative of fraudulent intent.[72] Badges of fraud play no role in analyzing whether section 55-81 applies to any given transfer, as the statute does not require an intent element.[73] Badges of fraud function only to provide evidence of section 55-80's requisite intent to hinder, delay, or defraud creditors.[74] Their existence is necessitated by the simple reality that a debtor seldom admits that an intent to hinder, delay, defraud creditors accompanied his decision, for

70. *See id*.
71. *See id*. § 55-81 (Repl. Vol. 2012).
72. Temple v. Jones, Son & Co., 179 Va. 286, 298, 19 S.E.2d 57, 62 (1942).
73. Virginia Dep't of Taxation v. Nicolet, 62 Va. Cir. 372, 373 (2003) (Richmond City).
74. Phillips v. Moazzeni (*In re* Tarangelo), 378 B.R. 128, 134 (Bankr. E.D. Va. 2007) (citing Hutcheson v. Sav. Bank of Richmond, 129 Va. 281, 291, 105 S.E. 677, 680–81 (1921)) (explaining the party challenging a transfer under section 55-80 may establish a prima facie case by proving badges of fraud existed in relation to the transfer).

example, to sell a priceless Cadillac to Grandpa Joe for the bargain price of $1. In other words, because proving section 55-80's intent element would be virtually impossible if the courts required direct evidence of that intent, a court will infer fraudulent intent if certain badges of fraud surround the transaction.[75] In Virginia, badges of fraud include:

> (1) retention of an interest in the transferred property by the transferor; (2) transfer between family members for allegedly antecedent debt; (3) pursuit of the transferor or threat of litigation by his creditors at the time of the transfer; (4) lack of or gross inadequacy of consideration for the conveyance; (5) retention or possession of the property by transferor; and (6) fraudulent incurrence of indebtedness after the conveyance.[76]

Attorneys should approach proposed asset protection transfers accompanied by any of the above-mentioned badges of fraud with caution, as a single badge of fraud is sufficient for a court to infer the transfer was motivated by the intent to hinder, delay, or defraud creditors.[77] Moreover, the court need not find that such intent was the primary or sole intent underlying the transfer.[78] Thus, it appears that transfers accompanied by a mixed intent to hinder, delay, or defraud creditors and achieve long-term security still fall within the gamut of section 55-80.[79] That being said, the presumption of fraudulent intent raised by badges of fraud can be rebutted if the proponent of any given transfer can produce evidence of its bona fide nature.[80] Therefore, badges of fraud should be perceived by asset protection planning attorneys as a legal and ethical yellow traffic light—a warning to slow down and examine the entire situation before proceeding.

---

75. *Id.* (explaining that the court may rely on badges of fraud as proof of fraudulent intent in the absence of direct evidence).

76. Fox Rest Assocs., L.P. v. Little, 282 Va. 277, 285, 717 S.E.2d 126, 132 (2011) (citing Hyman v. Porter (*In re* Porter), 37 B.R. 56, 63 (Bankr. E.D. Va. 1984)).

77. Moore v. Manson (*In re* Springfield Furniture, Inc.), 145 B.R. 520, 534 (Bankr. E.D. Va. 1992) (citing Hickman's Ex'r v. Trout, 83 Va. 478, 491, 3 S.E. 131, 136 (1887)).

78. Coleman v. Cmty. Trust Bank (*In re* Coleman), 285 B.R. 892, 908 (Bankr. W.D. Va. 2002).

79. *Id.*

80. Balzer & Assocs., Inc. v. The Lakes on 360, Inc., 250 Va. 527, 533, 463 S.E.2d 453, 457 (1995) ("Once a party has established a prima facie case in support of its claim that a transfer is voidable, the burden of producing evidence to rebut the prima facie case shifts to the opposing party.").

C. *Financial Circumstances*

An honest examination of the client's finances might be the most certain way to assess whether fraudulent transfer litigation is on the horizon. No attorney can make a reliable assessment of the permissibility of a client's asset protection goals without some knowledge of the client's financial standing. This is true for two reasons: (i) section 55-80's intent requirement is inextricably tied to the financial condition of the transferor,[81] and (ii) section 55-81 only applies to insolvent transferors.[82]

Regarding section 55-80, common sense dictates that financially secure clients are in a stronger position to make true asset protection transfers than those facing dire financial straits. A debtor making asset protection transfers while still maintaining sufficient personal assets to honor obligations to creditors seemingly is not taking any action to the detriment of those creditors. It is important to note, however, that even insolvent clients can be financially secure for the purposes of section 55-80.[83] Indeed, insolvency alone is not a badge of fraud under Virginia law.[84] If it were, most law school graduates and many homeowners would not be able to make lawful asset protection transfers. Rather than using insolvency as a litmus test for a transfer's permissibility under section 55-80, attorneys should attempt to ascertain whether the client's financial condition has deteriorated to the point that creditors are pursuing the client or threatening litigation. Such a condition, in itself, is a badge of fraud.[85] Even if creditors have not yet started pursuing the client or threatened litigation, the transfer will be sufficiently problematic if the client's finances are such that he no longer can reasonably expect to meet his obligations to creditors.[86] In such circumstances, a court is

81. *See* VA. CODE ANN. § 55-80 (Repl. Vol. 2012).

82. *See id*. § 55-81 (Repl. Vol. 2012).

83. McBeth, *Bulls*, *supra* note 45, at 318.

84. *See* Hutcheson v. Sav. Bank of Richmond, 129 Va. 281, 291, 105 S.E. 677, 681 (1921) (quoting Hickman's Ex'r v. Trout, 83 Va. 478, 491–92, 3 S.E. 131, 136–37 (1887) (not naming insolvency among the badges of fraud)).

85. *See, e.g*., Fox Rest Assocs. L.P. v. Little, 282 Va. 277, 286, 717 S.E.2d 126, 132 (2011).

86. *See* Butler v. Loomer (*In re* Loomer), 222 B.R. 618, 622 (Bankr. D. Neb. 1998). For the purposes of this essay, a client who reasonably can expect to honor obligations to creditors will be termed "financially secure." Conversely, a client who reasonably cannot expect to honor obligations to creditors will be termed "financially insecure."

likely to conclude asset protection transfers are fraudulent transfers.[87]

Although not decided under Virginia law, the case of *In re Loomer* provides guidance on this point. In that case, the Bankruptcy Court for the District of Nebraska held that the debtor's prepetition retirement contributions were fraudulent transfers.[88] The key fact driving the court's holding was the debtor's decision to make retirement contributions even after defaulting on a loan agreement and franchise agreement.[89] From the court's perspective, these defaults marked a point in time when the debtor knew or should have known that he no longer could fulfill his various payment obligations, indicating the presence of the requisite intent to hinder, delay, or defraud creditors.[90]

Unlike section 55-80, which takes a more holistic snapshot of the debtor's financial circumstances, section 55-81 relies on insolvency as the benchmark standard for seeking relief under the statute.[91] In *Hudson v. Hudson*, the Supreme Court of Virginia discussed insolvency in the context of section 55-81.[92] The court explained that a debtor is insolvent when he has insufficient property to pay all his debts.[93] The process for conducting an insolvency analysis includes determining if the debtor's liabilities exceed his assets.[94] In comparing the liabilities and assets, however, the court will not include the value of the property transferred as an asset of the debtor.[95] Rather, the court determines the net worth of the debtor following the transfer.[96] This rule applies even in cases transferring individually held property into a

87. *See, e.g.*, *id.*

88. *Id.* at 623.

89. *Id.* at 621–22.

90. *Id.*

91. *Compare* VA. CODE ANN. § 55-80 (Repl. Vol. 2012), *with id.* § 55-81 (Repl. Vol. 2012).

