

1997

Annual Survey of Virginia Law: Professional Responsibility

James M. McCauley

Michael L. Rigsby

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

James M. McCauley & Michael L. Rigsby, *Annual Survey of Virginia Law: Professional Responsibility*, 31 U. Rich. L. Rev. 1115 (2017).
Available at: <http://scholarship.richmond.edu/lawreview/vol31/iss4/7>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

PROFESSIONAL RESPONSIBILITY

*James M. McCauley**

*Michael L. Rigsby***

I. AMENDMENTS TO THE VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY

A. *Adoption of the Model Rules of Professional Conduct*

On October 18, 1996, the Virginia State Bar Council (Council) approved a change in the format of the Code of Professional Responsibility¹ (Code) from canons, disciplinary rules, and ethical considerations to the Model Rules of the American Bar Association (Model Rules).² The first twenty-one rules, Model Rules 1.1 through 2.5, were approved in substance with some amendments at the Council's meeting on June 19, 1997. This approval represents approximately one-third of the conversion from the Code to the Model Rules. The second installment of the conversion was approved by Council at its October 1997 meeting. Notwithstanding Council's approval of this major undertaking, the adoption of the Model Rules will require the imprimatur of the Supreme Court of Virginia.

* Ethics Counsel, Virginia State Bar. B.A., 1978, James Madison University; J.D., 1982, University of Richmond School of Law. Mr. McCauley frequently lectures at Continuing Legal Education classes on matters involving legal ethics, lawyer advertising and the unauthorized practice of law and is also an adjunct professor at J. Sargeant Reynolds Community College in Richmond, Virginia.

** B.S., 1967, Virginia Polytechnic Institute and State University; J.D., 1969, University of Richmond School of Law. Mr. Rigsby served as Bar Counsel for the Virginia State Bar from 1977 to 1997 and now practices law with the firm of Midkiff & Hiner, P.C. He is also an adjunct professor of law at the University of Richmond teaching professional responsibility.

1. VA. SUP. CT. R. pt. 6, § II (Repl. Vol. 1997).

2. MODEL RULES OF PROFESSIONAL CONDUCT (1987).

B. Advertising and Solicitation

Members of the Bar frequently complain about the advertising of other lawyers. A problem arises because advertising involves issues of commercial free speech, which can be restricted by the state only in limited circumstances.³ As stated by the Virginia State Bar's Special Committee to Monitor Advertising and Solicitation in its Report to the Council in 1991:

1. Any regulation of lawyer advertising must be measured against the constitutional standard which permits absolute prohibition only of that advertising which is false, misleading or deceptive.

2. Lawyer advertising that does not in some manner achieve the end of providing information to the consumer may, and should, be regulated.

3. Lawyers who are advertising need guidance from the Supreme Court of Virginia with respect to what forms of advertising are considered false or misleading and what are considered safe harbors that will avoid the imposition of disciplinary sanctions.⁴

In an effort to monitor lawyers' increasing use of telephone directory and electronic media advertising, a special committee recommended, and the Council and the Supreme Court of Virginia ultimately approved, the creation of a standing committee to review advertising practices, monitor print and electronic media advertising, and issue informal opinions regarding the propriety of particular forms of advertising and solicitation.⁵

3. Few areas of the law have received as much attention from the United States Supreme Court as lawyer advertising and solicitation. The Court has issued a litany of opinions since its landmark decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), in which it held that it is unconstitutional under the First Amendment for the states to prophylactically ban truthful and non-deceptive commercial speech. See *Bates*, 433 U.S. at 383; see, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978).

4. REPORT OF THE SPECIAL COMMITTEE TO MONITOR ADVERTISING AND SOLICITATION, 54TH ANN. REP. OF THE VA. ST. BAR, at 34 (1992).

5. VA. SUP. CT. R. pt. 6, § IV, ¶ 10 (Repl. Vol. 1997).

The Standing Committee on Lawyer Advertising and Solicitation has issued several written informal advisory opinions.⁶

Disciplinary Rule 2-101(B) was amended, effective January 23, 1995, to permit an attorney to engage in live advertising. In pertinent part, the provision now reads:

6. Examples of such advisory opinions include: A television commercial depicting a lawyer must provide a disclaimer indicating that any actor portraying an attorney is not an attorney associated with the law firm on whose behalf the commercial is made. *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0101 (1993).

The use of the phrases "no recovery, no fee" or "you pay nothing unless we win" are improper under DR 2-101(A) as misleading unless accompanied by an additional statement in the advertisement to the effect that the client remains responsible, in any event, for out-of-pocket expenses incurred by the law firm, i.e., filing fees, court reporter fees, expert witness fees, etc. *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0102 (1993).

The use of a corporate, trade or fictitious name is misleading and deceptive under DR 2-101(A) unless the attorney or law firm actually practices under that name. *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0103 (1993).

Advertisements which assert that a person injured in an accident "will have to consult an attorney" before speaking with a representative from the insurance company violate DR 2-101(A). While it may make good sense for an accident victim to consult with an attorney before dealing with an insurance company, there is no legal requirement for this, and therefore the statement is false. *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-6104 (1993).

Advertisements made on behalf of lawyer referral services or joint marketing arrangements must measure up to the standards articulated in prior opinions issued by the Standing Committee on Legal Ethics. *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0105 (1995); *see, also* VSB Comm. on Legal Ethics, Legal Ethics Op. 1543 (1993).

A lawyer or law firm may not advertise specific case results because of the misleading nature of such communications created by the practical inability to reveal, in advertising media, all material circumstances under which the specific result was achieved. *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0106 (1994).

A patent law firm employing lawyers admitted in various jurisdictions inquired as to whether it could designate, on its letterhead stationery, those attorneys not admitted in Virginia with an asterisk beside the name of each non-Virginia attorney listed. The Committee opined that the use of an asterisk, accompanied by a footnote "Admitted to a bar other than in Virginia" would satisfy the requirements of DR 2-102(D). *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-D107 (1995).

Though truthful, a law firm's claim that "we have obtained the largest jury verdict in the city" is inherently misleading and thus violates DR 2-101(A). *See* VSB Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0109 (1997).

