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Annual Survey of Virginia Law: Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

This year, 1989, may become known as the Ethics Year as accounts of questionable behavior of public, governmental and leading business figures, many of whom are lawyers, proliferate in the media. Questionable ethical behavior leads to the erosion of public confidence in the legal profession and demonstrates the need for increased scrutiny of the conduct of lawyers in both their professional and private capacities.[1]

This survey covers significant changes to the Virginia Code of Professional Responsibility (the "Code")[2] enacted between 1987 and 1989, and also discusses several critical Virginia disciplinary decisions. In addition, the survey will address several cases of national concern which have considered issues relative to a lawyer's professional responsibilities: mandatory reporting of another lawyer's misconduct; advertising and solicitation; acceptance of involuntary court appointments; and the legality of mandatory bar membership and residency requirements.

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1. *See, e.g., In re* Sipes, 297 S.C. 531, 377 S.E.2d 574 (1989) (lawyer serving as "cookie chairperson" for daughter's Girl Scout troop suspended for one year for misappropriating $1,800 of cookie sales proceeds).

2. VA. SUP. CT. R. pt. 6, § II. As one of the few professions granted the authority to regulate and monitor the behavior of its members, the organized bars of individual states have developed and adopted codes of professional responsibility and procedures for ensuring compliance with those codes. After its creation by the General Assembly in 1938, the Virginia State Bar recommended that the Supreme Court of Virginia adopt the 1908 American Bar Association Model Code of Professional Responsibility and subsequently its 1969 progeny with certain modifications. The Code and its revisions were adopted for the protection of the public and the guidance of lawyers under the power of the Supreme Court of Virginia to govern lawyers' professional conduct and to prescribe procedures for disciplining, suspending, and disbarring attorneys. VA. CODE ANN. § 54.1-3909 (Repl. Vol. 1988). The Virginia State Bar acts as the administrative arm of the court overseeing adherence to the code. *Id.* § 54.1-3910.

II. Revisions to Rules of Court

A. *Virginia Code of Professional Responsibility*

1. Maintaining or Renewing License to Practice Law

A 1987 amendment to Disciplinary Rule (DR) 1-101[3] extended the prohibition against making materially false statements in connection with an application for admission to the Virginia State Bar (the "Bar") to include any "materially false statement in *any certification required to be filed as a condition of maintaining or renewing his license to practice law.*"[4] Thus, disciplinary proceedings would attach to any materially false statement made to attest to a lawyer's participation in such activities as Continuing Legal Education programs, the mandatory course in professionalism, and more recently, in the required statement as to malpractice/professional liability insurance coverage.

2. Obligation to Report Misconduct

Disciplinary Rule 1-103[5] mandates that "[a] lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects shall report such information to the appropriate professional authority, except as provided in DR 4-101."[6] Apparently to ensure the efficacy of the program jointly established by the Bar and the Virginia Bar Association which assists lawyers who are substance abusers, "Lawyers Helping Lawyers", DR 1-103 was amended in 1987 to exempt program participants from the mandatory reporting requirements of the rule as they apply to participants' use of illegal substances.[7]

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3. Va. Code of Professional Responsibility DR 1-101 (1983).

4. *Id.* DR 1-101(B) (emphasis added).

5. Va. Code of Professional Responsibility DR 1-103 (1987).

6. *Id.* (DR 4-101 protects confidences and secrets gained in the attorney-client relationship).

7. *Id.*; *see also* VSB Comm. on Legal Ethics, Legal Ethics Ops. 977 and 1004 (1987).

3. Aiding the Unauthorized Practice of Law

A basic tenet of the Code is that a lawyer shall not aid a nonlawyer in the unauthorized practice of law.[8] Disciplinary Rule 3-101 was amended in 1987 to specify the capacity in which a lawyer, whose license has been suspended or revoked for professional misconduct, may be employed by a law firm. Subsection B provides that a lawyer, law firm or professional corporation may not employ the disciplined lawyer in any capacity during the period of suspension or revocation if the lawyer had been associated with that individual, firm or corporation on or after the date of the acts which resulted in the suspension or revocation.[9] Additionally, DR 3-101(C) prohibits any firm, which permissibly employs the disciplined lawyer as a consultant, law clerk or legal assistant, from representing any client earlier represented either by the disciplined lawyer or by any lawyer with whom he practiced at or after the time of the acts which resulted in suspension or revocation.[10]

4. Prosecutorial Disclosure of Evidence to Defendant

In *Read v. Virginia State Bar*,[11] the Supreme Court of Virginia held that a prosecutor's failure to timely disclose to a defendant that a witness' testimony had changed, thereby exculpating the defendant, did not violate DR 8-102(A)(4).[12] In response to *Read*, the court revised the rule effective July 1, 1989. In a broad application of the *Brady* rule,[13] DR 8-101(A)(4) now requires:

> (A) A public prosecutor or other government lawyer in criminal litigation shall . . . (4) [m]ake timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that

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8. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) (1987).

9. *Id.* DR 3-101(B).

10. *Id.* DR 3-10(C); *see* VSB, Comm. on Legal Ethics, Legal Ethics Op. 1044 (1988) (employment of disbarred lawyer as insurance adjustor); *see also* VSB Comm. on Legal Ethics, Legal Ethics Op. 1218 (1989) (disbursing fees earned prior to lawyer's suspension).