92. 249 Va. 335, 340–41, 455 S.E.2d 14, 17 (1995).

93. *Id.* at 340, 455 S.E.2d at 17 (citing McArthur v. Chase, 54 Va. (13 Gratt.) 683, 694 (1857)).

94. *Id.* at 340–41, 455 S.E.2d at 17 (citing Darden v. George G. Lee Co., 204 Va. 108, 109–11, 129 S.E.2d 897, 898–99 (1963); Gray v. McCormick, 181 Va. 52, 63–64, 23 S.E.2d 803, 808–09 (1943)).

95. Shaia v. Meyer (*In re* Meyer), 206 B.R. 410, 417 (Bankr. E.D. Va. 1997), *vacated*, 244 F.3d 352, 355–57 (4th Cir. 2001) (vacated on misapplication of consideration deemed valuable in law standard).

96. *In re Meyer*, 206 B.R. at 417.

form of joint ownership, such as tenancy by the entirety.[97] Additionally, the court will not include the value of any exempt property or contingent property interests held by the debtor as part of the debtor's net worth.[98] Essentially, if the property is not capable of being attached, it is not an asset for the purposes of solvency calculations under section 55-81.[99]

Accordingly, understanding a client's financial condition is key to understanding the legal and ethical risks Virginia's fraudulent transfer law poses to a specific proposed transfer. Although a slightly different standard should be employed when assessing avoidability under section 55-80 as opposed to section 55-81 (i.e., financial stability versus insolvency), much of the information required for making either assessment overlaps and may be obtained through client interviews.

D. *Using Factors to Find the Difference*

There is a difference between valid asset protection planning and fraudulent transfers. The difference, however, does not rest in the nature of the transfer. Indeed, transferring real estate to a legal entity so that it may be held in protected form may or may not be a fraudulent transfer.[100] It depends on the client's circumstances. An analysis of the client's creditors, any potential badges of fraud accompanying the transfer, and the client's financial standing will yield a reliable prediction as to on which side of the blurry "fraudulent transfer line" the client's goals fall.[101]

Given the fact-driven nature of differentiating between asset protection planning and fraudulent transfers, attempting to enunciate a bright-line legal rule would be both long-winded and unworkable in many situations. Nonetheless, the charts below serve as quick reference tools in assessing the risk of subsequent fraudulent transfer litigation in relation to any given transfer.

97. *Id.* at 420 (citations omitted).
98. *Id.* at 418*; see also In re* Massey, 225 B.R. 887, 890 (Bankr. E.D. Va. 1998).
99. *In re Meyer*, 206 B.R. at 418.
100. *See supra* note 46 and accompanying text.
101. *See supra* Parts III.A–C.

Table Definitions:

Category A client: The client maintains no existing creditors nor foreseeable future creditors, but may have unforeseeable future creditors.

Category B client: The client maintains no existing creditors, but does have foreseeable future creditors and may have unforeseeable future creditors.

Category C client: The client maintains existing creditors, but no foreseeable future creditors, and may have unforeseeable future creditors.

Category D client: The client maintains existing creditors as well as foreseeable future creditors, and may have unforeseeable future creditors.

Table 1: Section 55-80 Analysis Key:

AS – Category A client (financially secure)
BS – Category B client (financially secure)
BI – Category B client (financially insecure)
CS – Category C client (financially secure)
CI – Category C client (financially insecure)
DS – Category D client (financially secure)
DI – Category D client (financially insecure)
BOF – Badges of fraud accompanying transfer
NBOF – No badges of fraud accompany transfer
"+" – Transfer is likely legitimate asset protection
"-" – Transfer is likely fraudulent transfer
"?" – Transfer is in gray area and should be heavily analyzed

NOTE: "Financially secure" means a client's income and assets in relation to legal obligations create a reasonable expectation that the client is capable of honoring obligations to creditors

	AS	BS	BI	CS	CI	DS	DI
BOF	+	?	-	?	-	?	-
NBOF	+	+	-	+	-	+	-

Table 2: Section 55-81 Analysis Key:

A – Category A client
B – Category B client
C – Category C client
D – Category D client
I – Client is insolvent
S – Client is solvent
"+" – Transfer is likely legitimate asset protection
"-" – Transfer is likely a voluntary conveyance
"?" - Transfer is in gray area and should be heavily analyzed

NOTE: "Insolvent" means that the client's liabilities exceed the client's assets after excluding all property owned by the client that would not be counted as an asset for solvency purposes from the calculation.

NOTE: This table assumes the transferor ***has not*** *received consideration deemed valuable in law in exchange for the transfer.*

	A	B	C	D
I	+	+	-	-
S	+	+	+	+

IV. THE ETHICAL DIFFERENCE

Understanding the difference between asset protection planning and fraudulent transfers offers Virginia attorneys additional benefits beyond anticipating the legal effects of a proposed transfer. Modern ethics opinions indicate there is a cognizable ethical difference between assisting a client in asset protection planning transfers as opposed to effecting fraudulent transfers.[102] Indeed, an attorney found on the wrong side of the fence in this regard might face severe ethical repercussions.[103]

Virginia's *Legal Ethics Opinion 1771* (*"LEO 1771"*) discusses a lawyer's ethical obligations when faced with a client who wishes to effect a fraudulent transfer.[104] Unfortunately, Virginia's guidance on the issue is limited to this one advisory opinion. *LEO 1771* examines a hypothetical situation in which a client seeks to

102. VA. CODE ANN. L. Ethics Op. 1771 (Cum. Supp. 2012).
103. *See, e.g.*, *infra* notes 142–47 and accompanying text.
104. VA. CODE ANN. L. Ethics Op. 1771 (Cum. Supp. 2012).

transfer her only asset to her husband and herself as tenants by the entirety.[105] The hypothetical transfer would involve no remunerative consideration, and would place the transferred assets out of the reach of the client's creditors.[106] *LEO 1771* correctly presumes that absent other mitigating factors, the transfer would be void under section 55-80 and voidable under section 55-81.[107] *LEO 1771* provides that, under the above-described circumstances, the applicable ethical rule is Virginia Rule of Professional Conduct 1.2(c) ("RPC 1.2(c)").[108] RPC 1.2(c) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.[109]

The ethics committee determined that whether the lawyer seeking guidance in *LEO 1771* would be found in violation of RPC 1.2(c) hinged on a question of substantive law outside of its purview.[110] Specifically, the committee determined that "[a] definitive conclusion as to . . . whether the attorney in this hypothetical can assist this client without violating Rule 1.2(c) would require an analysis of whether a transfer described by §§ 55-80 and/or 55-81 constitutes fraud."[111] Therefore, aside from identifying the applicable ethical rule, *LEO 1771* offers little guidance to Virginia practitioners attempting to determine whether a client's request-

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. VA. SUP. CT. R. pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).
110. VA. CODE ANN. L. Ethics Op. 1771 (Cum. Supp. 2012). In cases regarding different areas of law, the ethics committee similarly has declared that a substantive legal question regarding the legality of a particular conduct is outside the purview of the committee and has concluded only that an attorney should not counsel his client to take the specified action where the attorney determines the conduct in question is illegal. *Id.* (citing *id.* L. Ethics Op. 1227 (Repl. Vol. 2012) (regarding whether an attorney could assist potential parents in certain steps towards private adoption); *id.* L. Ethics Op. 1222 (Repl. Vol. 2002) (regarding whether an attorney could assist in a settlement involving secrecy about criminal acts in light of the statutes addressing misprision of a felony); *id.* L. Ethics Op. 1219 (Repl. Vol. 2002) (regarding whether an attorney could arrange for one client to loan a second client money for litigation expenses in light of the statutes addressing champerty and maintenance); *id.* L. Ethics Op. 782 (Repl. Vol. 2002) (regarding whether an attorney could advise a client separated and divorcing her husband to enter their jointly owned home in which only the husband resided to remove her personal property)).
111. *Id.* L. Ethics Op. 1771 (Cum. Supp. 2012).

ed asset protection transfer—which may be subsequently avoidable pursuant to sections 55-80 and/or 55-81—would, if carried into effect, create risk of disciplinary repercussions.