A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication. If such communication is disseminated to the public by use of electronic media and is prerecorded prior to dissemination, the prerecorded communication shall be approved by the lawyer before it is broadcast.⁷

C. *Administration of Attorney Trust Accounts*

Disciplinary Rule 9-103(B) was amended to enhance the Virginia State Bar's (Bar) ability to monitor attorney trust accounts.⁸ Depository institutions managing attorney trust accounts must be approved by the Bar for the receipt of trust funds.⁹ To be approved, the financial institution must agree to report overdrafts and presentments against insufficient funds.¹⁰

D. *Maintenance of Attorney Trust Accounts by Out-of-State Attorneys*

Attorneys practicing law in jurisdictions contiguous to Virginia have often questioned the need to maintain trust accounts in Virginia when their law practices were outside the Commonwealth. To accommodate the inconvenience that accompanied the maintenance of trust accounts in more than one jurisdiction, the Court amended DR 9-102 and DR 9-103, effective July 1, 1995, to permit the maintenance of a trust account in "a state in which the lawyer maintains a law office."¹¹ The trust accounting procedures apply to all trust accounts maintained by lawyers who are holding funds on behalf of clients who reside in Virginia or from a "transaction arising" in Virginia, "whether or not the lawyer or law firm maintains an office" in Virginia.¹²

While the rule change adopted a "locus of law practice" standard, it retained three important requirements: (1) the lawyer

7. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B).

8. *See id.* DR 9-103.

9. *See id.* DR 9-103(B)(1)(a).

10. *See id.* DR 9-103(B)(1)(b).

11. *Id.* DR 9-102.

12. *Id.* DR 9-103(B).

is still limited to those financial institutions which agree to notify the Bar of overdrafts and presentments against insufficient funds; (2) the lawyer must notify the financial institution of the identity and purpose of the account; and (3) trust funds can be maintained only in a financial institution approved by the Bar or a depository expressly approved by the client in writing.¹³ No trust account shall be maintained in any financial institution which does not agree to report to the Bar "in the event any instrument which would be properly payable if sufficient funds were available, is presented against attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored."¹⁴ Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty days notice in writing to the Bar, or as otherwise agreed to by the Bar. The agreement may be canceled without prior notice by the Bar if the financial institution fails to abide by the terms of the agreement.¹⁵

II. AMENDMENTS TO THE PROCEDURE FOR THE INVESTIGATION OF COMPLAINTS AGAINST ATTORNEYS

No area of lawyer regulation has experienced more change than the procedural rules which govern the investigation and prosecution of disciplinary complaints made against lawyers.¹⁶ All of the rule changes were motivated by a desire to either increase the scrutiny of lawyer conduct or improve the operation of the disciplinary system against a steady growth of complaints made against lawyers in Virginia. Only the most significant changes are outlined in this section.

A. Subcommittee Action

An important improvement in the disciplinary system was the establishment of subcommittees, a panel of two lawyers and

13. *See id.* DR 9-103(B).

14. *Id.* DR 9-103(B)(1)(b).

15. *Id.*

16. *See* VA. SUP. CT. R. pt. 6, § IV, ¶ 13 (Nov. Supp. 1997).

one layperson,¹⁷ to review the Bar's report of investigation and to make a disposition of the complaint. Under Paragraph 13 (B)(5)(b) of Part 6 of the Virginia Supreme Court Rules, a subcommittee of a district committee must make a disposition of all investigations referred for further investigation by Bar counsel.¹⁸ This rule change is significant because the full district committee becomes a hearing panel only. The subcommittee can (1) dismiss the complaint; (2) direct bar counsel to conduct further investigation; (3) certify the matter to the disciplinary board upon a reasonable belief that the attorney has engaged in misconduct which, if proved, would justify a suspension or revocation of the attorney's license to practice law; (4) set the matter for a hearing before the district committee; or (5) issue a private or public reprimand, with or without terms, with the consent of the respondent attorney and/or his or her counsel.¹⁹

B. *Reinstatement*

Paragraph 13 (J) was amended to require any attorney whose license was suspended for more than one year after July 1, 1990, to attend twelve hours of continuing legal education for every year, or fraction thereof, that the license has been suspended as a condition to reinstatement.²⁰ In addition, the suspended attorney must take the Multistate Professional Responsibility Exam and receive an adjusted score of seventy-five or higher.²¹ The prior requirements, including payment of costs assessed by the Clerk of the Disciplinary System and reimbursement to the Client Protection Fund, remain in force.²²

C. *Agreed Dispositions*

Bar counsel and the respondent can enter into an agreement regarding the disposition of a complaint.²³ This agreement

17. *See id.* at ¶ 13(A) (defining "Subcommittee").

18. *See id.* at ¶ 13(B)(5)(c)(ii).

19. *See id.* at ¶ 13(B)(5)(ii)(a)-(e).

20. *See id.* at ¶ 13(J).

21. *See id.*

22. *See id.*

23. *See id.* at ¶ 13(B)(5)(b).

must have the unanimous approval of the subcommittee.²⁴ Previously, all matters had to be tried in an adversarial hearing before a district committee.

D. *Appeals of Reprimands*

A respondent may appeal private or public reprimands to the disciplinary board.²⁵ The case is heard on the record developed before the district committee.²⁶ The standard of review is the same as provided in Virginia Code section 9-6.14:17 for review of administrative agency decisions, the "substantial evidence" test.²⁷ Oral argument is granted unless waived by the respondent.²⁸ The disciplinary board may decrease, but cannot increase, the severity of the sanction imposed by the district committee.²⁹ Previously, the respondent could request a redetermination of a reprimand, but the case was heard de novo, not on the record, as is the current rule.³⁰

E. *Confidentiality*

As a general rule, all matters within the disciplinary system are confidential and exempt from discovery.³¹ The confidentiality rule, however, now allows the Bar to inform other lawyer regulatory agencies of on-going investigations within Virginia and allows Bar counsel to comment, in limited ways, on investigations which are independently in the public forum.³²

F. *Random Review vs. Reasonable Basis for the Review of Trust Accounts*

The fiscal year of July 1, 1992 to June 30, 1993 saw a

24. *See id.*

25. *See id.* at ¶ 13(B)(10)(2).

26. *See id.*

27. *See* VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1993); *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 308 S.E.2d 123 (1983).

28. *See* VA. SUP. CT. R. pt. 6, § IV, ¶ 13(D)(3) (Nov. Supp. 1997).

29. *See id.* ¶ 13(D)(4).

30. *See id.* ¶ 13(B)(10).

31. *See id.* ¶ 13(K)(5).

