

2000

## Ethical Challenges of Restructuring for Lawyers: Lawyer/Client Loyalty in a Rapidly Evolving Industry

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### Recommended Citation

Robert E. Eicher, *Ethical Challenges of Restructuring for Lawyers: Lawyer/Client Loyalty in a Rapidly Evolving Industry*, 7 Rich. J.L. & Tech 26 (2000).

Available at: <http://scholarship.richmond.edu/jolt/vol7/iss2/21>

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**Volume VII, Issue 2,**

**Fall 2000**

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**Ethical Challenges of Restructuring for Lawyers:  
Lawyer/Client Loyalty in a Rapidly Evolving Industry**

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**by Robert E. Eicher, Esquire(\*)**

**Cite As:** Robert E. Eicher, *Ethical Challenges of Restructuring for Lawyers: Lawyer/Client Loyalty in a Rapidly Evolving Industry*, 7 RICH. J.L. & TECH. 26 (Symposium 2000), at <http://www.richmond.edu/jolt/v7i2/eicher.html>.

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**ETHICS PROGRAM**

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- Shrinking Pool of Energy Lawyers and Consequent Unauthorized Practice Problems.
  - Industry restructuring to foster competition will produce new market entrants looking for competent lawyers in a discrete, sophisticated area of practice. New market entrants in a jurisdiction may discover that lawyers qualified by expertise and experience are not available there because they represent industry competitors whose interests are directly adverse.
  - The shrinking pool of energy lawyers presents a serious dilemma for new market entrants. Do they hire just any lawyer and await the learning curve required for effective representation? Or do they turn to their home-situs lawyer who is not admitted to practice in the jurisdiction in which they wish to do business and to appear before regulatory agencies.
  - The unauthorized practice of law problem is tied to Virginia Rules of Professional Conduct (hereinafter "VRPC") 5.5:

A lawyer shall not:

- practice law in a jurisdiction where doing so violates the regulation the legal profession in

that jurisdiction; or

- assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.<sup>[1]</sup>
- A crucial question for lawyers is at what point does a lawyer's contact with a foreign jurisdiction become the practice of law in that jurisdiction. An alarming answer to the question was given in *Birbrower, Montalbano, Condon & Frank v. Superior Court*.<sup>[2]</sup> Two lawyers from the New York law firm must meet in California with their California client on numerous occasions to discuss its dispute with another California bar. The lawyers gave advice and discussed a proposed settlement in California. They also conducted negotiations of a settlement and began arbitration proceedings in California before the matter settled. Later the client sued the law firm for malpractice, and the law firm counterclaimed for its fee.

The *Birbrower* court held that the law firm's fee agreement was not enforceable in California for services performed in California because the law firm's activities in California constituted the unauthorized practice of law. Significantly, the court stated that a foreign lawyer could violate the unauthorized practice of law prohibition without being physically present in California by advising a California law regarding a California dispute by telephone, fax, or electronic mail.<sup>[3]</sup>

- There are few decisions that address the question of permissible practice in foreign jurisdictions. Those that exist suggest that *Birbrower* is over broad.<sup>[4]</sup> The following rule is stated in the Third Restatement of the Law Governing Lawyers:

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

\* \* \*

(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent the lawyer's activities in the matter arise out of or are otherwise reasonably related to the lawyer's practice [in the admitting jurisdiction].<sup>[5]</sup>

The comment to § 3 contains the following observations about permitting practice in a foreign jurisdiction:

When other activities of a lawyer in a non-home state are challenged as impermissible for lack of local admission, the context in which and purposes for which the lawyer acts should be carefully assessed. Beyond home state activities, proper representation of clients often requires a transactional lawyer to conduct activities while physically present in one or more other states. Such practice is customary in many areas of legal representation. As stated in Subsection (3), such activities should be recognized as permissible so long as they arise out of or otherwise reasonably relate to the lawyer's practice in a state of admission. In determining that issue, several factors are relevant, including the following: whether the lawyer's client is a regular client of the lawyer or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multi-state transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature. Because lawyers in a firm often practice collectively, the activities of all lawyers in the representation of a client are relevant. The customary practices of lawyers who engage in

interstate law practice is one appropriate measure of the reasonableness of a lawyer's activities out of state....[6]

## I. Client Engagement/Retainer Agreements.

A. Lawyers will be well advised to craft client engagement/retainer agreements that define the content of the attorney-client relationship.