11. 233 Va. 560, 357 S.E.2d 544 (1987).

12. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(A)(4) (1983) (amended 1989). This rule, as in effect up to the 1989 amendment, provided that "[t]he prosecutor in a criminal case or a government lawyer shall [d]isclose to a defendant all information required by law." *Id.*; *see also* Mims, *Disclosure Not Required But Justice Still Prevails*: United States v. Trimper, 2 GEO. J. LEGAL ETHICS 1003 (1989).

13. *See* Brady v. Maryland, 373 U.S. 83 (1963) (prosecutor required to disclose all exculpatory material to defendant).

> tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.[14]

Thus, whereas prosecutor Read's failure to disclose the changed testimony to the defendant's counsel until after the close of the Commonwealth's case in chief did not violate the unamended DR 8-102(A)(4), the new rule would have allowed the Disciplinary Board to find that Read's conduct was improper.

5. Attorney Subpoenas

In response to the potential for abuse of discretion by prosecutors,[15] a new section was added to DR 8-102 which requires a prosecutor to seek prior judicial approval before issuing a subpoena for an attorney to testify and provide evidence concerning a person who is or was represented by the attorney/witness.[16] The amended Virginia rule is similar to one enacted by Massachusetts[17] and was adopted following the passage of a resolution on the matter by the American Bar Association.[18] It is specifically applicable to grand jury proceedings, further strengthening protections afforded to a client's confidences and secrets. Federal prosecutors have challenged the amendment on grounds that it violates the supremacy clause in that it attempts to regulate the subpoena power of the federal government.[19] The federal prosecutors' request for repeal was denied by the Supreme Court of Virginia in January, 1989.[20]

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14. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(4)(1989).

15. A balance must be struck between the lawyer's ethical duty to preserve client confidences and his obligation to appear before the court in response to a subpoena. Such disclosure or testimony and the resultant requirements for the lawyer's withdrawal from the case may encourage prosecutors to utilize such demands in an effort to preclude a lawyer's participation in a case. *See* Williams v. District Court El Paso County, 700 P.2d 549 (Colo. 1985) (court required prosecution to show a compelling need for the lawyer's evidence that cannot be satisfied from some other source).

16. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(A)(5) (1987). This rule states that the prosecutor in a criminal case or a government lawyer shall "[n]ot subpoena an attorney in any criminal case or proceeding, including any proceeding before any grand jury, without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is or was represented by the attorney witness." *Id.*

17. MASS. SUP. CT. R. 3:08.

18. [Current Reports] 2 Law. Man. on Prof. Conduct. (ABA/BNA) 35 (Feb. 19, 1986).

19. 3 VLW 1065 (May 29, 1989).

20. *Id.*

6. Interest on Trust Fund Accounts

Disciplinary Rule 9-102[21] permits an attorney to deposit client trust funds into interest bearing accounts provided the interest is either transmitted to the client in accordance with procedures for computation and payment[22] or remitted by the bank directly to the Virginia Law Foundation ("VLF").[23] Additional subsections to DR 9-102 became effective December 1, 1988 which make remittances to the VLF automatic unless the lawyer follows procedures permitting him to opt-out of the program.[24] Notice of election not to participate in the VLF must be submitted within ninety days of admission to the Bar and a lawyer may withdraw from participation on July 1 of any year by submitting the appropriate notice during the preceding June.[25] DR 9-102 also provides that a lawyer who does not receive client funds may receive an exemption from the requirement.[26] Although the new sections are very precise, DR 9-102(J) indicates that failure to comply with the procedures shall not subject an attorney to disciplinary action under the Rules.[27]

B. *Organization and Government of the Bar*

1. Proceedings Upon Adjudication of a Crime

A revision to Paragraph 13 of the Rules of the Supreme Court of Virginia,[28] which govern the organization and operation of the Bar, was adopted to prevent an attorney from practicing law after having been convicted of a crime. The revision to Paragraph 13 provides for a "summary suspension" wherein the attorney's license may be suspended by the Disciplinary Board upon proof that the attorney has been found guilty of a crime by verdict of a judge or jury, irrespective of whether sentencing has occurred.[29] Under the former rule, action by the Disciplinary Board could not occur until the entry of a conviction order generally following imposition of a sentence. For example, in *United States v. McAfee*,[30] under the

21. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1983).
22. *Id.* DR 9-102(D).
23. *Id.* DR 9-102(E).
24. *Id.* DR 9-102(G)-(J) (1989).
25. *Id.* DR 9-102(B).
26. *Id.*
27. *Id.* DR 9-102(J).
28. VA. SUP. CT. R. pt. 6, § IV, ¶13(D).
29. *Id.*
30. No. 87-00018-R (W.D. Va. Sept. 9, 1988).

former rule, a lawyer continued to represent clients pending the judge's imposition of a sentence for the lawyer's convictions,[31] whereas similar circumstances utilizing the provision for summary suspension would now result in an immediate cessation of the convicted lawyer's practice.