32. *See id.*

groundswell of support for stricter oversight of attorneys handling fiduciary funds. The fallout arising from the highly publicized defalcations of David M. Murray, Sr. and James Arthur dominated the thinking of those responsible for the regulation of the legal profession in Virginia.³³ Even so, Council would not approve a rule authorizing random audits of attorney trust accounts. As a compromise, Paragraph 13(B)(3) was amended in response to the demand for greater authority to review attorney trust accounts. Key features of the rule are: (1) the Bar may review a trust account whenever there is a reasonable basis to believe that the account is not in compliance with the Code; and (2) the reasonable basis must be set forth in writing by the Bar.³⁴

G. *Cost Assessments*

The Clerk of the Disciplinary System assesses costs against the respondent attorney in misconduct matters including an administrative fee of \$300 in a case where a final determination of misconduct has been made.³⁵ The Bar also may recover reimbursement of travel and out-of-pocket expenses for witnesses, court reporter fees and copying costs.³⁶ In reinstatement cases, a \$1000 bond must be posted with the Clerk of the Supreme Court of Virginia and the respondent must pay whatever costs are determined by the Board and incorporated in the order of the supreme court granting or denying reinstatement.³⁷

H. *Notification of Suspension or Disbarment*

Paragraph 13(K)(1) requires a disbarred or suspended attorney to give notice of that fact to clients, opposing counsel and judges.³⁸ The rule was further amended to require the attorney

33. See REPORT OF THE DEPARTMENT OF PROFESSIONAL REGULATION, 55TH ANN. REP. OF THE VA. ST. BAR, at 6 (1993).

34. See VA. SUP. CT. R. pt. 6, § IV, ¶ 13(B)(3) (Nov. Supp. 1997).

35. See *id.* ¶ 13(K)(10).

36. See *id.*

37. See *id.*

38. See *id.* ¶ 13(K)(1).

to furnish proof of compliance to the Bar within forty-five days of the effective date of the suspension or disbarment, indicating that timely notice was given and arrangements made for the disposition of client matters.³⁹ In the absence of such proof, the disbarred or suspended attorney is not entitled to reinstatement.⁴⁰

I. Informal or Abbreviated Investigations

Effective January 13, 1997, the Supreme Court amended its investigation procedure for complaints of ethical misconduct.⁴¹ The amendment was deemed necessary because many complaints involve minor disagreements between attorney and client, or minor disruptions in the attorney/client relationship. Key features of this non-traditional investigation process include: (1) the investigation is used only in instances of less serious misconduct; (2) the goal of the investigation is to resolve the complaint to the satisfaction of the complainant, the attorney, and the Bar within ninety days from the date of filing the complaint; and (3) if the complaint is resolved within ninety days, it will be dismissed without becoming a part of the attorney's disciplinary record, but if the complaint is not resolved within ninety days, the complaint will be processed as any other.⁴²

J. Report of the Joint Legislative Audit and Review Commission (JLARC) and Recommended Changes to the Disciplinary System

In what some may describe as a political backlash to the Bar's Interest on Lawyer Trust Accounts Program, (IOLTA)⁴³

39. *See id.*

40. *See id.*

41. *See id.* ¶ 13(B)(5)(b).

42. *See id.*

43. The 1995 Session of the General Assembly passed House Bill 1970 which "rolled back" the Bar's IOLTA Program through which the Legal Services Corporation of Virginia (LSCV) received a significant boost in funding for legal aid to the indigent. *See* Act of March 7, 1995, ch. 93, 1995 Va. Acts 121. The legislature made lawyer participation in the IOLTA program optional by adding Virginia Code section 54.1-3915.1:

the 1995 Session of the General Assembly enacted Senate Joint Resolution 263 calling for a study of the Bar by JLARC.⁴⁴ While initially JLARC's goals and objectives were unclear, it quickly became apparent that the Commission focused primarily upon the disciplinary system. JLARC presented twenty-five specific recommendations relating to the disciplinary process in Virginia in a report to the General Assembly.⁴⁵ The recommendations proposed changes by statutory amendment of the Rules of Court which govern the disciplinary process and changes in the internal operating procedures of the Office of Bar Counsel. The Bar's Standing Committee on Lawyer Discipline (COLD) studied JLARC's recommendations and the Council and the Supreme Court of Virginia acted upon some of these recommendations. As a result of JLARC's recommendations, the Bar: (1) implemented a written policy requiring Bar counsel to document in writing every decision to dismiss a complaint at the intake level or after preliminary investigation; (2) adopted a written internal procedure affording the complainant an opportunity to rebut the accused attorney's response to the complaint prior to any decision by Bar counsel to dismiss or refer the complaint to a district committee; (3) obtained the supreme court's approval to amend the rules regarding investigation to require lay member participation on any district committee or disciplinary board panel taking action in a disciplinary case;⁴⁶

The Supreme Court shall not promulgate any disciplinary rules, rule or regulation requiring that attorneys or law firms deposit client funds in interest-bearing accounts, pooled or otherwise, on which the interest is required to be paid to any person or entity other than the client. Any disciplinary rule, rule or regulation previously promulgated which is inconsistent with this section is void and of no effect.

The Supreme Court of Virginia was compelled to amend the Rules of Court to provide that attorneys could "opt out" of the IOLTA program, leaving the attorney with the option of placing trust funds in a non-interest bearing fiduciary account, or an account drawing interest except that any interest earned had to be paid to the client. *See* VA. SUP. CT. R. pt. 6, § IV, ¶ 20 (Repl. Vol. 1997).

44. *See* S.J. Res. 263, Va. Gen. Assembly, (Reg. Sess. 1995).

45. *See* JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, REVIEW OF THE VIRGINIA STATE BAR, S. Doc. No. 15 (1996).

46. Paragraph 13(B)(2) and (C) were amended to require that a non-lawyer member be scheduled to participate in every hearing before a district committee or the disciplinary board. However, if the non-lawyer member was unexpectedly unable to participate and a substitute could not be located, the trial would nevertheless proceed so long as a quorum was otherwise present. *See* VA. SUP. CT. R. pt. 6, § IV, ¶ 13(B)(2)(d), (C)(2) (Nov. Supp. 1997).

(4) implemented a study to examine the consistency of decisions and sanctions imposed by the district committees throughout the state; (5) successfully petitioned the General Assembly to provide qualified immunity for complainants;⁴⁷ (6) obtained the supreme court's approval to amend the rules to prohibit any member of Council, COLD, the disciplinary board, and the district committees from representing a respondent at any point in the disciplinary system;⁴⁸ (7) obtained the supreme court's approval to amend the rules to prohibit committee members who participate in the subcommittee's review of a case from sitting on the committee panel that ultimately hears the case;⁴⁹ and (8) obtained the supreme court's approval to amend the rules allowing a respondent to request a hearing before a committee panel for any dismissal that creates a disciplinary record.⁵⁰

III. LEGAL ETHICS OPINIONS⁵¹

A. *Ancillary Businesses*

Lawyers who form lay corporations to provide arbitration and mediation services to customers of the corporation are not engaged in the practice of law and, therefore, not all of the provisions of the Code apply.⁵² For example, the prohibition against splitting fees with a non-lawyer under DR 3-102⁵³ does not apply unless the lawyer/mediator performs legal services beyond the role of a scrivener of the parties' memorandum of agree-

47. Section 54.1-3908 of the Virginia Code was amended in 1996 to read:

No person shall be held liable in any civil action for words written or spoken in any complaint regarding, proceeding concerning, or investigation of, the professional conduct of any member of the Virginia State Bar, unless it is shown that such statements were false and were made willfully and maliciously.