A thorough examination of Virginia jurisprudence reveals no cases nor opinions in which the above-described situation is addressed in more detail. However, other jurisdictions applying substantively identical or substantially similar ethical rules offer some guidance.[112] The following sections address the elements of RPC 1.2(c) in greater detail, and examine cases and ethical opinions from other jurisdictions in order to provide insight and guidance to Virginia lawyers faced with a situation occupying this ethical gray area.

A. *RPC 1.2(c)*

As noted above, RPC 1.2(c) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[113]

Based on this language, an attorney violates RPC 1.2(c) when she (i) knowingly (ii) counsels a client to engage in or assists a client in (iii) conduct which is criminal or fraudulent.[114] In the context of fraudulent transfers, however, these requirements become somewhat blurred.

1. Knowingly

The term "knowingly" in the context of RPC 1.2(c) "denotes actual knowledge of the fact in question."[115] It refers to a lawyer's knowledge of the facts and circumstances surrounding the rele-

---

112. However, the author must note that "[a]lthough interpretation of similar language in the ABA Model Rules by other states' courts and bars might be helpful to understanding Virginia's Rules, those foreign interpretations should not be binding in Virginia." VA. SUP. CT. R. pt. 6, § II, Preamble: Scope (Repl. Vol. 2012).

113. *Id.* pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).

114. *See id.*

115. *Id.* pt. 6, § II, Preamble: Terminology (Repl. Vol. 2012) (noting that "[a] person's knowledge may be inferred from circumstances.").

vant conduct.[116] Phrased alternatively, RPC 1.2(c)'s "knowingly" requirement cannot be met simply by proving that a lawyer knew she was assisting in a transfer or knew she was advising her client to make a transfer.[117] To violate this rule a lawyer must *know* that the transfer she advises the client to make is "fraudulent" as defined by the Rules.[118] The Rules' unique definition of the term "fraudulent" is examined more thoroughly below.[119] Thus, it appears that a large part of determining whether a lawyer acted ethically hinges on the lawyer's intent. Although Virginia offers little guidance, other jurisdictions provide some insight.

The case of *In re Mirabile*, from the Supreme Court of Missouri, discusses the "knowingly" element in greater detail.[120] There, Mr. Moroney, an attorney, represented Mr. Leahy in a child support hearing.[121] At this hearing, the court held that Mr. Leahy's current child support payments to his first wife were insufficient based on his monthly income of $7000.[122] The judge ordered that Mr. Leahy pay an additional $1580 per month in child support payments.[123] Dismayed by the verdict, Mr. Moroney and Mr. Leahy's wife at the time of the hearing, Mrs. Joyce Leahy, sought to avoid these increased payments.[124] Upon hearing the verdict, Mr. Moroney stated to the judge that Mr. Leahy could avoid the increased child support payments by divorcing Mrs. Joyce Leahy and transferring assets into her name.[125] Mr. Moroney spoke with Mrs. Joyce Leahy, and upon her request, recommended several divorce attorneys, including Mr. Mirabile.[126] After Mrs. Joyce Leahy hired Mr. Mirabile, Mr. Moroney and Mr. Mirabile worked jointly on the necessary paperwork and filed the necessary documents.[127] The filing included a separation agreement in which Mr.

116. *See id.*

117. *Id.* pt. 6, § II, R. 1.2 cmt. 9 (Repl. Vol. 2012).

118. *Id.* pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012). The rules define fraud and fraudulent as "conduct having a purpose to deceive and not merely negligent misrepresentation, or failure to apprise another of relevant information." *Id.* pt. 6, § II, Preamble: Terminology (Repl. Vol. 2012).

119. *See infra* Part IV.A.3.

120. 975 S.W.2d 936, 940–41 (Mo. 1998).

121. *Id.* at 937.

122. *Id.*

123. *Id.*

124. *See id.*

125. *Id.*

126. *Id.*

127. *Id.* at 937–38.

Leahy agreed to pay Mrs. Joyce Leahy a total of $7000 in child support and alimony each month.[128] Mr. Leahy's first wife filed a complaint after a temporary order implementing the stipulation was entered, and the divorce and separation agreement were later set aside by the court.[129] Mr. Leahy and Mrs. Joyce Leahy soon reconciled and were again living together in California when disciplinary actions against Mr. Moroney and Mr. Mirabile began.[130] The master of the disciplinary counsel found both attorneys to be in violation of the state's ethical rules.[131] The master specifically found that the timing of Mr. Leahy and Mrs. Joyce Leahy's divorce and separation agreement, as well as the fact that Mr. Moroney and Mr. Mirabile were their personal friends, constituted sufficient evidence to find that both lawyers acted with the requisite intent to defraud Mr. Leahy's first wife.[132] Ultimately, the Supreme Court of Missouri overturned the master's finding that both Mr. Mirabile and Mr. Moroney breached the ethical rules.[133]

In support of its finding, the court noted that the Leahys' testimony that they had desired a divorce, actually separated, and complied with the court's separation order was proof that Mr. Moroney and Mr. Mirabile did not necessarily *know* that the separation proceeding was for the purpose of defrauding Mr. Leahy's first wife.[134] The court wrote:

> There is no evidence that the respondents encouraged Joseph Leahy to refuse to pay his child support, nor any proof that he was ever unable to pay the child support (as he candidly testified he had the resources to pay it). The contempt order only shows that Joseph Leahy did not want to pay the child support, and does not constitute evidence of misconduct on the part of the respondents."[135]

The court also stated that "[l]awyers are responsible for pleadings and other documents prepared in litigation, but need not have personal knowledge of matters asserted in documents submitted to courts because such documents contain assertions of the

128. *Id.* at 938.
129. *Id.*
130. *Id.*
131. *Id.* at 939.
132. *Id.*
133. *Id.* at 941.
134. *Id.* at 940–41.
135. *Id.* at 941 (citation omitted).

client, not the lawyer."[136] Particularly germane to the "knowingly" element is Judge Holstein's discussion of Mirabile's intentions in filing the divorce and separation agreement in his separate opinion.[137] Judge Holstein stated:

> With respect to respondent Mirabile, the evidence that he knew the Leahys' ulterior motive in filing the [divorce and separation agreement] is not as strong or clear as that implicating Moroney. Unlike Moroney, Mirabile was essentially brought into this situation by a colleague, not by an emotional, vindictive client. The extent of Mirabile's knowledge of [Mr. Leahy's] underlying legal controversy in [the child support hearing against his first wife] is unclear. Mirabile was, therefore, more likely an unwitting participant in the Leahys' scheme. While his lack of diligence in inquiring into the details of his client's circumstances is troubling, it is not usually a cause for substantial discipline.[138]

However, Judge Holstein had a different position on whether Mr. Moroney knowingly participated in the fraudulent transfer of assets.[139] Judge Holstein stated:

> A lawyer with the full knowledge of the circumstances Moroney had at hand should at least be held to the same standard as a reasonable person in recognizing that fraud was afoot. Without other contradictory information a lawyer might . . . believe the statements of a client. But the lawyer-client relationship does not suspend the lawyer's need to exercise common sense in evaluating the client's intent to commit a fraud.[140]