2. Mandatory Professionalism Course

Active members of the Bar have been required for some time to complete a four-hour course on the revised Code in order to maintain active Bar membership status. The amended rule of court now mandates that new admittees and any other member changing to an active membership status must complete a course on both the Code and the lawyer's broader professional obligations.[32]

C. *Statutory Change: Renumbering; Protection of Client Interests When Attorney is Disabled, Absent, Deceased, Suspended or Disbarred*

The 1988 session of the Virginia General Assembly changed Title 54 of the Code of Virginia to Title 54.1.[33] Although most sections were simply renumbered, a new section was enacted permitting Bar counsel, the chairman of a district committee of the Virginia State Bar, or any interested party to petition the appropriate circuit court to appoint an attorney to inventory the files of a disabled, absent, deceased, suspended or disbarred attorney.[34] The appointed attorney is directed to "take whatever action seems indicated to protect the interests of clients until such time as the clients have had an opportunity to obtain substitute counsel."[35] The appointed attorney will be bound by the attorney-client privilege and shall be entitled to recover costs and a reasonable fee which would be entered as judgment against the original attorney or his estate.[36]

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31. *See In re* McAfee, No. 88-000-0954 (VSB Disciplinary Board, Sept. 1988) (McAfee was convicted in federal district court of criminal offenses including interstate travel to commit a crime and concealment of the existence of currency from the Department of Treasury).

32. VA. SUP. CT. R. pt. 6, § IV, ¶ 13.1.

33. 1988 Va. Acts 765.

34. VA. CODE ANN. § 54.1-3900.01 (Repl. Vol. 1988).

35. *Id.* § 54.1-3900.01(A).

36. *Id.* § 54.1-3900.01(A),(B).

III. Recent Virginia Disciplinary Actions

A. *Advancing Financial Assistance to Clients*

Disciplinary Rule 5-103(B)[37] prohibits a lawyer from advancing or guaranteeing financial assistance to a client during the course of representation, in order to prevent the lawyer's judgment from being clouded by his interest in recouping the funds.[38] In *Shea v. Virginia State Bar*, attorney Kevin P. Shea, while representing a seaman in a personal injury matter, advanced more than $6,000 of his personal funds to the seaman for household expenses and automobile payments.[39] Shea conceded that this violated the applicable DR, but he appealed the ninety-day suspension imposed by the Disciplinary Board on several grounds. Among other contentions, Shea argued that: (1) there was a widespread and long-standing practice within the maritime plaintiff's bar which involved advancing living expenses to clients; (2) many other lawyers were guilty of the same violation, yet he alone was being singled out for disciplinary action; and (3) he was unaware that he was violating the DRs.[40]

In a tersely worded opinion, the Supreme Court of Virginia rejected Shea's arguments and held that "[e]very lawyer in Virginia is expected to be fully aware of each and every disciplinary rule."[41] The court added that "[a]ny lawyer who violates the disciplinary rules must stand ready to bear the individual consequences of that violation regardless of what others were doing."[42] The court upheld Shea's ninety-day suspension.[43]

B. *Improper Personal Injury Representation*

In ordering a five-year suspension of attorney Bruce Britton, the Disciplinary Board found infractions in three separate personal injury cases handled by Britton.[44] In one case, Britton represented a

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37. Va. Code of Professional Responsibility DR 5-103(B) (1983).
38. *Id.*
39. 236 Va. 442, 443, 374 S.E.2d 63, 64 (1988).
40. *Id.* at 444, 374 S.E.2d at 64.
41. *Id.*
42. *Id.*
43. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1155 (1988); *see also* VSB Comm. on Legal Ethics, Legal Ethics Ops. 1219, 1248 (1988).
44. Virginia State Bar *ex rel.* Tenth Dist. Comm. v. Britton, Nos. 88-102-0855, 88-102-0853, 88-102-0166 (VSB Disciplinary Board, Apr. 21, 1989).

woman who had been injured while a passenger in her mother's car.[45] Britton, with full knowledge that his client's mother was represented by an attorney, met with her in direct violation of the DRs.[46]

In the second case, Britton's client was being treated by a physician for injuries received in an automobile accident, when he was involved in a second accident. Britton told his client not to reveal anything of the first accident to the doctor providing treatment for the second injuries and similarly instructed the client not to inform the first doctor of the second accident or of the treatment he was receiving for those injuries. The Board found Britton's instructions to his client constituted a wrongful act and involved dishonesty, fraud, deceit, or misrepresentation which reflected adversely on his fitness to practice law.[47]

In the third case, Britton misrepresented settlement offers made to his client, failed to withdraw following his discharge by the client, and failed to keep his client informed on the matter of the litigation.[48]

In the second and third cases, although the Board specifically found Britton to have engaged in dishonest, fraudulent, or deceitful conduct, the cumulative effect of his ethical improprieties was clearly a factor in the severity of the sanctions imposed.

C. *Fiduciary Responsibilities*

In *Virginia State Bar ex rel. Second District Committee v. Gay*,[49] the Disciplinary Board ordered a three year suspension based on an attorney's extraordinary manipulation of funds entrusted to him for investment purposes. Although not squarely within the scope of an attorney-client relationship, the Board found that Gay's personal and investment use of funds from an account set up in trust for his client, Mrs. Williams, his lack of any substantial accounting to her, and his failure to disgorge the assets under his control when requested to do so violated numerous rules

45. *Id.* No. 88-102-0166.

46. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A)(1)(1983). This Rule prohibits a lawyer from communicating with an adverse party, whom the lawyer knows to be represented in the matter by an attorney, without the prior consent of the adverse party's attorney. *Id.*

47. Virginia State Bar *ex rel.* Tenth Dist. Comm. v. Britton, No. 88-102-0853.

48. *Id.* No. 88-102-0855.

49. No. 87-0279 (VSB Disciplinary Board, Apr. 26, 1989).

requiring the lawyer to attend to a client's matters promptly and to keep a client reasonably informed about the matters at hand. In addition, Gay failed to adhere to the appropriate recordkeeping procedures required under DR 9-102 and DR 9-103. The Board found:

> a continuing course of dealing with Mrs. Williams' funds in a manner calculated to avoid or delay the day when [he] would be called upon to satisfy an acknowledged personal liability if [the company to which he had loaned the trust funds] were unable to pay its obligations. Mr. Gay put himself in the position of having this personal liability by his own improper dealing with Mrs. Williams' money and attempted to protect himself by the continued misuse of her funds.[50]

Although ultimate restitution was made to Mrs. Williams, the Board, citing *Delk v. Virginia State Bar*[51] and *Maddy v. First District Commission of the Virginia State Bar*,[52] articulated that "the Bar is not required to establish actual loss of a client's funds to justify a suspension in a trust account case."[53]

IV. Issues of National Concern

A. *Mandatory Reporting of Lawyer Misconduct*

The delicate balance between an attorney's duty as an officer of the court and his duties to his client was re-defined by the recent Supreme Court of Illinois decision, *In re Himmel*.[54] A client engaged Himmel to seek restitution from another lawyer who had represented the client in a personal injury matter and had converted the settlement proceeds. The client, Ms. Forsberg, had specifically requested that Himmel not pursue any disciplinary proceedings against the first attorney, Casey, since she preferred not to dilute her chances for recovery by any possible sanction. Him-

50. *Gay*, No. 87-0279, slip op. at 12.

51. 233 Va. 187, 355 S.E.2d 558 (1987). The court stated that loss of money by a client is not a prerequisite to the suspension of a attorney's license for mishandling the client's money. Additionally, it is not necessary to show moral turpitude on the part of the attorney. *Id.* at 191-92, 355 S.E.2d at 561.

52. 205 Va. 652, 139 S.E.2d 56 (1964). The court stated that even if none of an attorney's clients suffered "any prejudice to his legal rights," the attorney will not be exonerated in disbarment proceedings. *Id.* at 658, 139 S.E.2d at 61.

53. *Gay*, No. 87-0279, slip op. at 13.

54. 125 Ill.2d 531, 533 N.E.2d 790 (1988).

mel and Casey reached an agreement which provided for payment to Forsberg of more than the original amount converted. Under the terms of the negotiated settlement, Forsberg agreed not to initiate any criminal, civil or disciplinary action against Casey. Casey failed to perform the agreement to repay Forsberg and Himmel instituted suit for the breach. Judgment was entered against Casey, but the matter came to the attention of the Illinois Attorney Registration and Disciplinary Commission which began proceedings against Himmel for having failed to report Casey's misconduct.[55] The Illinois Attorney Discipline Hearing Board found that Himmel had violated Illinois DR 1-103(a)[56] and recommended a private reprimand. The Bar, apparently seeking a stronger sanction, appealed to the Review Board which found no violation and recommended dismissal of the complaint.[57] The Bar then appealed to the Supreme Court of Illinois which reinstated Himmel's DR 1-103(a) violation and imposed a one-year suspension.[58] The courts also held that Forsberg's report to Himmel of Casey's misconduct was not privileged information since Forsberg discussed it with her mother and fiance present.[59]

Considerable consternation has followed the *Himmel* decision. Himmel's sanction may be viewed as encouraging the self-regulatory aspect of the profession, but the opinion apparently disregards the attorney's duty to maintain his client's confidentiality or to zealously represent her in an attempt to secure the best possible result. The court emphasizes the fact that the lawyer's ethical responsibilities under the DRs may not be disregarded simply because the client instructs the lawyer to do so.[60]

Virginia's DR 1-103(A) is similar in substance to the Illinois rule,

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55. *Id.* at ___, 533 N.E.2d at 791.

56. ILL. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(a) (1980) reads: "A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

Rule 1-102 reads:

> (a) A lawyer shall not . . .
>
> (3) engage in illegal conduct involving moral turpitude;
>
> (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or
>
> (5) engage in conduct that is prejudicial to the administration of justice.

Id. DR 1-102.

57. 125 Ill.2d at ___, 533 N.E.2d at 792.

58. *Id.* at ___, 533 N.E.2d at 795-96.

59. *Id.* at ___, 533 N.E.2d at 794.