VA. CODE ANN. § 54.1-3908 (Cum. Supp. 1997).

48. See VA. SUP. CT. R. pt. 6, § IV, ¶ 13(K)(9)(a) (Nov. Supp. 1997).

49. See *id.* at ¶ 13(B)(5)-(6).

50. See *id.*

51. The Standing Committee on Legal Ethics (Committee) is authorized to issue written advisory opinions, pursuant to a request made by a member of the bar. See VA. SUP. CT. R. pt. 6, § IV, ¶ 10 (Repl. Vol. 1997). The opinions of the Committee are informal and not binding on any court or tribunal unless approved by the Supreme Court of Virginia. See *id.* at ¶ 10 (C)(VI).

52. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1368 (1990).

53. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102 (1983).

ment in the mediation process.⁵⁴ However, the attorney/mediator must comply with DR 5-101(A)⁵⁵ by disclosing his or her ownership interest in the corporation to the parties.⁵⁶

It is not unethical per se for a law firm to develop an ancillary business to complement the legal services provided by the firm.⁵⁷ As a result, the ancillary business may send its clients to the law firm, and the law firm may send its clients to the ancillary business.⁵⁸

B. *Conflicts*

1. Financial Interests

The Standing Committee on Legal Ethics (Committee) addressed the propriety of an attorney drafting an instrument which names the attorney as personal representative or trustee, or which directs such other designee to employ the attorney as fiduciary administrator.⁵⁹ In a broad-sweeping opinion affecting estate planners, the Committee addressed the conflicts which arise when an attorney or his or her law firm provides services to the testator or the testator's estate, beyond the preparation of the will or trust instrument.⁶⁰

There need not be a prior attorney/client relationship for the attorney to be named as executor or trustee under the testamentary document. However, the attorney should be mindful of the appearance of overreaching and not consciously influence a client to name him as executor or trustee in an instrument.⁶¹ The naming of the executor or trustee must be an informed and fully volitional act of the client.⁶²

54. See LEO 1368.

55. See VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A).

56. See LEO 1368.

57. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1658 (1995) (law firm handling labor and employment law litigation owns and operates consulting firm specializing in human resources and behavioral science to which it refers clients).

58. See *id.*

59. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1515 (1994).

60. See *id.*

61. See *id.*

62. See *id.*

As executor, trustee or attorney for the estate, the attorney must disclose the attorney's potential fees.⁶³ The Committee recommended that the fee disclosure be reduced to writing, and established the attorney's duty to recommend to the client that he or she investigate the fees of others who would provide similar services.⁶⁴

When the attorney named as executor or trustee intends to, or is considering, retaining his or her law firm as attorney for the estate or trust, the attorney must disclose that intention to the testator/grantor and obtain their consent prior to the execution of the will or trust.⁶⁵ The attorney acting as a fiduciary is subject to the constraints of the Code of Professional Responsibility.⁶⁶

The Supreme Court of Virginia approved the Committee's opinion, effective February 1, 1994, making it a decision of the supreme court.⁶⁷

2. Multiple Parties

a. Simultaneous Representation Requiring Withdrawal

Attorney 1 represented Defendant A and Attorney 2 represented Defendant B in separate capital murder trials on the same case. Defendants A and B were each found guilty and sentenced to death. Thereafter, Attorney 1 was assigned to represent Defendant B in a habeas petition alleging ineffective assistance of counsel, and Attorney 2 was similarly appointed to represent Defendant A.⁶⁸

The Committee analyzed this dilemma in light of DR 5-101(A) and concluded that, with client consent after full and adequate disclosure, the conflict is curable.⁶⁹

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See* VA. SUP. CT. R. pt. 6, § IV, ¶ 10(g)(v) (Repl. Vol. 1997).

68. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1665 (1996).

69. *See id.*

b. Is Consent to a Conflict Revocable?

An attorney agreed to represent client H on charges of driving under the influence while representing client W in contempt proceedings against client H for child support arrearages. Client H recognized the existence of a conflict of interest, and signed a waiver stating that he had no objection to the attorney continuing to represent client W in the contempt proceedings. Client H also agreed orally not to object to the attorney's continued representation of client W. Subsequently, client H revoked his waiver and objected to the attorney's continued representation of client W.⁷⁰

Notwithstanding the written waiver and the oral representations of client H, the Committee initially observed, "[c]onsent is not a contractual obligation. Client consent may be withdrawn at any time."⁷¹

Upon further reflection, the Committee reconsidered the issue and changed its position. An attorney must withdraw from representation only if the consent is withdrawn "under certain circumstances."⁷² The Committee considered such factors as whether there was a substantial relationship between the current and former representation, and whether one could reasonably argue that the attorney learned confidential information in the earlier representation that could be used improperly in the current representation.⁷³

C. Fees

1. Fees for the Collection of Medical Expense Payments

A lawyer inquired which of the following methods of payment would be appropriate for the recovery of Med Pay: (1) an administrative fee of ten percent of any medical expense proceeds

70. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1652 (1995) (reconsidered and revised July 8, 1996).

71. *Id.* (citing VSB Comm. on Legal Ethics, Legal Ethics Op. 1354; Commercial & Sav. Bank v. Brundige, 5 Va. Cir. 33, 34 (Winchester City 1981)).

72. *Id.*

73. See *id.*

collected by the attorney for the client; (2) a flat fee based on the actual estimated cost of having a paralegal assist the client; or (3) an hourly fee based on the paralegal's standard hourly rate of sixty-five dollars.⁷⁴

The Committee opined that the percentage-based administrative fee was clearly improper because it was similar to a contingency fee. For a contingency fee to be proper, there must be some risk of not collecting it. The Committee concluded, however, that the flat fee and the hourly fee were not per se improper.⁷⁵

In a subsequent opinion, the committee considered whether an attorney could ethically charge a contingency fee for the recovery of medical payments against the *tortfeasor's* insurance carrier, noting that the contingency fee is improper where collection is ministerial in nature and payment is automatic. The Committee determined that since the client's entitlement to medical expense reimbursement was contested by the tortfeasor's carrier, it was not improper to charge a contingency fee for the recovery of medical expenses.⁷⁶

2. Value Billing

A law firm proposed an arrangement whereby clients were classified in categories for the attorney who originated the work and those attorneys who actually did the work. The question presented was whether it was proper to bill additional amounts to the client for "administrative fees," "processing fees," or "value billing" (a fixed "percentage add on from 20% to 200%" at the originating attorney's hourly rate) when the originating attorney does not actually work on the case.⁷⁷ Under this arrangement, the client would not be informed of the fee markup. In the absence of advance client knowledge and consent, the

74. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1641 (1995); see also VSB Comm. on Legal Ethics, Legal Ethics Op. 1461 (1992); *Anderson v. Kenelly*, 547 P.2d 260, 261 (Colo. Ct. App. 1976); *The Florida Bar v. Moriber*, 314 So.2d 145, 148 (Fla. 1975).