The case of *Florida Bar v. Cohen* aligns with Judge Holstein's dissent.[141] In *Cohen*, the attorney counseled his client to execute a mortgage and note on behalf of a corporation (of which the client was the sole shareholder) in favor of the attorney and the individual client.[142] Subsequently, the attorney and client foreclosed on the mortgage, and the attorney filed an affidavit of indebtedness claiming that the corporation owed his client and himself the principal amount due on the note plus interest.[143] The ethics

136. *Id*. at 940.
137. *See id*. at 944 (Holstein, J., dissenting in part and concurring in part).
138. *Id*.
139. *See id*. at 943.
140. *Id*. at 944.
141. *See* 534 So.2d 392, 392–93 (Fla. 1988) (holding that the attorney, Cohen, was guilty of engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and suspending Cohen's license to practice law for ninety-one days).
142. *Id*. at 392.
143. *Id*.

committee's referee determined that the attorney made these transactions in order to allow his client to avoid paying high insurance premiums and damages owed by the transferring corporation to multiple individuals.[144] The court sanctioned the attorney for violating Disciplinary Rule 7-102(A)(7) ("DR 7-102(A)(7)"), "counseling or assisting his client in illegal or fraudulent conduct."[145] The fact that Mr. Cohen had a history of disciplinary problems was germane to the court's holding.[146] The court noted that in *Cohen v. New Sunrise Investment Corp.*, Florida's "Eleventh Judicial Circuit held that Cohen had transferred real properties fraudulently and ordered the conveyances to be set aside."[147]

Although not involving fraudulent transfer law, another disciplinary case, *Florida Bar v. Cohen* (hereinafter referred to as "*Cohen II*"), helps clarify the type of conduct that might fulfill the "knowingly" requirement of RPC 1.2(c).[148] In *Cohen II*, Mr. Cohen was charged with felony conspiracy.[149] The conspiracy revolved around Mr. Cohen's structuring of financial transactions to avoid reporting cash transfers of $10,000 or more, in violation of title 31 of the United States Code.[150] Mr. Cohen pled guilty to the charges and revealed that he had personally concealed and received about $640,000.[151] Mr. Cohen performed these transactions on behalf of a client who later was found to be a major drug distributor.[152] The disciplinary charges brought against Mr. Cohen focused on his criminal conduct.[153] At his disciplinary hearing, Mr. Cohen claimed he did not know the money at issue was the product of an illegal operation, and that he believed the money to be the fruit of a legitimate enterprise.[154] The Supreme Court of Florida, agreeing with the disciplinary hearing's referee, rejected this claim:

144. *Id.* at 392–93.
145. *Id.* at 393.
146. *See id.*
147. *Id.* (citation omitted).
148. *See* 908 So.2d 405, 411 (Fla. 2005) (finding that Cohen "knowingly" conspired with his client).
149. *Id.* at 407.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 408.
154. *See id.*

> We also approve of the referee's use of common sense and logic in making his factual findings based on the evidence presented. We agree that it strains credulity that an attorney would believe that $640,000 in cash delivered in plastic-wrapped $10,000 bundles for storage in a safety deposit box was legitimately acquired.[155]

Although at first blush RPC 1.2(c)'s "knowingly" requirement appears ambiguous, comment nine of RPC 1.2(c), when read in conjunction with the above cases, offers substantial guidance.[156] Comment nine's provision differentiating between presenting legal analysis of a course of conduct and recommending a means by which to execute fraud[157] combined with the Rules' permission to prove knowledge with circumstantial evidence informs the issue.[158] It seems that whether a lawyer had actual knowledge of the fraudulent nature of the transfer depends on the extenuating and mitigating factors surrounding it. *Cohen II* exemplifies this principle; the court found it unbelievable that any reasonable person would believe $640,000 cash in neatly packaged bundles was earned from a legitimate enterprise.[159]

However, perhaps the most decisive factor in a court or disciplinary committee's decision is whether or not the attorney can provide a non-fraudulent explanation for the transfer. In *Mirabile*, the evidence that played a major role in persuading the court to overturn the disciplinary committee's findings was the fact the clients actually were separated for a period of time and complied with the court's separation orders.[160] Similarly, Judge Holstein in his separate opinion noted that it was more likely that Mr. Mirabile lacked the fraudulent intent necessary to be found in violation of the ethical rules because he did not represent Mr. Leahy in the original child support hearing; as compared with Mr. Moroney who had done so.[161] If an attorney can show a non-fraudulent basis for a transfer, the prosecuting body will have a very difficult time proving that the attorney *knew* the transfer was "fraudulent." This is in large part due to the unique definition of the term

155. *Id*. at 411 (citation omitted).
156. *See* VA. SUP. CT. R. pt. 6, § II, R. 1.2 cmt. 9 (Repl. Vol. 2012).
157. *Id*.
158. *See id*. pt. 6, § II, Preamble: Terminology (Repl. Vol. 2012).
159. *See Cohen*, 908 So.2d at 411.
160. *See supra* notes 134–35 and accompanying text.
161. *See supra* notes 137–40 and accompanying text.

"fraudulent" contained in the Rules, which is discussed in more detail in Part IV.A.3.

2. Advising Versus Counseling to Engage or Assisting

RPC 1.2(c) forbids an attorney from assisting a client with or counseling a client to engage in a transfer of assets that would be fraudulent within the meaning of the Rules.[162] RPC 1.2(c) does not prohibit, however, an attorney from discussing the legal consequences of a proposed transaction.[163] The second clause of RPC 1.2(c)—"but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law"[164]—supports the maxim that a lawyer is required to give an honest opinion about the actual consequences that are likely to result from a client's conduct.[165] If the client chooses to act against the attorney's advice and proceed in a manner that is criminal or fraudulent, the lawyer is not necessarily a party to the action.[166] There is a significant ethical difference between advising a client on his legal options (including the validity, scope, and application of the law) and "recommending the means by which a crime or fraud might be committed with impunity."[167] Thus, if an attorney determines that a proposed transfer constitutes fraudulent conduct, the attorney only would be permitted to "explain the legal consequences of the client's proposal, namely, that the transfer would be void with regard to those creditors [the] client wishes to evade."[168]

The case of *In re Hockett* from the Supreme Court of Oregon provides an excellent example of the type of behavior considered an ethical violation.[169] There, the court suspended the attorney from practice for sixty-three days for conduct arising from his handling of two divorce cases and related property transfers.[170]

---

162. VA. SUP. CT. R. pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).
163. *Id*.
164. *Id*.
165. *Id*. pt. 6, § II, R. 1.2 cmt. 9 (Repl. Vol. 2012).
166. *Id.* pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).
167. *See id.* pt. 6, § II, R. 1.2 cmt. 9 (Repl. Vol. 2012).
168. VA. CODE ANN. L. Ethics Op. 1771 (Cum. Supp. 2012).
169. 734 P.2d 877 (Or. 1987).
170. *Id.* at 879–80.