60. *Id.*

but requires mandatory reporting of another lawyer's violation of the DRs only when the violation "raises a substantial question as to that lawyer's fitness to practice law in other respects."[61] Two early Legal Ethics Opinions have addressed the mandatory reporting issue in Virginia. Although Legal Ethics Opinions are advisory only and not binding on any court or tribunal, they are generally viewed as instructive. Legal Ethics Opinion 497 holds that "it is not improper for an attorney who during the course of his representation, determines that his client's former attorney violated the Code, to refrain from disclosing the violations when such disclosure would adversely affect his client's interests and the client has not consented to the disclosure."[62] Stated even more emphatically, Legal Ethics Opinion 217 finds that "[i]t is improper for an attorney to report to the Bar information concerning unethical conduct by another attorney when such information was obtained from a client in confidence and the client refuses to consent to the disclosure thereof."[63] However, both Opinion 497 and Opinion 217 were issued by the Bar's Standing Committee on Legal Ethics prior to the 1983 Code revision. The earlier Code adopted by the Supreme Court of Virginia in 1970 did not include the current language of DR 1-103(A) which requires reporting only where the violation raises a substantial question as to the offending lawyer's fitness to practice law in other respects.

B. *Advertising/Solicitation*

1. Targeted Direct Mail

Last year, the United States Supreme Court extended the application of commercial speech protections to one more area of lawyer advertising, continuing the line of cases which began with *Bates v.*

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61. DR 1-103(A) of the Code states:

> A lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects, shall report such information to the appropriate professional authority, except as provided in DR 4-101.

VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A)(1983); *see* VSB Comm. on Legal Ethics, Legal Ethics Op. 497 (1983).

62. VSB Comm. on Legal Ethics, Legal Ethics Op. 497 (1983).

63. VSB Comm. on Legal Ethics, Legal Ethics Op. 217 (1982); *but see* Maryland State Bar Ass'n Comm. on Ethics, Op. 89-46, [Current Reports] 5 Law. Man. on Prof. Conduct (ABA/BNA) 186 (June 21, 1989) (under the Model Rules of Professional Conduct, the client's desire for confidentiality may preclude the lawyer from revealing the client's prior lawyer's misconduct).

State Bar of Arizona[64] and including *In re R.M.J.*,[65] and *Zauderer v. Office of Disciplinary Counsel of The Supreme Court of Ohio.*[66] The major limitation imposed thus far on lawyer self-promotion is the limitation regarding in-person solicitation. When an attorney outrageously overreached and attempted to coerce two accident victims to engage him for personal injury representation, the Court found in *Ohralik v. Ohio State Bar Association*[67] that states may categorically ban lawyer in-person solicitation to protect the public.[68]

In *Shapero v. Kentucky Bar Association*,[69] Richard Shapero, a Kentucky lawyer, requested that the Kentucky Attorneys Advertising Commission approve a solicitation letter he proposed sending to individuals against whom home foreclosure suits had been filed. Although it found that the letter was neither misleading nor false, the Commission refused to approve the letter based upon the applicable Kentucky DR which prohibited the targeting of direct mail advertising to a specific group of potential clients.[70]

The Supreme Court of Kentucky replaced the rule with the ABA Model Rule 7.3,[71] but upheld the ban on Shapero's targeted direct mail advertising. By analogy to *Ohralik*, the Court found that potential clients who need specific legal services were easily abused.[72] In reversing that decision and remanding the case to the Supreme Court of Kentucky, the Court found that the targeted direct mail

64. 433 U.S. 350 (1977) (lawyer advertising protected by first amendment).

65. 455 U.S. 191 (1982) (lawyer mail advertising to potential clients is protected).

66. 471 U.S. 626 (1985) (permitted solicitation of legal business through targeted newspaper advertising).

67. 436 U.S. 447 (1978).

68. *Id.* at 468.

69. 108 S. Ct. 1916 (1988).

70. KY. SUP. CT. R. 3.135(5)(b)(i). This Rule prohibits mailing or delivery of written advertisements "precipitated by a specific event . . . involving or relating to the addressee . . . as distinct from the general public." *Id.*

71. The model rule reads:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1987).

72. *Shapero*, 108 S. Ct. at 1921-22.

letter presented no risk of overreaching comparable to that of the in-person solicitation banned under *Ohralik*[73] since "a letter, like a printed advertisement (but unlike a lawyer) can readily be put in a drawer to be considered later, ignored, or discarded."[74]

In Virginia, DR 2-101(A)[75] permits all manner of public communication for the purpose of lawyer advertising unless the communication contains a "false, fraudulent, misleading, or deceptive statement or claim."[76] In applying what is surely one of the broadest such rules in the country, Legal Ethics Opinions have been issued approving of targeted direct mail campaigns to all persons recently charged with criminal offenses[77] and to individuals whose homes are subject to foreclosure.[78] Similarly, a Maryland Legal Ethics Opinion recently found that targeted direct mail announcements of legal services to individuals against whom the Internal Revenue Service had filed a notice of tax lien were not inherently unethical under the applicable rule.[79]

2. In-Person Solicitation

Although *Ohralik* was based upon the overreaching in-person solicitation by one lawyer in a hospital setting with an ordinary personal injury victim, the issue of in-person solicitation now frequently deals with lawyers' activities at the scenes of mass disasters. States which prohibit in-person solicitation,[80] bans which are permitted if not encouraged by *Ohralik*, sometimes take assertive measures to guard against improper activities immediately following a mass disaster. When extensive improper solicitations took place following a major air crash in Dallas, the Bar recognized the need for averting such behavior. Consequently, within hours of a second crash two years later, Texas State Bar officials arrived at