75. See LEO 1641.

76. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1696 (1997).

77. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1648 (1995).

Committee determined that such billing practices would be unethical.⁷⁸

3. Collection Fee

An attorney proposed to have his clients sign a retainer agreement which provided, among other things, that if the attorney had to sue the client for any unpaid fees, the client would pay a \$500 collection fee.⁷⁹ Pointing out that a fee agreement between an attorney and a client is "in a classification peculiar to itself" and is "permeated with the paramount relationship of attorney and client,"⁸⁰ the Committee concluded that the contract would violate the mandate of DR 2-105(A).⁸¹

4. Charging Fee to Pro Bono Client

The Committee addressed the question of whether an attorney who received a pro bono client by referral from a legal aid office could subsequently charge, and receive, a fee.⁸² At issue was whether such conduct violated DR 1-102(A)(4) which states that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law."⁸³

The Committee also considered EC 2-27, which urges all lawyers, to "find time to participate in serving the disadvantaged."⁸⁴ The Committee held:

For an attorney to agree to receive cases on a pro bono basis from Legal Aid and then, with no notice to the Legal Aid Society, to extract a fee from the referred client is a clear misrepresentation regarding the attorney's fulfillment of the Society/attorney referral agreement. The committee

78. *See id.*

79. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1667 (1996).

80. *Id.* (citing *Heinzman v. Fine, Fine, Legum & Fine*, 217 Va. 958, 962-63, 234 S.E.2d 282, 285 (1977)).

81. *See id.*; VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) ("A lawyer's fees shall be reasonable and adequately explained to the client.").

82. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1691 (1996).

83. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4).

84. *See id.* EC 2-27.

opines that, due to the importance of the availability of free legal services to the public, the misrepresentation by the attorney . . . does constitute a violation of DR 1-102(A)(4).⁸⁵

D. *Confidences and Secrets*

1. Duty to Reveal Former Client's Misrepresentation

An attorney completed a divorce for a client and the client subsequently filed for bankruptcy. The client listed the attorney as a creditor, but did not list a number of assets owned by the client which were included in the property settlement agreement incorporated into the final divorce decree.⁸⁶

Notwithstanding the fact that the final decree, and, therefore, the property settlement agreement, were public documents, the Committee concluded that the attorney could not reveal the client's fraud.⁸⁷ The information regarding the assets was a "secret" protected by DR 4-101(A).⁸⁸ The Committee also concluded that the attorney could not report the former client's fraud on the bankruptcy court under DR 4-101(D)(2) since the fraud did not occur "in the course of the relationship."⁸⁹

2. Duty To Protect Client Confidences and Secrets

A client engaged counsel for assistance in a wrongful discharge claim against her former employer. The discharged employee received, from a friend still working at the company, a copy of a letter from the company's counsel to company management which addressed the wrongful discharge claim.⁹⁰ The employee then gave the copy of the letter to her lawyer and requested that the lawyer destroy it.⁹¹ The client feared that her

85. LEO 1691.

86. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1643 (1995).

87. See *id.*

88. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A).

89. VSB Comm. on Legal Ethics, Legal Ethics Op. 1643 (1995); see VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(2).

90. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1688 (1996).

91. See *id.*

former employer would take retaliatory action against her friend.⁹²

The Committee was faced with a number of interesting questions. Is the existence of the letter a client confidence or secret? Does the duty of zealous representation require that the attorney review the contents of the letter? Is there anything about the letter which must be revealed to the opposing counsel? May the lawyer destroy the letter? Does the attorney have a duty to withdraw from the representation? Does the attorney/client privilege apply?

The Committee opined that the circumstance under which the lawyer received the letter is a secret.⁹³ No duty of zealous representation required the lawyer to read the letter. Since the information is protected as a client secret, the attorney must comply with the client's wishes, including destroying the letter, and may not reveal anything about the letter to opposing counsel.⁹⁴ Further, since the attorney had no role in the procurement of the letter, he is not required to withdraw from the representation.⁹⁵ If a discovery request is filed with the attorney, he should file an objection.⁹⁶

E. *Trial Conduct*

1. What Does One Do Upon Learning That the Plaintiff's Expert Lied?

Disciplinary Rule 7-102(B)(1) requires a lawyer who receives information clearly establishing that someone other than his client has perpetrated a fraud upon a tribunal to promptly reveal the fraud to the tribunal.⁹⁷ Therefore, defense counsel, upon learning that the plaintiff's expert witness lied about his qualifications in his deposition, must reveal the fraud to the tribunal.⁹⁸

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1).

98. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1650 (1995).

2. Contact with Former Employee of Adverse Party

The Committee was asked to consider the propriety of defense counsel communicating ex parte with a former employee of the plaintiff corporation, regarding the employee's recollections concerning matters at issue in a pending law suit.⁹⁹ At issue was whether DR 7-103(A)(1)¹⁰⁰ prohibited defense counsel's contact with the former employee since the corporation was represented by counsel.¹⁰¹ Even though a former employee is a member of the control group,¹⁰² once the employee separates from the corporation, the restrictions upon direct contact cease to exist because the former employee no longer speaks for the corporation or binds it by his or her actions or admissions.¹⁰³

3. Interference with Opposing Party's Expert Witness

May defense counsel employ the senior member of the medical practice group as an expert witness if the plaintiff's previously designated expert was also a member of the same practice group? Does counsel for the defendant have a duty to instruct his expert not to communicate with the plaintiff's expert about the case? In this scenario presented to the Committee, the senior doctor advised the younger doctor to reconsider his decision to serve as an expert for the plaintiff.¹⁰⁴ The Committee concluded that the answers depended on motivation. It is

99. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1670 (1996).

100. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A).

