

2017

A Guide to Legal Research in Virginia

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2017 EDITION

A Guide to Legal Research in Virginia

Editor: Joyce Manna Janto



Continuing Legal Education by the Virginia Law Foundation

A GUIDE TO LEGAL RESEARCH IN VIRGINIA

Eighth Edition

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Joyce Manna Janto
University of Richmond Law School Library / *Richmond*



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A GUIDE TO LEGAL RESEARCH IN VIRGINIA

Eighth Edition

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ACKNOWLEDGMENTS

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PREFACE

The primary goal of this new edition of *A Guide to Legal Research in Virginia* is to expand coverage in several chapters and to add a new chapter covering legal ethics materials. This edition also notes changes in the URLs for many Virginia government websites. Most of these changes are likely based on changes in administrations and technological upgrades. The researcher should be aware that there is a lack of consistency among Virginia government web addresses. Changes in the operation and coverage of the major legal databases are noted where appropriate. Today, Virginia practitioners have a wide variety of resources, both print and online, available to help them with their research needs. This edition will help researchers use these resources in a more efficient manner.

More generally, I encourage researchers to consult with a law librarian, where one is available, for additional help in finding and using resources. Lawyers, paralegals, and law students need to realize that the library is no longer just a building. Instead, the library is a collection of information across multiple formats organized and disseminated in a method designed to provide access to high-quality resources. Library services reach beyond the mere collection and organization of information. Library professionals provide services that deliver content as well as provide instruction on accessing that content effectively through training, teaching, and demonstration.

The first edition of this book was published in 1989 and compiled under the auspices of the Young Lawyers Section of the Virginia Bar Association. I would also like to acknowledge the contribution of the late Clayne M. Calhoun, then the librarian of the Roanoke Law Library, whose thoughtful suggestions improved the first edition. Members of the Virginia Association of Law Libraries have provided timely and thorough updates of these chapters in the subsequent editions.

I would like to extend thanks to the editors at Virginia CLE who worked on this and previous editions of this book. Thanks also go to John Eure and Gail Zwirner who edited previous editions.

PREFACE

Despite all efforts to avoid them, errors and omissions can occur in a work such as this. I ask the reader's indulgence and also request that errors or omissions be reported and suggestions for revisions be sent to Virginia CLE Publications, 105 Whitewood Road, Charlottesville, Virginia 22901.

Joyce Manna Janto

Richmond

May 2017

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CHAPTER 10

LEGAL ETHICS

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CHAPTER 10

LEGAL ETHICS

10.1 INTRODUCTION

The American Bar Association (ABA) adopted the Model Rules of Professional Conduct on August 2, 1983. The Model Rules were issued by the MacCrate Commission, a body charged by the ABA to review and revise the Model Code of Professional Responsibility. On January 25, 1999, the Supreme Court of Virginia replaced the Virginia Code of Professional Responsibility with the Virginia Rules of Professional Conduct. The new Virginia rules were adapted from the Model Rules issued by the ABA. They became effective on January 1, 2000. Since they were introduced, forty-nine states have adopted the Model Rules either in whole or with revisions. As of this publication date, California has not adopted the Model Rules. The California State Bar is currently revising their Rules of Professional Conduct, taking into account the final report and recommendations of the ABA's Ethics 20/20 Commission, with the intent of eliminating conflicts between the rules in California and other states. Thus, an attorney in Virginia who wishes to research a particular rule or an ethical issue has a wide array of sources available.

10.2 VIRGINIA RULES OF PROFESSIONAL CONDUCT

10.201 Finding the Rules in Print. The Virginia Rules of Professional Conduct are found in print in *Code of Virginia 1950, Annotated* published by LexisNexis. The Virginia State Bar is under the jurisdiction of the Virginia Supreme Court, so the rules are found in the Rules of the Supreme Court of Virginia volume (volume 11). The rules comprise part six, section II of the Rules of the Supreme Court of Virginia. This volume also includes the rules dealing with the unauthorized practice of law, part six, section I.

There are three ways to access the rules in *Code of Virginia 1950, Annotated*. The first is to use the title index to part six, section II. This index lays out the contents of the part in detail. The heading of each rule is listed allowing the user to quickly scan and identify the needed provision. The second way is to use the volume's index. This index provides a more controlled, subject-oriented access to the rules. Finally, the general index of *Code of Virginia 1950, Annotated* contains entries to the material found in the rules volume.

10.202 Finding the Rules Online: Free and Subscription Databases.

A. Free Sources.

1. Virginia State Bar Website. The rules are presented on the Virginia State Bar's (VSB's) website¹ since the VSB no longer provides printed copies to new lawyers. Once a researcher accesses the VSB website, hovering the cursor over the heading "Professional Regulation" will bring up a menu of resources. From this menu select "Professional Guidelines and Rules of Professional Conduct." The link to the rules is found in the left-hand frame of the webpage.

There are two ways to access the rules from this page. First, the researcher can choose from a menu that appears when the cursor hovers over the heading "Rules of Professional Conduct." The menu groups the rules by broad subject area. Second, the researcher can use the subject search box provided on the page. The results page can be confusing. The top part of the page consists of various links to other parts of the VSB website. The researcher must scroll down to find the search results.

2. Fastcase. Fastcase is "free" in that access is a benefit of membership in the VSB. The database does not contain

¹ www.vsb.org.

the Rules of Professional Conduct per se, but a Fastcase user may select the Rules of the Virginia Supreme Court, which will redirect the researcher to the Supreme Court's website, which, in turn, links the user to the Virginia State Bar version of the rules.

B. Subscription Databases. All of the subscription databases contain the rules and all allow a researcher to search only the Rules of Professional Conduct rather than the entire Rules of the Supreme Court. There are still some distinctions.