73. *Id.* at 1924.
74. *Id.* at 1923.
75. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)(1983).
76. *Id.*
77. VSB Comm. on Legal Ethics, Legal Ethics Op. 862 (1986).
78. VSB Comm. on Legal Ethics, Legal Ethics Op. 904 (1987); *see also* VSB Comm. on Legal Ethics, Legal Ethics Op. 579 (1984) (solicitation of persons charged with driving while intoxicated); VSB Comm. on Legal Ethics, Legal Ethics Op. 625 (1984) (all forms of accident victim solicitation permissible, if not false, fraudulent, or deceptive, and without substantial potential for coercion or harassment).
79. Maryland State Bar Ass'n Comm. on Ethics, Op. 88-27, [Current Reports] 4 Law. Man. on Prof. Conduct (ABA/BNA) 25 (Feb. 17, 1988).
80. *See, e.g.*, TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1989).

the scene to provide assistance and guard against a second round of unacceptable solicitation. Similarly, to counteract the activities of Hawaiian lawyers who were paying airline employees to distribute the lawyers' business cards, the Hawaii State Bar Association placed newspaper advertisements which outlined the Bar's anti-solicitation rules and described how to report disciplinary violations.[81]

Virginia DR 2-103(A),[82] regarding in-person solicitation, is considerably more permissive than *Ohralik* might indicate. However, it does prohibit such solicitation if:

> (1) Such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or
> (2) Such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over-persuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.[83]

In response to the increasing ethical problems regarding in-person solicitation, an ad hoc committee, appointed to serve during 1989-90 by Bar President Philip B. Morris, will review the current broad disciplinary rules permitting such activities.

3. Certified Trial Specialist Denotation

The United States Supreme Court recently granted certiorari of a case in which an Illinois lawyer appealed the censure imposed for his letterhead indicating that he is a "Certified Trial Specialist By the National Board of Trial Advocacy."[84] Parallel to Virginia's rule,[85] Illinois DR 2-105(a) precludes an attorney from holding himself out as a specialist except in the areas of patents, trade-

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81. *See* Moss, *Race to Flight 1141*, A.B.A. J., Dec. 1, 1988 at 30; [Current Reports] 4 Law Man. on Prof. Conduct (ABA/BNA) 211-12 (July 6, 1988); [Current Reports] 5 Law. Man. on Prof. Conduct (ABA/BNA) 37 (Feb. 15, 1989). .

82. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1983).

83. *Id.*

84. *In re* Peel, 126 Ill.2d 397, 534 N.E.2d 980 (1989), *cert. granted*, 57 U.S.L.W. 3851 (U.S. July 3, 1989) (No. 88-1775).

85. *See* VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 (1983).

marks, or admiralty.[86] In *In re Peel*, the Supreme Court of Illinois held that the use of the term "Certified Trial Specialist" was misleading and therefore improper since the state bar does not have provisions for recognizing such certifications.[87] At least two other state courts, however, have held that a blanket prohibition on claiming the same certified designation would violate the first amendment.[88] Thus, the Supreme Court's examination of *In re Peel* will add yet another dimension to the lawyer advertising picture.

C. *Involuntary Court Appointments*

No specific DR demands that a lawyer assist the profession to fulfill its duty of making legal counsel available, but Ethical Consideration ("EC") 2-27[89] entreats the lawyer to "find time to participate in serving the disadvantaged" who are unable to pay reasonable legal fees.[90] Similarly, EC 2-31[91] encourages the lawyer not to seek to be excused, except for compelling reasons, from undertaking court appointments or bar association requests to represent a person unable to obtain counsel for either financial or other reasons.[92] Among factors not considered compelling are: the repugnance of the proceeding's subject matter; the identity or position of a person involved in the case; the lawyer's belief that a criminal defendant is guilty; and the lawyer's belief regarding the merits of a civil case.[93]

For more than fifty years, courts have based their demands that lawyers accept involuntary appointments on the lawyer's role as an officer of the court. This role carries with it the obligations of service to the profession, the court, and those unable to pay legal fees.[94] An appointment which would, however, cause the lawyer to violate his ethical responsibilities would presumably not be acceptable since adherence to the Code would override the lawyer's duty

86. ILL. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(a) (1980).
87. 126 Ill.2d at ___, 534 N.E.2d at 984-86.
88. *See Ex parte* Howell, 487 So. 2d 848 (Ala. 1986); *In re* Johnson, 341 N.W.2d 282 (Minn. 1983).
89. VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27 (1983).
90. *Id.*
91. *Id.* EC 2-31.
92. *Id.*
93. *Id.*
94. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).

as an officer of the court. Thus, if the acceptance of the court appointment would result in a conflict of interest or in providing representation in an area in which one was not competent, the court might find those to be compelling reasons to refuse the appointment.