101. See LEO 1670.

102. The Committee has adopted the "control group" test employed in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), to define those management-level employees that opposing counsel may not contact without permission from the corporation's attorney. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1504 (1992) (not improper for attorney to directly contact or interview employees of an adverse party provided such employees are not members of the corporation's "control group"). *But see* *Queensberry v. Norfolk and W. Ry.*, 157 F.R.D. 21 (E.D. Va. 1993) (applying DR 7-103(A)(1)'s prohibition against ex parte contacts with employees of adverse party even if employee is not a member of the "control group" where activities or statements of employee are part of the focus of litigation or would make employer vicariously liable).

103. See LEO 1670.

104. See VSB Comm. on Legal Ethics, Legal Ethics Op. 1678 (1996).

not ethically permissible for a lawyer to directly advise the other party's expert witness not to testify, or to cause the other party's witness not to testify indirectly through another acting at the lawyer's request. If defense counsel did in fact employ his expert merely to harass or injure the plaintiff by subverting plaintiff's employment of his expert, such conduct would violate DR 7-102(A)(1).¹⁰⁵ However, two physicians in the same practice group may serve as expert witnesses in the same litigation without presenting an ethics issue.¹⁰⁶

F. *Surreptitious Tape Recordings*

The Committee, having previously determined that suggesting secret tape recording to a client was unethical,¹⁰⁷ encountered the same issue in the context of a wrongful discharge case.¹⁰⁸ An attorney/officer of a corporation secretly recorded a telephone conversation with a discharged employee who was involved in a dispute with the company over the termination of his employment.¹⁰⁹ The recorded telephone conversation was between the former employee and the attorney/officer, who did not indicate that he was acting as the attorney for the corporation even though the former employee knew that the officer was also an attorney.¹¹⁰ Even though the attorney later admitted to the former employee's counsel that he taped the conversation and the tape was produced in response to a discovery request, the Committee determined that the attorney's conduct in secretly recording the former employee's conversation was improper and violated DR 1-102(A)(4).¹¹¹

105. *See id.*

106. *See id.*

107. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1448 (1992). The Committee relied on the holding of *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989), that the surreptitious recording of the wife's telephone conversations with third parties, at the direction of husband's lawyer, to which husband's lawyer was not a party, and without the consent or knowledge of the wife and such third parties, was conduct involving dishonesty, fraud, or deceit under DR 1-102(A)(4). *See Gunter*, 238 Va. at 622, 385 S.E.2d at 600.

108. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1635 (1995).

109. *See id.*

110. *See id.*

111. *See id.*

G. *Duty to Report Misconduct*

DR 1-103(A) requires an attorney to report misconduct which raises a substantial question as to an attorney's fitness to practice law.¹¹² Should an attorney report alleged misconduct of opposing counsel in an ongoing civil matter? The Committee once again addressed the tension between the duty to report misconduct and the admonition to refrain from filing a disciplinary complaint solely to obtain an advantage in a civil matter.¹¹³ While the Committee did not develop a "bright line" rule for reporting, the Committee stated that a good faith intent to discharge one's responsibility under DR 1-103 could not be viewed as a filing "solely to obtain an advantage in a civil matter."¹¹⁴

IV. DISCIPLINARY DECISIONS AND RELATED COURT CASES

A. *Attorney-Client Relationship*

Disciplinary Rule 7-102(A) prohibits a lawyer, *in the representation of a client*, from knowingly advancing a claim that is unwarranted under existing law.¹¹⁵ The Disciplinary Board (Board) found that an attorney violated DR 7-102(A) while representing himself pro se.¹¹⁶

In another case, an attorney was appointed as a hearing officer under Virginia Code section 9-6.14:12 to make findings of fact and conclusions of law in a matter before the Virginia Real Estate Board and then file his report within ten days after the hearing.¹¹⁷ The hearing occurred on February 17, 1993, but, as of December 16, 1994, the respondent had not filed the report.¹¹⁸ The Disciplinary Board held that, for purposes of applying DR 1-102(A)(4) and DR 6-101(B) and (C), the Depart-

112. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A).

113. *See id.* DR 7-104(A).

114. VSB Comm. on Legal Ethics, Legal Ethics Op. 1646 (1995).

115. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A).

116. *See In re Edward Falcon Hodges*, No. 93-090-1550 (VSB Disc. Bd. 1994).

117. *See In re Mark William Rossi*, No. 94-032-1074 (VSB Disc. Bd. 1994).

118. *See id.*

ment of Professional Occupation and Regulation employed the respondent to conduct a hearing on behalf of the Real Estate Board and the "Board" was his client.¹¹⁹

B. *Concealment; Duty to Third Persons and the Court*

A Commonwealth's Attorney concealed from the victim of a sexual assault and the sentencing judge material aspects of an accord and satisfaction reached between the prosecutor and defense counsel, including the fact that some of the money offered by the defense would be the subject of charitable contributions to particular entities on the prosecutor's behalf.¹²⁰ The court found that concealment designed to mislead another is conduct involving fraud, dishonesty or deceit under DR 1-102(A)(4).¹²¹ An attorney's duty not to practice deceit or misrepresentation is not confined to dealings with his clients; it also extends to others who may be adversely affected by such conduct.¹²² A prosecutor is required to inform the sentencing judge if the Commonwealth requires charitable contributions from the accused persons or their families as a condition to a plea agreement.¹²³

C. *Reinstatement Cases*

The Board has found that "[r]einstatement hearings present the Board with one of its most difficult tasks and must be approached on a case by case basis."¹²⁴ The Board considers numerous factors in determining whether to recommend reinstatement to the Court.¹²⁵ In recent years, the Board seems to

119. *See id.*

120. *See Morrissey v. Virginia State Bar*, 248 Va. 334, 339, 448 S.E.2d 615, 618 (1994).

121. *See id.* at 340, 448 S.E.2d at 618.

122. *See id.* at 340, 448 S.E.2d at 619.

123. *See id.* at 340, 448 S.E.2d at 619-20.

124. *In re Alfred L. Hiss*, No. 83-26 (VSB Disc. Bd. 1984).

125. Among the factors considered by the Disciplinary Board in reinstatement cases are:

- a. the severity of the misconduct, including the nature and circumstances surrounding the misconduct;
- b. the attorney's character, maturity and experience at the time of disbarment;
- c. the time elapsed since the attorney's disbarment;

have held respondents to a higher standard and threshold of proof in applications for reinstatement.