B. A critical element of a client engagement/retainer agreement consists of a statement of the fee to be charged for the representation. VRPC 1.5(b) requires an adequate disclosure to the client of the lawyer's fee and states that, when the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, "preferably in writing," before or within a reasonable time after beginning the representation.[7] VRPC 1.5(c) requires contingent fee agreements to be in writing.[8]

C. Whatever the fee arrangement, VRPC 1.5(a) requires that a lawyer's fee shall be reasonable and sets forth eight factors to be considered in determining the reasonableness of a fee.[9] That a fee is stated and agreed to in a contract does not mean that it is reasonable since contracts for legal services are not treated as ordinary commercial contracts.[10] For example, the court in *McKenzie Const. Co. v. Maynard*, set aside a 33% contingent fee agreement where the recovery was \$195,000 and billing at the regular hourly rate would have produced a fee of \$4,000.[11]

D. An observation from a quieter, gentler era: "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money getting trade." [12]

E. Since litigation of a fee dispute is rather unseemly (and often results in a counterclaim for malpractice), some client engagement/retainer agreements include a provision requiring arbitration. VA Legal Ethics Op. 1707 (1998) concluded that an arbitration provision is ethically permissible under VA Disciplinary Rule 5-104(A) (superseded by VRPC 1.7(b)) if -

1. Before entering into the engagement agreement, the lawyer makes a full and adequate disclosure to the client of all possible consequences of the building arbitration provision,
2. The client gives an informed consent, and
3. The binding arbitration provision is not unconscionable, unfair, or inequitable, when made.[13]

## II. Government Lawyers entering Private Practice

A. It is not uncommon for a lawyer to be employed by a regulatory agency, to gain significant knowledge and expertise, and then to leave the agency and join a law firm that represents clients before or adverse to the agency.

B. VRPC 1.11(b) addresses the ethical constraints on successive government and private employment as follows:

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with

which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.[\[14\]](#)

C. VA Legal Ethics Op. 1699 (1997), applying the equivalent prohibition in DR 9-101(B), concluded that a former Assistant City Attorney who entered private practice was not permitted to represent a client seeking to have a zoning ordinance declared invalid when she had participated in drafting it during her employment as Assistant City Attorney. *But see*, VA Legal Ethics Op. 1299 (1990) (former government agency permitted to represent client challenging agency regulation where the regulation promulgated was materially different from lawyer's initial draft).[\[15\]](#)

D. The screen (or the so-called Chinese Wall) that VRPC 1.11(b)(1) recognizes is a significant addition. DR 9-101(B) did not recognize a screen and resulted in vicarious disqualification of all lawyers in the firm. The screening mechanism, it is suggested, is a blow to the realities of practice in law firms.

### III. Who is the Client?

A. One result of industry deregulation has been the formation of various alliances, associations, and consortiums among industry members to advocate matters of common interest before the regulatory agencies. In some instances the members have a common interest in some matters but differing interests in other matters.

B. A lawyer representing an alliance, association, or consortium of companies has an attorney-client relationship with the organization but not with the members individually simply because the lawyer represents the organization.[\[16\]](#) VPRC 1.13(d) cautions, however, that in dealing with the constituents of an organization, a lawyer shall explain the identity of the client when it is apparent the organization's interest are adverse to those of the constituents.[\[17\]](#)

C. That a lawyer represents the organization and not its constituents may not permit the lawyer to represent a client in litigation against a constituent. The court in *Westinghouse Elect. Corp. v. Kerr-McGee Corp.* disqualified a law firm from representing the plaintiff in an antitrust action against companies that belonged to a trade association the law firm represented.[\[18\]](#) Disqualification was warranted because, in the course of the representation of the trade association, the law firm had received confidential information from members. The law firm, it was said, had a fiduciary duty to safeguard the confidential information received.[\[19\]](#)

### IV. Multiple Clients in the Same Matter.

A. A lawyer representing an alliance, association, or consortium may also represent one or more of its constituents, or without representing the alliance, association, or consortium may represent several of the constituents in the same matter. The ethical test in each instance is whether the clients are directly adverse, or whether the lawyer's representation of each client will be materially limited by the lawyer's responsibilities to the other client(s) in the matter.[\[20\]](#) If there is direct adversity between the clients, or if the representation of one client may be materially limited by the lawyer's responsibilities to the other client(s), then the multiple representation is

not ethically permissible under VRPC 1.7 unless (1) the lawyer "reasonably believes" the multiple representation will not adversely affect the clients, and (2) the clients consent after consultation, including an explanation of the implications of the common representation and the advantages and risks involved.<sup>[21]</sup> The loss of attorney-client privilege is one risk. The prevailing rule is that when two clients are represented by the same lawyer in a matter, neither of them may assert the privilege against the other in litigation between them regarding the subject of the dual representation.<sup>[22]</sup> Moreover, once the multiple clients represented by the lawyer in a matter develop an actual, adversarial conflict of interest, the lawyer is not permitted to continue representation of any of the clients.<sup>[23]</sup>