The court sanctioned the attorney for, among other reasons, violating DR 1-102(A)(7), which provided that an attorney shall not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."[171] The attorney represented clients who were indebted to banks and individuals in amounts approaching $400,000.[172] The conduct in question involved the attorney's assistance and counsel in filing for divorce between the clients and their respective wives, and subsequently transferring all of the clients' assets to their wives as part of each property settlement agreement.[173] The issue of whether the attorney crossed the boundary between merely counseling his clients and counseling them to engage or assisting is determined easily. The attorney performed the acts necessary to effect the transfer.[174] Given that the other requirements of "knowingly" and "fraudulent" were satisfied, the attorney violated the ethical rules.[175]

The case of *In re Kenyon* also provides a useful example of when an attorney crosses the line separating mere advisement and conduct that constitutes "counseling to engage or assisting."[176] This Supreme Court of South Carolina case involved the conduct of two lawyers, Mr. Kenyon and Mr. Lusk.[177] The issues revolved around their handling of the estate of Mr. Meredith, a longtime client of their firm.[178] Prior to the purported ethical violation, Mr. Meredith was sought by federal authorities in connection with drug violations.[179] He eventually committed suicide, and Mr. Kenyon and Mr. Lusk subsequently handled his estate.[180] At the time of Mr. Meredith's death, there was in excess of $540,000 of claims against his estate.[181] Mr. Kenyon and Mr. Lusk provided assistance in conveying a parcel of property owned by Mr. Meredith's estate to a corporation of which Mr. Kenyon and Mr. Lusk were sole owners.[182] Following this conveyance, another corporation

---

171. *Id*. at 881 (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980)).
172. *Id*. at 879.
173. *Id*. at 880.
174. *Id*.
175. *Id*. at 881–83.
176. 491 S.E.2d 252, 256 (S.C. 1997).
177. *Id.* at 253.
178. *Id.*
179. *Id.*
180. *See id.* at 253–54.
181. *Id.*
182. *Id.* at 254.

owned by Mr. Kenyon and Mr. Lusk provided a $250,000 mortgage on the property.[183] Finally, the property was re-conveyed to Mr. Meredith's children, and the mortgage was satisfied.[184] These transactions removed the property from the estate, to which creditors would have first claim, and transferred the property directly to Mr. Meredith's children, circumventing probate.[185] Obviously such conduct far surpassed mere advising, as Mr. Kenyon and Mr. Lusk had proactive roles in the transfers, ranging from constructing the necessary paperwork to actually serving as strawmen to effectuate the transaction.[186]

Florida Bar v. Cohen is another case in which the issue of advising versus counseling to engage or assisting is fairly straightforward.[187] Here, the attorney again crossed the line between merely advising a client of her rights and behavior that violated the ethical rules.[188] In *Cohen*, the attorney not only counseled his client to execute the mortgage (in and of itself a violation of the rule), but also assisted the client by becoming a part of the transaction and later initiating foreclosure proceedings.[189]

The requirement of counseling to engage or assisting is the most straightforward of Rule 1.2(c)'s three requirements.[190] In the context of this requirement the ethical line is clear. On one end, an attorney may discuss the implications of a proposed course of conduct and explain the legal consequences of acting upon it. This will not result in an ethical breach. Quite to the contrary, this conduct is exactly the type which lawyers are expected to provide. On the other end of the spectrum are situations in which the attorney takes an active role in the transfer, either by preparing the documents as in *In re Hockett*,[191] or by acting as a strawman in more extreme cases, such as in *In re Kenyon*.[192] These actions clearly meet RPC 1.2(c)'s "counsel[ing] . . . to engage, or as-

183. *Id.*
184. *Id.*
185. *Id.*
186. *See id*. at 254–55.
187. 534 So. 2d 392, 393 (Fla. 1988). This case was examined in the context of a discussion of the "knowingly" requirement of RPC 1.2(c) above. *See supra* Part IV.A.1.
188. *Cohen,* 534 S.E. 2d at 393.
189. *See supra* notes 142–43 and accompanying text.
190. *See* VA. SUP. CT. R. pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).
191. *See supra* notes 169–75 and accompanying text.
192. *See supra* notes 176–86 and accompanying text.

sist[ing]" requirement.[193] The only possible gray area exists in situations where an attorney clearly lays out how a client might effect a transfer which the attorney knows to be fraudulent, but stops short of assisting with the transfer. In this hypothetical it is helpful to imagine an unscrupulous attorney providing his client a clear outline of how to make herself judgment proof, and then adds, with a wink and a nod, that it would be unethical for the attorney to advise the client to follow that path. In such cases, the court or disciplinary committee will face the arduous task of determining whether the attorney was merely advising the client of the implications of the proposed actions, or counseling the client to engage in the conduct. This determination will hinge on the evidence presented.

3. Fraudulent

In order to determine whether an attorney who counsels a client to engage in or assists a client in conducting a transfer avoidable under sections 55-80 and/or 55-81 is liable for misconduct under RPC 1.2(c), one must look to the unique definition of the word "fraudulent" contained in the Rules.[194] The Rules define "fraudulent" as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."[195] This definition indicates that the transfer must be made with some degree of scienter, deceit or intent to mislead another party.[196] In sum, "[w]hether or not a particular transaction is a fraudulent transfer as a matter of substantive law is not the decisive factor in applying the Rules. The decisive factor[] [is] whether the lawyer knows that the transfer constitutes conduct having a purpose to deceive. . . ."[197] This quality of deceit seems to indicate that the conduct must be analogous to "fraud" as the word is defined in the tortious sense. However,

193. *See* VA. SUP. CT. R. pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).

194. *See* VA. CODE ANN. L. Ethics Op. 1771 (Cum. Supp. 2012).

195. VA. SUP. CT. R. pt. 6, § II, Preamble: Terminology (Repl. Vol. 2012).

196. *See* Denis Kleinfeld & Jonathan Alper, *The Florida Supreme Court Finds No Liability For Aiding Or Abetting A Fraudulent Transfer*, 78 FLA. B.J. 22, 27 (June 2004) [hereinafter Kleinfeld, *Florida Supreme Court*].

197. Gideon Rothschild & Daniel S. Rubin, *Asset-Protection Planning: Ethical? Legal? Obligatory?*, TRUSTS & ESTATES, Sept. 2003, at 42, 43, http://mosessinger.com/articles/files/AssetProtectionPlanning-Ethical-Legal-Obligatory.pdf [hereinafter Rothschild, *Ethical?*].

upon closer examination, it is clear this definition falls short of what is required to prove the common law tort of fraud.

a. Fraud Versus Fraudulent

Professor Prosser in *Prosser on Torts* stated that the common law tort of fraud consists of the following elements:

(i) a false representation of fact,
(ii) knowledge or belief that the representation is false,
(iii) an intention to induce another to act,
(iv) justifiable reliance by such person, and
(v) damages resulting in such reliance.[198]

The definition of a fraudulent transfer is vastly different. A fraudulent transfer is not a tort; it is a remedy created by the Commonwealth's legislature.[199] Several courts discussed the importance of this distinction within the context of ethical rules. In *Elliot v. Glushon*, the Ninth Circuit "held that fraudulent transfers in the context of bankruptcy include a great variety of actions which are not common law fraud."[200] *Connecticut Informal Opinion 91-22 ("Opinion 91-22")*, a hypothetical advisory opinion similar to *LEO 1771*, outlines the standard used by the State of Connecticut to determine whether an attorney's conduct was "fraudulent."[201] *Opinion 91-22* deals with (among other rules) Connecticut's counterpart to RPC 1.2(c).[202] In *Opinion 91-22*, an attorney sought the advice of the Connecticut Bar Association Committee on Professional Ethics as to whether the attorney could ethically recommend or assist the attorney's client in transferring property to the client's wife when, at the time of the transfers, the client was indebted to a level beyond his ability to repay his creditors.[203] The opinion provides that the attorney may counsel or assist in the conduct if he does not know of any intent to deceive and is aware of a substantial purpose other than delaying

198. William L. Prosser, HANDBOOK OF THE LAW OF TORTS 685–86 (West Publ'g Co., 4th ed. 1971); *see also* Glaser v. Enzo Biochern, Inc., 464 F.3d 474, 476–77 (4th Cir. 2006) (citation omitted) (applying Virginia law).

199. *See* VA. CODE ANN. § 55-80 (Repl. Vol. 2012).

200. Kleinfeld, *Florida Supreme Court*, *supra* note 196 (citing Elliot v. Glushon, 390 F.2d 514, 516 (9th Cir. 1967)).

201. Conn. Bar Ass'n Informal Op. 91-22 (Dec. 5, 1991).

202. *See id*.