The recent *Mallard v. United States District Court for the Southern District of Iowa*[95] decision held that a federal court may not require an attorney to accept an appointment. The Supreme Court read section 1915(d) of the United States Code[96] as containing merely "precatory" language allowing the court to "request" an attorney to represent any person claiming *in forma pauperis* status.[97]

In resolving the apparent conflict between the circuits over whether section 1915(d) permits compulsory assignments to attorneys in civil cases,[98] the Court's opinion included an extensive discussion of both semantics and legislative history. The majority opinion did not address the underlying ethical precepts regarding involuntary assignments. Justice Stevens' dissent, however, expressed some indignation that the decision was based on the mere "parsing of the plain meaning of the work 'request.' "[99] Although the dissent recognized several circumstances which could provide appropriate reasons for a lawyer to decline to accept an appointment, it emphasized the tradition of the bar to provide representation to the indigent, and preferred to construe "request" to mean "respectfully command."[100]

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95. 109 S. Ct. 1814 (1989). Attorney Mallard had been requested to represent three inmates of an Iowa correctional facility in their 42 U.S.C. § 1983 action against prison officials. Their suit alleged that false disciplinary reports had been filed against them, that they had been mistreated physically, and that their lives had been endangered by exposing them as informants. After appointment, the attorney filed a motion to withdraw, claiming that he had no familiarity with the legal issues and that he lacked trial experience. Although he offered to provide services to indigent litigants in bankruptcy and securities law, his claimed areas of expertise, his motion was denied by a magistrate. He appealed to the district court, claiming that the forced representation would cause him to violate his ethical obligations regarding competence. He also alleged that the court did not have the requisite authority under 28 U.S.C. § 1915(d) to require his service. The district court affirmed the magistrate's decision and found Mallard competent to serve. Mallard then sought and was denied a writ of mandamus by the Eighth Circuit Court of Appeals.

96. 28 U.S.C. § 1915(d) (1982). This section states that "[t]he court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." *Id.*

97. 109 S. Ct. at 1818.

98. *Id.* at 1817.

99. *Id.* at 1823 (Stevens, J., dissenting).

100. *Id.* at 1826 (Stevens, J., dissenting).

In *Boone v. Commonwealth*, the Court of Appeals of Virginia used similar reasoning and granted a lawyer's motion for leave to withdraw from a case, in which he had been involuntarily appointed, to pursue an appeal for a criminal defendant.[101] Attorney Woodward had consistently refused to accept court appointments to represent indigent criminal defendants and did not allow his name to be placed on the rotation list maintained in his circuit, although his expertise and practice is almost exclusively in the area of criminal defense. He had represented defendant Boone through the sentencing phase of his trial for breaking and entering and petit larceny although neither Boone nor his mother had honored promises to pay Woodward's fees on a regular basis. When Judge Bagnell appointed Woodward, over his objections, counsel for the indigent Boone, Woodward moved to have attorney Overton, who was on the court appointment list, appointed co-counsel.[102] Since jurisdiction was unclear, Woodward filed petitions in both the Supreme Court of Virginia and the Court of Appeals of Virginia for a writ of prohibition to preclude the trial judge from compelling him to represent the defendant on appeal. Under different rationale, both applications were denied, but the defendant's appeal of the criminal conviction had by then reached the court of appeals.[103] Woodward moved the appellate court for leave to withdraw and relief was granted by a two-to-one decision which found, in addition to the fact that the defendant was represented by competent and willing co-counsel, that Woodward had never expressed a willingness to accept an appointment to represent the appellant.[104] The plain language of the statute permitting appointment requires that the attorney indicate his willingness to accept such an appointment.[105]

Although attorneys Mallard and Woodward were discharged from involuntary court appointments based, at least in part, on the

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101. No. 0761-88-1 (Va. App. Dec. 8, 1988) (order granting co-counsel leave to withdraw).

102. Petitioner's Memorandum in Support of Application for Writ of Prohibition at 2, *In re* Woodward, No. 880859 (Va. July 27, 1988).

103. Woodward had also moved for a temporary restraining order in the United States District Court for the Eastern District of Virginia, but asked that court to suspend any ruling pending any relief granted by the Court of Appeals of Virginia.

104. Boone v. Virginia, No. 0761-88-1 (Va. App. Dec. 8, 1988) (order granting Woodward permission to withdraw).

105. VA. CODE ANN. § 19.2-159 (Repl. Vol. 1983).

plain reading of the applicable statute, other cases on the subject are winding their way through the courts on other theories. Numerous state supreme courts have addressed the situation over the years in terms of constitutional issues, several holding that the minimal fees paid court-appointed lawyers become confiscatory in nature in that the fees do not even cover the lawyer's overhead, and therefore, the individual lawyer is involuntarily subsidizing the system.[106] Equal protection clause arguments have also been made claiming that the provision of counsel for indigent defendants should not be provided at the expense of only this particular group of citizens, those admitted to the bar, and most particularly those practicing in the less populated areas of a given state.[107]

Finally, it has recently been held that a lawyer's bald statement that he was incompetent to handle a case to which he was appointed was insufficient to warrant his removal. The Supreme Court of Colorado assigned the burden of proving incompetence to the lawyer, then allowed the court to determine if, under Canon six, the lawyer is capable of becoming competent by his own study and preparation or if the circumstances warrant appointment of co-counsel until the lawyer becomes competent.[108]

D. *Bar Membership Issues*

1. Residency Requirements

The United States Supreme Court recently handed down two decisions, less than nine months apart, which struck down specific residency requirements for bar membership. In *Supreme Court of Virginia v. Friedman*,[109] the Court found that no valid reason supported Virginia's requirement that a foreign attorney seeking admission to the Bar by reciprocity without examination be a resident of the Commonwealth. The Court held the requirement unconstitutional since the privileges and immunities clause of the

106. *See* DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987); Jewell v. Maynard, No. 18320 (W. Va. Apr. 26, 1989), [Current Reports] 5 Law Man. on Prof. Conduct (ABA/BNA) 165-66 (June 7, 1989); *see also* Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980). *But see* Huskey v. State, No. 87-05-I (Tenn. Jan. 11, 1988), [Current Reports] 4 Law. Man. on Prof. Conduct (ABA/BNA) 22-23 (Feb. 3, 1988).