B. Significantly, the "reasonably believes" standard in Rule 1.7 is defined in the terminology portion of the Preamble to the VRPC as "the conduct of a reasonably prudent and competent lawyer," which is an objective measurement.<sup>[24]</sup> So clients' consent to adverse representation, even in unrelated matters, is not curative of every conflict of interest. Thus, if a disinterested lawyer would determine that a client should not agree to the representation under the circumstances, the lawyer may not properly ask for the clients' consent to the adverse representation.<sup>[25]</sup> Moreover, in some circumstances the client may withdraw consent once given.<sup>[26]</sup>

C. The rules governing representation of multiple clients, whether in the same matter or in an unrelated matter, implicate fundamental principles of the attorney-client relationship. In representing a client, VRPC 2.1 mandates, a lawyer shall exercise independent professional judgment and render candid advice.<sup>[27]</sup> Implicit in the exercise of independent professional judgment is loyalty to the client. Loyalty is impaired whenever a lawyer will temper his representation of one client because of his representation of another client's interest.<sup>[28]</sup>

## V. Lawyer as intermediary.

A. VRPC 2.2 has no counterpart in the Disciplinary Rules. It was adopted from the ABA Model Rules.

B. Because of the importance of VRPC 2.2 to lawyers, it is set out:

(a) Except as prohibited in paragraph (d), a lawyer may act as intermediary between clients if:

- the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
- the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
- the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not

continue to represent any of the clients in the matter that was the subject of the intermediation.

- A lawyer shall not act as intermediary between client in certain matters relating to divorce, annulment or separation [...].[\[29\]](#)

C. VRPC 2.2 contemplates that the lawyer's clients have some sophistication or business expertise about the matter and, upon the lawyer's advocacy-free, impartial presentation of factors relevant to a decision, the clients will be able to make adequately informed decisions. The lawyer represents the clients who have potentially conflicting interests, but the lawyer's charge is to develop their mutual interests in the matter.[\[30\]](#)

D. The common representation of clients in intermediation is not permissible when the clients have already articulated a contentious, antagonistic assertion and denial of rights. In that circumstance the lawyer cannot be impartial between the contending clients. The distinction between VRPC 1.7 and VRPC 2.2 should not be overlooked. Under VRPC 1.7 the lawyer examines whether he can provide independent professional judgment to and simultaneously serve the interests of clients in the matter.[\[31\]](#) Under VRPC 2.2 the lawyer acts impartially between the clients to facilitate their decision in the matter following the lawyer's informed but neutral presentation of relevant considerations.[\[32\]](#)

## VI. Corporate Affiliates.

A. The "who is the client" question is reprised in the corporate family context. Is a law firm permitted to take on a representation adverse to a subsidiary, sister corporation, or affiliate of a current corporate client? Courts and ethics panels addressing the question are divided.

B. In ABA Formal Opinion 95-390, dated January 25, 1995, the ABA Standing Committee on Ethics and Professional Responsibility sought to define the situations in which a lawyer may, or may not, accept a representation that is adverse to an affiliate (e.g., a parent subsidiary, or sister corporation) of a corporate client.[\[33\]](#) Four of the committee's members favored a *per se* test that would automatically preclude a lawyer from taking a representation directly adverse to a corporate affiliate of a client. Six of the committee's members adopted a "qualitative" test that implicates several factors: (1) has the lawyer acquired confidential information from the affiliate of the corporate client, (2) do the corporate client and the affiliate share from a common legal department that supervises and manages litigation for both, (3) is the affiliate an *alter ego* of the corporate client, (4) is the subject of the lawyer's representation adverse to the affiliate substantially related to the representation of the corporate client, (5) will the corporate client's personnel with whom the lawyer deals be involved in the matter adverse to the affiliate, (6) has the affiliate ever been a client of the lawyer, (7) will the lawyer's representation adverse to the affiliate have a materially adverse effect on the corporate client, and (8) has the law firm erected a Chinese Wall between the lawyer representing the corporate client and the lawyers representing a client adverse to the corporate affiliate.[\[34\]](#)

C. The corporate affiliate issue will continue to be a significant one for lawyers because of the marketplace. There has been a proliferation of subsidiaries and affiliates of multi-national corporations. Sprint Corporation, for example, has more than 250 subsidiaries and affiliates. Moreover, the number of large law firms with multiple offices has grown. Bowing to those realities, Judge Anderson suggested in *Reuben H. Donnelly Corp. v. Sprint Pub. & Advertising, Inc.* that if Sprint wished to shield its 250 subsidiaries from adverse representation by Sprint's law firms, Sprint could include in its engagement agreements a provision barring representation adverse to any of its subsidiaries and affiliates and then regularly provide its law firms with

updated lists of affiliates.<sup>[35]</sup> The suggestion comports with common sense since the corporate client has superior knowledge about the corporate affiliates it has and what the relationship is between those affiliates and itself.