203. *See id*.

creditors.[204] If the lawyer suspects, but does not know, that the transfer would be fraudulent, or that there is purpose to deceive, the lawyer should give the client the benefit of the doubt.[205]

In *In re Hockett*, the Supreme Court of Oregon found similarly—that the attorney had not committed fraud or deceit in a tortious sense.[206] Instead the court described the attorney's conduct as "intending illegally to put property beyond the lawful claims of creditors."[207] The court held that the divorces and transfers were part of a course of conduct designed to hinder the creditors from reaching the debtor's assets.[208] Thus, while the attorney had not committed the tort of fraud, the court found that the attorney, in effecting the fraudulent transfers, possessed the intent to cheat the debtor's creditors and therefore violated the ethical rules.[209]

Another case illustrative of the differences between a fraudulent transfer and fraud is *In re Kenyon*.[210] There, the Supreme Court of South Carolina held that whether the conduct involved met the definition of a "fraudulent conveyance" was not a requirement in the context of the disciplinary proceeding.[211] Instead, the court held that the crux of such a disciplinary decision rests in the dishonest nature of the attorneys' conduct.[212]

Based on these multijurisdictional opinions, it appears that the fact that a fraudulent transfer has been committed within the meaning of section 55-80 or section 55-81 does not establish per se that an attorney who assisted with the transfer automatically violates RPC 1.2(c). Instead, the court or disciplinary committee will evaluate the conduct to determine if the accused attorney advised the client to make the transfer with the purpose of cheating or deceiving the creditors.[213] These decisions reconcile well with the definition of "fraudulent," which the Rules define as "conduct

204. *Id.*
205. *Id.*
206. 734 P.2d 877, 882 (Or. 1987).
207. *Id.*
208. *Id.* at 881.
209. *See id.* at 883–84.
210. 491 S.E.2d 252, 254 (S.C. 1997) (citation omitted).
211. *Id.*
212. *See id.*
213. *See supra* notes 197–212 and accompanying text.

having a purpose to deceive."[214] *In re Mirabile* outlines these concepts well.

Remember that in *In re Mirabile*, the Supreme Court of Missouri noted that the facts that the Leahys actually had separated and abided by the court's separation order were strong enough reasons to overturn the disciplinary committee's finding of culpability.[215] One can assume that the court found that it was just as likely that the attorneys assisted in the separation for the purpose of dissolving the marriage as it was that the separation was made for the purpose of deceiving Mr. Leahy's first wife (the creditor). In other cases such as *In re Hockett* or *In re Kenyon*, in which the attorneys were found to violate the ethical rules, no reasonable alternative purposes for the transfers were proffered.

Thus, it is safe to assume that the conduct in question does not have to rise to the level of common law fraud in order to violate RPC 1.2(c). However, it is equally clear that just because a lawyer assists a client in a transfer that later is avoidable under section 55-80 or section 55-81 does not mean the attorney automatically will be found to be in violation of RPC 1.2(c). It would appear that the "fraudulent" element of RPC 1.2(c) requires conduct somewhere in between merely assisting a client with or counseling a client to engage in a transfer which is avoidable under section 55-80 or section 55-81, and an attorney committing an act which would create liability for the tortious act of fraud. The questions then become: exactly where is the ethical line; and when does a lawyer cross it?

The distinction between present and future creditors will weigh heavily on whether or not the attorney's conduct is "fraudulent" as defined by the Rules. As is shown below, the nature of the creditor's claim tends to be central in this analysis.

b. RPC 1.2(c) and Present Creditors

When a lawyer is confronted with assisting a client in a transfer of assets that will shield those assets from creditors, the ethical implications of RPC 1.2(c) largely revolve around whether the client has any creditors and, if so, whether those creditors are

214. VA. SUP. CT. R. pt. 6, § II, Preamble: Terminology (Repl. Vol. 2012).
215. *See supra* notes 134–35 and accompanying text.

present creditors or future creditors.[216] Virginia case law recognizes the distinction; however, it does not thoroughly define either term.[217] Although modern jurisprudence contains only sparse discussion on the issue, courts and ethics advisory committees that have considered the question almost unanimously hold that assisting a client in effecting a transfer made to hinder, delay, or defraud a present creditor is a violation of that state's equivalent of RPC 1.2(c).[218]

One such example of an ethical violation relating to a fraudulent transfer against present creditors is found in the San Diego Bar Association's *Ethics Opinion 1993-1*, from the state of California.[219] In this opinion, the bar's Legal Ethics Committee considered whether an attorney violated the governing ethical rules if he advised a client to undertake certain measures to shield the client's assets from claims of existing and identifiable creditors.[220] The committee determined such advice would be a violation because California law treats fraudulent transfers as criminal acts and because such a course of conduct would undermine public respect and confidence in the legal profession.[221] Other cases which have been discussed above also support this result. The cases of *Hockett*, *Cohen*, *Kenyon*, and *Mirabile*, as well as *Informal Opinion 91-22* and *LEO 1771* all involved situations in which a creditor's existing right to payment had been established.[222]

Although Virginia law does not provide a clear definition of a "present creditor," a definition can be gleaned from the UFTA. The UFTA defines a present creditor as one who had a "claim" against the debtor before *the debtor made the alleged fraudulent transfer*.[223] The UFTA defines a "claim" as "a right to payment, whether or not the right is reduced to judgment, liquidated,

216. *See supra* Part III.A.
217. Harvey v. Fox, 32 Va. (5 Leigh) 444, 449 (1834).
218. *See, e.g.*, *In re* Kenyon, 491 S.E.2d 252, 256 (S.C. 1997); *In re* Hockett, 734 P.2d 877, 882 (Or. 1987).
219. San Diego Bar Ass'n Legal Ethics Comm., Ethics Op. 1993-1, *available at* http://www.sdcba.org/index.cfm?Pg=ethicsopinion93-1.
220. *Id.*
221. *See id.*
222. *See supra* notes 105–06, 120–24, 169–75, 176–81, 201–03.
223. *See* UNIF. FRAUDULENT TRANSFER ACT § 5, 7A, pt. 2 U.L.A. 129 (2006).

unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[224]

Thus, based on the holdings of Virginia's sister states, it would seem that if an attorney assists or counsels a client to engage in a transfer for the purpose of avoiding the claims of present creditors, the attorney would violate RPC 1.2(c). The analysis becomes less clear outside the context of present creditors.

c. RPC 1.2(c) and Future Creditors

The difference between present and future creditors is that a future creditor's claim arises after the alleged fraudulent transfer.[225] In the context of RPC 1.2(c), it is necessary to draw a line between foreseeable future creditors and remote future creditors.[226] A foreseeable future creditor is one that possesses a cognizable connection with the transferor at the time of the transfer.[227] To illustrate, "a doctor's pool of patients is comprised of future creditors of the doctor, as there is a foreseeable connection, but even in this example, the foreseeability will vary for each specific doctor, as each doctor has a different likelihood of being sued."[228] Conversely, a remote future creditor is one who acquires a claim against the transferor subsequent to the transfer, but the claim did not arise out of some pre-existing connection between the creditor and the transferor.[229] The distinction between foreseeable future creditors and remote future creditors is relevant to a discussion of RPC 1.2(c) because any assistance by an attorney in placing a debtor's assets beyond the reach of the former, as opposed to the latter, is much more likely to constitute a violation of RPC 1.2(c).[230] This conclusion is axiomatic given the inherent difficulties in arguing that a transfer constituted conduct having a purpose to deceive a creditor who was wholly unknown and not