A lawyer surrendered his license in 1986, having entered guilty pleas to conspiracy to file, and filing, a false loan statement with a federal agency—a felony.¹²⁶ He served time in a federal prison camp for about eighteen months. In his reinstatement hearing the Board found that the lawyer led educational and religious programs for inmates while in prison, repaid fines and restitution as circumstances permitted, enjoyed good standing in his community, was active in volunteer programs, kept current with the law, and no adverse impact on the public's confidence in the integrity of the legal profession would occur if reinstatement were allowed.¹²⁷

A commonwealth's attorney was convicted of cocaine possession and admitted to a cocaine addiction of three to four years while serving as Commonwealth's Attorney.¹²⁸ The Board considered evidence related to the underlying conviction and noted:

In the instant case, . . . we have evidence that the Commonwealth's Attorney (not an assistant), while in the process of buying cocaine from an undercover agent who was posing as a prospective client, said: "Give me something now (expletive). If you don't, . . . I'm gonna put you in jail, and I'll keep putting you in jail. . . . Just don't ever put me in a jam, hear? I might be the last (expletive) you need, you remember that."¹²⁹

-
- d. restitution to clients and the Bar;
 - e. the attorney's activities since disbarment, including his conduct and attitude during the period of disbarment;
 - f. the attorney's present reputation and standing in the community;
 - g. the attorney's familiarity with the Virginia Code of Professional Responsibility and his current proficiency in the law;
 - h. the sufficiency of the punishment undergone by the attorney;
 - i. the attorney's sincerity, frankness and truthfulness in presenting and discussing factors relating to the disbarment and reinstatement;
 - j. the impact upon public confidence in the administration of justice if the attorney's license to practice law was restored.

See id.

126. *In re Scott Meadows Reed*, No. 92-000-1495 (VSB Disc. Bd. 1993).

127. *See id.*

128. *See In re Lynn Curtis Brownley*, No. 94-000-2192 (VSB Disc. Bd. 1994).

129. *Id.*

The Board recommended that the former prosecutor not be reinstated and the Supreme Court of Virginia denied his petition.¹³⁰

In another drug-related case, a lawyer was convicted of conspiracy to distribute cocaine and conspiracy to defraud the Internal Revenue Service (IRS). By a vote of 3-2, the Disciplinary Board recommended the reinstatement of respondent's license to practice law.¹³¹ The Bar filed exceptions with the Supreme Court of Virginia, and the lawyer's petition was ultimately denied.¹³²

A former immigration hearing officer applied to the Board for reinstatement. Since he had certified petitions for citizenship containing false information and had immigrant workers perform labor at his residence, the officer was convicted of federal conspiracy, giving false statements to a federal agency, and receipt of illegal gratuities.¹³³ His petition for readmission was denied.¹³⁴

D. *Sanctions—Aggravation*

On charges of neglect, failure to communicate and incompetence in the handling of an appeal in a divorce matter, the Board found Edward Hodges violated DR 6-101(A), (B), (C) and (D).¹³⁵ When the Board learned of Hodges' prior disciplinary record, which revealed a pattern of inexcusable neglect in the handling of clients' matters, it stated:

It is, therefore, the opinion of the Board that the accumulation of repeated violations of the disciplinary rules must be taken into account. The express purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who continually fail to properly discharge their professional responsibilities to their clients, the public at large and the legal profession. Considering the number of prior offenses and the apparent inability or un-

130. *See id.*

131. *See In re J. Murray Hooker, II*, No. 94-000-0470 (VSB Disc. Bd. 1994).

132. *See id.*

133. *See In re Ira Steven Krup*, No. 94-000-1436 (VSB Disc. Bd. 1994).

134. *See id.*

135. *See In re Edward Falcon Hodges*, No. 93-090-1469 (VSB Disc. Bd. 1995).

willingness of the Respondent to correct these continuing deficiencies, the Board is of the opinion that the Respondent's license to practice law should be suspended for three (3) years.¹³⁶

Over the years, the Board has imposed severe penalties, typically a long suspension or a revocation, where the respondent attorney's prior disciplinary record has demonstrated an unacceptable pattern of neglect or inattention to client matters.¹³⁷ Repetitive behavior, multiple offenses, and a pattern of misconduct over a considerable period of time are aggravating factors and properly affect the degree of discipline to be imposed.¹³⁸

E. Misappropriation of Funds

In a show cause proceeding upon a criminal conviction, revocation resulted from violations of DR 1-102(A)(3) and DR 1-102(A)(4) where respondent, a private operating trustee in a Chapter 11 bankruptcy, committed the following acts starting in 1988: engaging in a scheme to defraud creditors, the Bankruptcy Court and the United States Trustee; engaging in a scheme to embezzle and convert money from the bankruptcy estate for his own personal use; and submitting a fraudulent Trustee's Final Report to the United States Trustee which did not disclose the money he had previously embezzled and converted.¹³⁹ Once the embezzlements had been discovered in 1994, respondent then tried to demonstrate that he was entitled to the embezzled monies by submitting to the United States Trustee a fraudulent "client billing worksheet."¹⁴⁰

Respondent was unable to meet his burden to show cause why his law license should not be revoked, despite arguing an

136. *Id.*

137. See generally *In re Charles Edward Mann*, No. 93-010-0213, 93-010-1218 (VSB Disc. Bd. 1994) (four-year suspension); *In re Ronald Lee Smallwood*, No. 92-033-1816, 93-033-0321 (VSB Disc. Bd. 1994) (revocation).

138. See *Tucker v. Virginia State Bar*, 233 Va. 526, 533, 357 S.E.2d 525, 529 (1987).

139. See *In re Joseph Francis Manson, III*, No. 94-052-2201 (VSB Disc. Bd. 1997).

140. See *id.*

honest reputation, lack of dishonest or selfish motive, and lack of a prior record.¹⁴¹

F. *Trustworthiness*

Disciplinary Rule 1-102(A)(3) provides that an attorney shall not commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law.¹⁴² The Board had an opportunity to consider this disciplinary rule in light of allegations involving a pattern of lying and deceit by an attorney.¹⁴³ The Board found that the attorney had engaged in a consistent pattern of lying to his clients, to his law practice mentor, and to the Bar.¹⁴⁴ Since one of the fundamentals of the legal profession is the integrity and trustworthiness of its members, the Board concluded that a light sanction was inappropriate for an attorney who consistently engaged in lying and imposed a three-year suspension¹⁴⁵

G. *Self-Dealing*

The Board revoked the license of William J. Powell to practice law in a case which prompted the Board to note, "[s]eldom have we seen such an egregious pattern of self-dealing on the part of a Virginia lawyer at the expense of an enfeebled client."¹⁴⁶

Powell met Ronald Kirby, who was eighty-three years old and physically, mentally and emotionally impaired, through Ellen Long, a friend of Powell's.¹⁴⁷ Powell took control of Kirby's \$1,700,000 in assets, and rewrote Kirby's will, leaving half of the estate to Ellen Long.¹⁴⁸ Powell prepared an unsecured note for \$365,000, gave it to Kirby, and used the funds to reconvert Powell's Chapter 7 bankruptcy to a Chapter 11 bank-

141. *See id.*

142. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3).