107. 242 Kan. at ___, 747 P.2d at 843-46.

108. Stern v. Grand County Ct., No. 87SA-354 (Colo. May 22, 1989), [Current Reports] 5 Law. Man. on Prof. Conduct (ABA/BNA) 200 (July 5, 1989).

109. 108 S. Ct. 2260 (1988). *See generally* Note, *Invalidation of Residency Requirements for Admission to the Bar: Opportunities for General Reform*, 23 U. RICH. L. REV. 231 (1989).

Constitution protects a nonresident's interest in practicing law on terms of substantial equality with those enjoyed by residents. The Court found that Virginia's requirement, that an attorney admitted by waiver maintain an office in the state, was sufficient to satisfy the state's full-time practice requirement without need to additionally require residency.

During its next term, the Court followed earlier decisions,[110] and found that the residency requirements for membership in the Virgin Islands Bar also violated the privileges and immunities clause.[111] There, the bar association argued that the distinctive nature of the Islands' distance from the mainland presented extenuating circumstances which required lawyers to have resided in the Virgin Islands for at least one year immediately preceding the lawyer's proposed admission to the bar.[112] The Court found a variety of options available to protect Island clients, including resident co-counsel arrangements and substitution for acceptance of mandatory court appointments.[113] Furthermore, the Court disagreed with the argument that members of the Virgin Islands Bar living in distant states would create extraordinary problems for the bar to regulate local ethics codes.[114] Rather, the Court found the monitoring problems faced by that bar to be no more problematic than those faced by any mainland state with limited resources.[115]

2. Mandatory Bar Membership

In *Levine v. Heffernan*,[116] the Seventh Circuit upheld a Wisconsin law requiring lawyers to join the Wisconsin Bar as a condition for practicing law in that state. The court held that such mandatory membership did not violate lawyers' first amendment rights not to associate and not to speak.[117] In *Hollar v. Virgin Islands Bar Association*,[118] the Third Circuit denied a similar claim by a group of Virgin Islands lawyers who also alleged that their

110. *See* Frazier v. Heebe, 482 U.S. 641 (1987); Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985).

111. Barnard v. Thorstenn, 57 U.S.L.W. 4316 (U.S. March 6, 1989) (Nos. 87-1939 and 87-2008).

112. *Id.* at 4318.

113. *Id.*

114. *Id.* at 4319.

115. *Id.*

116. 864 F.2d 457 (7th Cir. 1988), *rev'g* 679 F. Supp. 1478 (1988).

117. *Id.*

118. 857 F.2d 163 (3rd Cir. 1988).

first amendment rights were being violated by mandatory bar membership requirements. That circuit also reiterated the decision in *Lathrop v. Donohue*[119] permitting an integrated bar, and dismissed summarily allegations that several bar activities, including social events, were *ultra vires*.[120] It did, however, find that it was *ultra vires* for the bar to take a public position regarding a nominee for United States Attorney.[121]

V. CONCLUSION

Considerable uneasiness revolves around the ethical behavior of lawyers. Members of the bar and the judiciary are uneasy that the pragmatic demands of operating a law practice sometimes lead to ill-considered activities while the general public appears to uneasily vacillate between lawyer-bashing humor and outrage at the legal system. Public perception of the legal profession is not enhanced by a lawyer's infraction of either the law or the Code, whether in the form of crass advertising, breach of a client's trust or confidentiality, or advising a client to misrepresent the facts.

Tension sometimes exists between the lawyer's responsibilities as an officer of the court and as an advocate for his client. The organized bar, in an effort to be responsive to its role in protecting the public from unscrupulous lawyers, treats both the ethical precepts and the disciplinary system as fluid and subject to modification. In providing a code of ethics, the bar provides guidance to the lawyer as he sorts out his varying roles and responsibilities.

The questions which have been asked in the past two years have provided guidance in the areas of advertising and solicitation, mandatory reporting of another lawyer's misconduct even if doing so results in less zealous representation of a client, accepting court appointments even where the lawyer's expertise is less than desirable, revealing client confidences to a grand jury, and the level of responsibility a lawyer accepts in providing services to an individual outside the attorney-client relationship. The answers may, in some situations, need refinement in order to assist the lawyer to conform his conduct to appropriate standards.

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119. 367 U.S. 820 (1961).
120. 857 F.2d at 170.
121. *Id.*

The law of professional responsibility, as other fields of law, has few, if any, "black letter rules." Variations in circumstances may require variations in behavior. Furthermore, considering the multi-jurisdictional law practiced by many lawyers today, the variability of the ethical requirements from state to state present even greater challenges. The United States Supreme Court is being called upon more frequently to resolve splits among states[122] or circuits,[123] and it appears that some form of nationally-accepted standards of conduct for the legal profession may be one way to avoid some of the abounding uneasiness currently experienced both within and outside the bar.

122. *See supra* notes 87-88 and accompanying text.
123. *See supra* note 98 and accompanying text.