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## ENDNOTES

[\*] Mr. Eicher received his undergraduate and law degrees from the University of Virginia. He was awarded his B.A. with Honors in 1958 and his LL.B. in 1961. He was one of three students in the Political Science Honors Program and received the Z Society Book Award in Political Science. He was a member of Phi Beta Kappa and the Raven Society. In law school, he was a writing director for the Student Legal Research Group and a student assistant to Professor T. Munford Boyd.

Mr. Eicher passed the bar examination in 1960 after his second year in law school and was admitted to practice in 1961 following his graduation. Mr. Eicher practiced law with Copenhaver & Tremblay in Charlottesville until he entered the Air Force as a Legal Officer in February, 1962. He joined what is now Williams, Mullen, Clark & Dobbins as an associate in March 1965 and became partner in the firm on January 1, 1968.

Mr. Eicher is a former member of the Adjunct Faculty in the paralegal program of J. Sergeant Reynolds Community College. He taught courses in evidence, civil procedure, and the administration of decedent's estates. He was also an instructor for the City of Richmond Adult Education Program in wills, trusts and estates. In addition, Mr. Eicher has been a lecturer, contributing author and moderator on various courses presented by the Continuing Legal Education Committee of the Virginia Law Foundation, including The Law of Damages, Chancery Practice, Winning Jury Trials, and Professional Ethics for Virginia Lawyers. He has been a panel member on professional ethics programs for the Virginia Bar Association and the Richmond Bar Association.

Mr. Eicher's principal area of practice is civil litigation in commercial, business, real estate, and will, trusts and estate-related matters. He serves as chair of the firm's Opinion Letter Committee and the Conflicts Committee. He was a member of the Standing Legal Ethics Committee of the Virginia State Bar from July 1, 1992 to June 30, 1999 and served as chair from 1997 to 1999. He is a member of the faculty of the Virginia State Bar's Professionalism Course.

[1]. Virginia Rules of Professional Conduct (hereinafter "VRPC") 5.5

[2]. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (Cal. 1998).

[3]. *Birbrower*, 941 P.2d, at 41.

[4]. *See Multijurisdictional Practice*, Laws. Man. on Prof. Conduct (ABA/BNA) (No. 212), at 21:8017-21:8019 (Feb. 16, 2000); *ALAS, IX Loss Prevention Journal* 24 (Jan. 1998).

[5]. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 3 (1998).

[6]. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 3 cmt. e (1998).

[7]. VRPC 1.5(b).

[8]. VRPC 1.5(c).



- [9]. VRPC 1.5(a).
- [10]. VA Legal Ethics Op. 1606 (1994).
- [11]. *McKenzie Const. Co. v. Maynard*, 758 F.2d 97 (3rd Cir. 1985).
- [12]. CANONS OF PROF'L ETHICS NO. 12 (1908).
- [13]. *See* 25 *Professional Liability Reporter* 78 (Mar. 2000) (discussion of cases addressing arbitration provisions).
- [14]. VRPC 1.11(b).
- [15]. VA Legal Ethics Op. 1699 (1997), applying the equivalent prohibition in DR 9-101(B). *But see*, VA Legal Ethics Op. 1299 (1990) (former government agency permitted to represent client challenging agency regulation where the regulation promulgated was materially different from lawyer's initial draft).
- [16]. VRPC 1.13(a); VA Legal Ethics Op. 1168 (1998) (homeowners' association members not clients of lawyer representing association); VA Legal Ethics Op. 1610 (1994) (joint venture is entity distinct from the individual joint ventures).
- [17]. VPRC 1.13(d).
- [18]. *Westinghouse Elect. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 995 (1978).
- [19]. *Id.* at 1320.
- [20]. VRPC 1.7.
- [21]. *Id.*
- [22]. 24 *Prof'l Liability Reporter* 187 (June 1999).
- [23]. VA Legal Ethics Ops. 1435 (1991), 1239 (1989), and 1000 (1987).
- [24]. MODEL RULES OF PROF'L CONDUCT 1.7.
- [25]. VRPC 1.7, cmt. 5; *see* VA Legal Ethics Ops. 1652 (1995) and 1681 (1996).
- [26]. VA Legal Ethics Op. 1652 (1995).
- [27]. VRPC 2.1.
- [28]. VRPC 1.7, cmts. 1, 4.
- [29]. VRPC 2.2.
- [30]. VRPC 2.2, cmt. [3].
- [31]. VRPC 1.7.
- [32]. VRPC 2.2

[33]. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 390, (1995).

[34]. See VII ALAS *Loss Prevention Journal* 2 (Sept. 1996); 48 *Bus. Law.* 141, 181-83 (1992).

[35]. *Reuben H. Donnelly Corp. v. Sprint Pub. & Advertising, Inc.*, No. 95-C-5825, 1996 U.S. Dist. LEXIS 2363, at \*13 (N.D. Ill. Feb. 28, 1996).

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