---

224. *Id*. § 1, 7A, pt. 2 U.L.A. 14 (2006).
225. Stein, *Violations*, *supra* note 63, at 15.
226. *See id.*
227. *See id.*
228. *Id.*
229. *Id.*
230. *See* Hurlbert v. Shackleton, 560 So.2d 1276, 1280 (Fla. Dist. Ct. App. 1990) (Barfield, J., dissenting) (discussing the difficulties in concluding culpable intent on the part of the transferor where the creditor was unforeseeable at the time of the transfer).

foreseeable to either the transferor or the attorney at the time of the transfer.[231]

A South Carolina ethics opinion illustrates the importance of the distinction between remote and foreseeable future creditors. In *Ethics Advisory Opinion 84-02*, (*"Opinion 84-02"*) the South Carolina Bar Association's Ethics Advisory Committee determined an attorney could transfer a client's assets to protect the client against potential claims of future creditors.[232] It explained that the "critical issue" in analyzing the propriety of the transfer was whether there was a reasonable prospect of a judgment against the client and, if so, if it was far removed into the distant future.[233] The committee concluded "[i]f . . . there does not exist the immediate reasonable prospect of a judgment being entered against the client, the transfer merely to avoid the future possibility of an action by a creditor . . . would not be [an ethical violation]."[234]

While *Opinion 84-02* offers a nice line-in-the-sand rule, its holding is called into question by the Supreme Court of the United States in *Grupo Mexicano de Desarrollo, S.A., v. Alliance Bond Fund, Inc.*[235] *Grupo Mexicano* "solidified a property owner's right to freely transfer his property prior to judgment subject to subsequent equitable remedies under fraudulent conveyance statutes."[236] In *Grupo Mexicano*, a plaintiff-creditor sought a preliminary injunction against the defendant-debtor to prevent the transfer of the defendant's assets during the trial.[237] Kleinfeld and Alper succinctly summarize the Supreme Court's holding:

> The Supreme Court stated, "It was well established, however, that, as a general rule, a creditor's bill could be brought only by a creditor who had already obtained a judgment establishing the debt." The Court reiterated its understanding of the well-established general

---

231. *Id.*; *see also* Kromash, *Ethical Considerations*, *supra* note 5, § 1.15 to 1.29 (discussing the implications of future creditor status as it pertains to attorney ethics and asset protection).

232. S.C. Bar Ass'n Ethics Advisory Comm., Ethics Advisory Op. 84-02 (1984), *available at* http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleID/227/Ethics-Advisory-Opinion-84-02.aspx.

233. *Id.*

234. *Id.*

235. *See* 527 U.S. 308, 319–21 (1999).

236. *See* Kleinfeld, *Florida Supreme Court*, *supra* note 196, at 26.

237. *Grupo Mexicano*, 527 U.S. at 310; *see also* Kleinfeld, *Florida Supreme Court*, *supra* note 196, at 26.

> rule, "that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." In other words, under common law a creditor has no property interest in the assets of a debtor prior to the creditor obtaining a judgment, and before judgment, a debtor's property is freely alienable.
>
> The point is that all people, even potential debtors, have fundamental rights to protect and control their property. The transfer of freely alienable property is not unlawful and cannot be restrained by a creditor, absent obtaining remedies allowed under other statutory law such as bankruptcy, even if the transfer could subsequently be challenged under fraudulent transfer statutes.[238]

The Supreme Court's decision seems to be at odds with the holdings of *Ethics Opinion 84-02*, which provides that it constitutes an ethical violation for an attorney to counsel a client to engage or assist a client with a fraudulent transfer for the purpose of avoiding foreseeable future creditors.[239] Certainly, if the Supreme Court has stated that it is the right of all people to control their assets, absent an adverse right to those assets in the form of a judgment or pre-existing claim,[240] then it would be unjust to punish lawyers who help individuals to exercise this right. When examined in the context of the Rules' definition of the term fraudulent ("having the purpose to deceive"), the same result is reached.[241] How can a lawful transfer of property, which the attorney's client has the sole right to control, be considered deceitful?

The authors submit that this question can be answered by examining the context in which the Supreme Court made their decision in *Grupo Mexicano*. First and foremost, the case involved a prayer for a preliminary injunction.[242] The Court's decision was founded in the idea that

> [t]he rule requiring a judgment [before attachment would be allowed] was a product, not just of the procedural requirements that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor

238. Kleinfeld, *Florida Supreme Court*, *supra* note 196, at 26 (quoting *Grupo Mexicano*, 527 U.S. at 319–21).

239. *See supra* notes 232–34 and accompanying text.

240. *See Grupo Mexicano*, 527 U.S. at 319.

241. *See* VA. SUP. CT. R. pt. 6, § II, Preamble: Terminology (Repl. Vol. 2012).

242. *Groupo Mexicano*, 527 U.S. at 310.

> (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore, could not interfere with the debtor's use of that property.[243]

This is consistent with the classification of fraudulent transfer statutes as remedial, and not preemptive, tools. Thus, despite the fact a debtor may have every right to make a transfer, a lawyer who assists a client with the same transfer can be held culpable under RPC 1.2(c) if the purpose of the transfer was to deceive creditors.[244] While this analysis may seem counterintuitive, it must be remembered that an attorney's ethical obligations may be more restrictive on an attorney's conduct than the client's "bare legal rights." Phrased alternatively, just because an attorney's client has a legal right to pursue a particular course of conduct, it does not necessarily follow that the attorney would be acting ethically if the attorney stood solely on the client's right. For example, an attorney is prohibited under the ethics rules from directly contacting an adverse party who is represented by counsel—despite that the client has the legal right to directly reach out to the adverse party for settlement or any other purposes.[245]

4. Summary

Certainly, a Virginia lawyer may engage in asset protection planning—one would be hard-pressed to argue, for example, that a lawyer cannot advise clients who desire to start a real estate investment business that they should utilize a limited liability company versus a general partnership business structure.[246] Or, that a surgeon not protect her assets from the threat of a malpractice suit by placing those assets in a trust, or by owning the assets as tenants by the entirety with her husband. On the other hand, one would be equally hard-pressed to argue that the attorneys' behavior in the *In re Hockett* or *Cohen* cases examined above was ethically proper.

---

243. Rothschild, *Ethical?*, *supra* note 197, at 44 (quoting *Grupo Mexicano*, 527 U.S. at 319–20) (internal quotations omitted) (alterations in original).

244. *See* VA. SUP. CT. R. pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).

245. *See* VA. SUP. CT. R. pt. 6, § II, R. 4.2 (Repl. Vol. 2012).

246. *See* Gideon Rothschild & Daniel S. Rubin, *Asset Protection Planning*, 810-3D TAX MANAGEMENT, at A-8 (2011) (explaining that a more significant question is whether a particular fraudulent transfer has a substantial purpose other than to delay or burden third parties).

As is often the case, the difficulties arise in the middle ground, in the situations where there is not a clear violation. This essay outlines what an attorney must do in order to violate RPC 1.2(c). First, he must act with the requisite mens rea. In the context of RPC 1.2(c), the applicable mens rea is defined by the term "knowingly." The Rules define "knowingly" as having actual knowledge of the facts in question.[247] This actual knowledge can be proven by circumstantial evidence, and the result will vary from case to case.[248] Some jurisdictions seem to apply a reasonable person standard,[249] while others seem to focus on whether there was a non-fraudulent explanation for the transfer.[250]

Secondly, in order to be found in violation of RPC 1.2(c) the attorney's conduct must consist of counseling a client to engage in, or assisting a client with the allegedly fraudulent transfer.[251] This requirement is the clearest of the three. On one hand, it is not only ethically proper, but professionally expected, that a lawyer will advise a client of the legal consequences of a proposed transfer. On the other hand, an attorney clearly cannot assist the client in effecting a transfer in violation of RPC 1.2(c). This forbidden assistance includes becoming a party to the transfer,[252] or simply preparing and filing documents.[253] Furthermore, an attorney cannot step back from actually assisting in the transfer only to instruct a client to engage in the forbidden conduct. This situation has not been examined in any available cases, disciplinary hearings, or opinions, most likely because the proof required to find a violation would be very difficult to obtain.