143. *See In re Daniel Wood Aldredge*, No. 94-033-2151 (VSB Disc. Bd. 1995).

144. *See id.*

145. *See id.*

146. *In re William J. Powell*, No. 93-041-1723 (VSB Disc. Bd. 1995).

147. *See id.*

148. *See id.*

ruptcy. Powell then prepared a letter for signature by Kirby, forgiving the \$365,000 note.¹⁴⁹ Powell also paid himself \$300,000 in legal fees to administer Kirby's assets.¹⁵⁰

H. *Threatening Criminal or Disciplinary Action to Obtain a Civil Advantage*

When representing the heir of an estate, an attorney wrote another heir to request the return of some estate property. The attorney went beyond the limits of appropriate communication, however, when he advised the addressee that he (the attorney) would "seek felony embezzlement, fraud, grand larceny and forgery capital warrants against both of them pursuant to statutory mandate" unless the property was returned.¹⁵¹

In another complaint, the same attorney threatened to bring disciplinary charges against a second attorney, noting how close the second attorney's office was to the offices of the Virginia State Bar,¹⁵² a clear violation of DR 7-104.¹⁵³ The attorney was given a public reprimand with regard to both violations.¹⁵⁴

In the case of *In re Sa'ad El-Amin*,¹⁵⁵ the Respondent, on behalf of his clients, wrote to another attorney advising that a financial settlement of his clients' claims would forestall the filing of a lawsuit and a complaint with the Bar.¹⁵⁶ By agreed disposition, the Board imposed an admonition, finding a violation of DR 7-104(A).¹⁵⁷

149. *See id.*

150. *See id.*

151. *In re* George Albert Bates, Nos. 94-070-2414 and 95-070-2396 (7th Dist. Subcom. 1996).

152. *See id.*

153. *See id.*; VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 ("A lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.").

154. *See In re* Bates, Nos. 94-070-2414 and 95-070-2396 (7th Dist. Subcom. 1996).

155. No. 93-032-0694 (VSB Disc. Bd. 1994).

156. *See id.*

157. *See id.*

I. *Communication with Clients*

With regard to a scheduled hearing of a driving while intoxicated charge in the Fairfax County General District Court, an attorney: (1) failed to contact or otherwise consult with the client until the day before trial; (2) sent an inexperienced and unprepared associate to try the case; (3) made no arrangements for the appearance of the client's witnesses at trial; (4) failed to advise the client that the attorney had a scheduling conflict with the trial date; and (5) made no arrangements for a continuance.¹⁵⁸ This lapse of communication and inactivity violated DR 6-101(B) and (C). A public reprimand with terms was imposed.¹⁵⁹

J. *Mitigation*

In the case of *In re David Jerome Allmond*,¹⁶⁰ the Board considered a series of cases involving neglect, misrepresentation, failure to communicate adequately with the client, and failure to properly account for client funds. In deciding an appropriate sanction, the Board considered the following circumstances: (1) the misconduct arose while the attorney was addicted to cocaine; (2) the attorney was committed to a two-year aftercare contract with the William J. Farley Institute, which required random urine testing, group therapy sessions, and meetings; (3) the attorney had not used any addictive substances, including alcohol, since June 1994, and (4) had complied with all terms and conditions imposed by the Farley Institute.¹⁶¹

The Board imposed a three-year suspension. Additionally, the attorney must successfully complete all terms and conditions of probation, and the attorney shall complete all terms and conditions of the two-year aftercare contract.¹⁶²

158. See *In re Mark Thomas Crossland*, No. 95-053-0770 (5th Dist. Comm. 1995).

159. See *id.*

160. No. 94-010-0309 (VSB Disc. Bd. 1995).

161. See *id.*

162. See *id.*

K. *Reciprocal Discipline*

An attorney whose license was suspended in California for two years for a neglect matter was ultimately disbarred in California for not complying with that state's probation requirements.¹⁶³ The question for the Board was whether disbarment was an appropriate sanction in Virginia. The Board concluded that the attorney's original misconduct, coupled with his refusal to comply with the requirements of the California Supreme Court, warranted a lesser sanction than disbarment and imposed a ninety-day suspension.¹⁶⁴

L. *Trying Case While Suspended for Failure to Pay Bar Dues*

Respondent represented his client at trial of a civil case and at a subsequent hearing two months later knowing that his law license had already been suspended. However, Respondent failed to inform the presiding judge, opposing counsel, or his client of his suspension and admitted his knowledge only after confronted with the matter at the second hearing.¹⁶⁵ The Board found violations of DR 1-102(A)(4) and DR 2-108(A)(1) and suspended the attorney for thirty days.¹⁶⁶

M. *No Trust Account for Fear of IRS Lien*

Respondent fell behind in payments to the IRS on an arrearage which resulted in the IRS filing liens against respondent's accounts including his trust account.¹⁶⁷ The lien against the trust account was quickly released. When an IRS agent told the respondent that a lien would again be placed on the trust account if he fell behind in his payments, the respondent decided it would be too risky to continue maintaining a trust account and closed it.¹⁶⁸

163. *See In re Alan Jay Cilman*, No. 95-000-1299 (VSB Disc. Bd. 1995).

164. *See id.*

165. *See In re Stephen Hayden Mims*, VSB Docket No. 96-021-1669 (VSB Disc. Bd. 1996).

166. *See id.*

167. *See In re Martin Donelson, III*, No. 96-090-1165 (VSB Disc. Bd. 1997).

168. *See id.*

Trust account violations were based upon, among other things, the fact that when respondent received unearned fees, he placed some of the funds in his personal checking account and received the balance as cash instead of depositing said funds into a trust account as required.¹⁶⁹ By agreement, respondent received a six-month suspension followed by a one-year probationary period.¹⁷⁰

N. Failure to Honor Subpoena Duces Tecum and Summons of District Committee

Respondent was personally served with a subpoena duces tecum to bring certain trust account records to a district committee meeting thirty minutes prior to a hearing on the case, but failed to do so.¹⁷¹ A summons was also personally served requiring respondent's appearance before the district committee at a designated time for the hearing on the same complaint. Respondent failed to appear at the designated time although his counsel appeared for the case.¹⁷² The district committee found violations of DR 1-102(A)(3) and DR 7-105(A) as a result of a new complaint filed on the basis of the failure to honor the process of the district committee.¹⁷³

169. *See id.*

170. *See id.*

171. *See In re James L. Tucker*, No. 95-101-0701, (10th Dist. Comm. 1996).

172. *See id.*

173. *See id.*