Finally, the transfer at issue must qualify as "fraudulent."[254] As noted, the Rules provide a unique definition of the word.[255] Many courts and scholarly sources agree that a lawyer will not run afoul of the ethical rules simply because he or she effects a transfer which is later held to be avoidable under section 55-80 or sec-

247. VA. SUP. CT. R. pt. 6, § II, Preamble: Terminology (Repl. Vol. 2012).
248. *Id.*
249. *See* Florida Bar v. Cohen, 908 So.2d 405, 411 (Fla. 2005).
250. *See In re* Mirabile, 975 S.E.2d 936, 940–41 (Mo. 1998).
251. VA. SUP. CT. R. pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).
252. *See supra* notes 176–86 and accompanying text.
253. *See supra* notes 169–75 and accompanying text.
254. *See supra* Part IV.A.3.
255. *Id.*

tion 55-81.[256] The same courts and scholars agree that the conduct does not have to equate to common law fraud.[257] Again the line is somewhere in the gray area. This ethical line is illuminated slightly by examining the differences between present, future foreseeable, and future remote creditors. If the "knowingly" requirement is met, an attorney's assistance in a transfer to avoid a client's present creditors most likely will be fraudulent and thus a violation of RPC 1.2(c).[258] On the other end of the spectrum, if a lawyer knowingly assists a client in transferring assets outside of the reach of future remote creditors, he most likely will not be found in violation of RPC 1.2(c).[259] Therefore, once again, the ethical line is in the middle ground, accompanied by the class of individuals known as foreseeable future creditors.

The final section strives to provide guidance as to how a Virginia practitioner can avoid running afoul of RPC 1.2(c) in unclear situations, such as those in which foreseeable future creditors are involved.

V. GUIDANCE

In the context of asset protection planning, the truism "with great power comes great responsibility" holds fast. Lawyers assisting clients with asset protection planning have great power to shield clients' assets from creditors, thereby providing peace of mind and long-term financial security. However lawyers, as officers of the court, also have a great responsibility not only to their clients, but also to the judicial system and society as a whole to act within the bounds of the law and comply with ethical standards provided by the profession.[260]

In order for a lawyer to avoid an ethical breach when assisting a client with a transfer of the client's assets, she should ensure that the transfer is not being made for the purpose of deceiving creditors. One scholar suggests that a lawyer should become fully informed of the client's standing vis-à-vis present creditors as a

256. *See supra* Part IV.A.3.a.
257. *Id.*
258. *See supra* Part IV.A.3.b.
259. *See supra* Part III.A.3.c.
260. *See* VA. SUP. CT. R. pt. 6, § II, Preamble (Repl. Vol. 2012); *In re* Giffiths, 413 U.S. 717, 724 n.14 (1973).

part of the lawyer's due diligence.[261] Due diligence in this context means "the attorney should independently investigate the client's financial and legal affairs, including an analysis of the client's solvency."[262] This also would include "attempt[ing] to uncover any existing, foreseeable or threatened claims."[263]

Several scholarly sources have offered practical guidance on ways to perform this due diligence, and steps attorneys can take to avoid disciplinary sanctions arising from their involvement with possibly fraudulent transfers. First, "counsel may wish to obtain from his prospective client an affidavit reciting that the client will not be rendered insolvent by the contemplated transfer and that the elements inherent in the [jurisdiction's fraudulent transfer statute] are not present in the client's case."[264] Similarly, an attorney may ask a client to fill out a questionnaire pertaining to the reasons the client is effecting the transaction.[265] Furthermore, in addition to RPC 1.2(c) and the guidance set forth above, an attorney must be mindful of Virginia Rule of Professional Conduct 1.16 ("RPC 1.16").[266] RPC 1.16, similar to Model Rule of Professional Conduct 1.16,[267] dictates that an attorney who learns of a client's wrongful conveyances and cannot persuade the client to disclose those transfers should consider withdrawing from representation.[268] If the attorney is able to convince her client to reveal the transfers to the court, counsel also should make a good faith effort to recover any amounts already transferred as a result of fraudulent conveyances.[269]

While the above guidance is well-intentioned and may indeed provide for the appropriate actions in an ideal world, the authors contend that such steps are not practical in the everyday practice

---

261. Kromash, *Ethical Considerations*, *supra* note 5, at § 1.41 (explaining that, in regards to a lawyer's ethical obligations when assisting a client in the transfer of assets, "it is imperative for the attorney to conduct due diligence with respect to the client's legal and financial situation").

262. *Id.*

263. *Id.*

264. Jerome Ostrov, *Tax & Estate Planning with Real Estate, Partnerships & LLCs,* § 11:8 (2d ed. 2010).

265. *Id.*

266. *See* VA. SUP. CT. R. pt. 6, § II, R. 1.16 (Repl. Vol. 2012).

267. MODEL RULES OF PROF'L CONDUCT R. 1.16 (1980).

268. *See* Adrienne O'Connell McNamara & Carl A. Eklund, *Ethical Quandaries of a Debtor's Lawyer, in* REAL ESTATE WORKOUTS AND BANKRUPTCIES 243, 273 (Practising Law Inst. 1993).

269. *Id.* at 272.

of law. Furthermore, the language of the Rules disincentivizes such actions. RPC 1.2(c)—specifically the "knowingly" requirement contained therein and examined in Section IV.A.1 above—may have the effect of creating an "ostrich approach," whereby attorneys are encouraged to "stick their heads in the sand" as it relates to the financial standing of their clients. For example, it is well-established that a lawyer can rely on statements made by his clients.[270] Why then would an attorney dig any deeper into a client's financial standing than the client initially provides? Not only would this serve to frustrate or possibly anger clients, but it would also expose the lawyer to a potential RPC 1.2(c) violation. While a thorough analysis of the changes that could or should be made to the Rules in order to curb this temptation is beyond the scope of this essay, it is one the Virginia State Bar's Legal Ethics Committee should consider undertaking in the near future.

VI. CONCLUSION

The object of this essay is to illuminate the line between ethical asset protection strategies and unethical transfers. Although fraudulent transfer law is, in many ways, the flip side of the asset protection coin, these competing concepts are more than a distinction without a difference. The legal difference between the two may, at times, be blurry at best. Nonetheless, an attorney can make a reliable prediction as to the legal propriety of a client's asset protection goals through an analysis of a client's creditor situation, the badges of fraud surrounding a proposed transfer, and a client's financial circumstances.

In terms of the ethical difference, the contentious relationship between (i) a lawyer's duty to zealously represent his or her clients, (ii) a lawyer's duty to abide by the ethical rules, (iii) the amorphous nature of the Rules' terminology, and (iv) the lack of Virginia precedent creates a situation in which a bright line rule is impossible to nail down. Admittedly, this essay may raise more questions than it provides answers. However, it is the authors' hope that at the very least, this essay has defined the ethical boundaries of asset protection work and fraudulent transfer law. The authors attempted, through this essay, to illuminate gray areas—situations in which it would be wise for lawyers to take the additional steps outlined in Section V. Finally, it is the authors'

270. VA. SUP. CT. R. pt. 6, § II, R. 1.2(c) (Repl. Vol. 2012).

sincere hope that this essay identifies those sections of the Rules of which the Virginia State Bar's Legal Ethics Committee can provide further guidance or refinement to ensure that Virginia practitioners not only will know there is an ethical distinction and difference between asset protection planning and fraudulent transfers, but also be able to clearly identify the difference.