1. Lexis and Westlaw. On both Lexis Advance and Westlaw, after selecting Virginia law database, there is an option to select the "Rules of the Supreme Court." The user can then select the "Rules of Professional Conduct." Search terms are entered in the search box at the top of the page.

2. Bloomberg Law. On Bloomberg Law, the user first selects Virginia and then the option for "State Laws and Regulations." This screen gives the researcher the option to select "Court Rules" and then specify Virginia rather than Federal. Finally, the user can find the option for Rules of Professional Conduct. When the user hovers the cursor over the entry for the rules, a search button appears. When clicked, a new search box pops up allowing the user to search only the rules. If the user enters terms in the search box at the top of the page, the default search is in the entire Rules of the Supreme Court.

3. Casefinder. There are two ways to access the rules in Casefinder. The researcher can select the Rules of the Virginia Supreme Court on the home page. This allows a search within the entire rules database. Alternatively, the researcher can click on the "Library" tab. Doing so opens up a search tree, where each selection provides a choice of more specific menu items.

10.3 STATUTORY AUTHORITY

The Rules of Professional Conduct are not the only limit on a lawyer's activity in Virginia. Sections 54.1-3900 through 54.1-

3944 of the Virginia Code must also be consulted. Unlike the rules, these statutory sections focus more on the business of law than the practice of law. Sections deal with the definition of the practice of law, the corporate structure of law offices, the organization of the VSB, and procedures for disciplining and licensing attorneys.

10.4 LEGAL ETHICS OPINIONS AND UNAUTHORIZED PRACTICE OF LAW OPINIONS

The Standing Committee on Legal Ethics of the VSB meets regularly to consider attorneys' formal requests for advisory opinions seeking guidance on legal ethics and the unauthorized practice of law. Legal Ethics Opinions (LEOs) are issued by this group in conjunction with the office of the VSB Bar Counsel. These opinions, while they have no precedential value, do give guidance as to how a disciplinary committee might interpret a rule.

Members can request a LEO from the VSB. There is a link on both the "Professional Regulation" page and the "Members Resources" page that allows members to request a LEO via email. A researcher could also call the "Legal Ethics Hotline" maintained by the VSB. The caller will be prompted to leave a detailed message, and the call will be returned the same business day, if possible. Both the online and in-person service is confidential; ethics counsel for the VSB cannot disclose the contents of any discussion about the email or phone call without the express consent of the person posing the question.

The VSB disbanded the Unauthorized Practice of Law (UPL) Committee after the United States Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.² The Federal Trade Commission claimed the North Carolina Board of Dental Examiners was engaged in unreasonably restraining trade when it sent cease and desist letters to

² 135 S. Ct. 1101 (2015).

salons that were offering teeth whitening services claiming this practice consisted of the unauthorized practice of dentistry. While the Committee has been disbanded, the VSB will, if needed, issue a UPL opinion. The opinion will be issued by the Ethics Committee.

10.401 Finding LEOs and UPL Opinions in Print.

While not actually part of the *Code of Virginia 1950, Annotated*, the LEOs and the UPL opinions issued by the VSB are provided as unnumbered volumes. Access to these opinions is through the subject index, which is located at the back of each volume.

10.402 Finding LEOs and UPL Opinions Online: Free and Subscription Databases.

A. Free Databases.

1. VSB and Virginia CLE. LEOs are available from the VSB website³ and also from the Virginia CLE website⁴ in similar formats. A researcher can pull up LEOs by number or search by subject. When the subject search is selected, the researcher can also run an advanced Google search, which permits Boolean searching, and the ability to limit the search by date.

UPL opinions are also available on the VSB website. From the “Professional Regulation” home page, the researcher clicks on “Unauthorized Practice of Law.” The page retrieved allows a researcher to request a UPL opinion or to click to find existing UPL opinions.⁵ The search page is maintained by the VSB, and it allows users to search by UPL number or to browse a topical index.

³ www.vsb.org/site/regulation/leos.

⁴ www.vacle.org/LEOsLegalLinks-pg107.aspx.

⁵ www.vsb.org/site/regulation/unauthorized-practice.

2. McGuireWoods Website.⁶ Another link available on both the Virginia CLE and VSB websites to the LEOs directs the researcher to a page maintained by the law firm of McGuireWoods. This site contains LEO summaries prepared by attorney Tom Spahn. Mr. Spahn, a partner at McGuireWoods, is a nationally recognized expert in the field of legal ethics. The database contains his summaries of not only the Virginia LEOs recognized by the VSB after its reorganization of the LEOs in 1983 but also the formal opinions issued by the ABA Standing Committee on Professional Responsibility. Opinions are searchable in a variety of ways. There is a topical table of contents that links to LEOs on an assortment of subjects. There is also a link that will retrieve a list of all of the LEO summaries written in the past year. The database also supports keyword searching. When searching by keyword, users have the option of filtering the search by date or limiting the search to ABA or Virginia LEOs.

B. Subscription Services. The following subscription services contain LEOs and UPL opinions.

1. Lexis. Lexis contains LEOs and UPL opinions issued by the VSB. After selecting the Virginia database, the researcher should then click on the option for all Virginia administrative materials. The LEOs are listed as the Virginia Opinions of the Standing Committee on Legal Ethics. Coverage begins in 1963 for the LEOs and 1980 for the UPL opinions.

2. Westlaw. Westlaw also contains the LEOs issued by the VSB. They are not, however, accessed through the Virginia page. From the Westlaw home page, the researcher should select “Administrative Decisions and Guidance” and then “Virginia Administrative Decisions and Guidance.” The LEOs are listed under the heading “State Bar Legal Ethics Opinions.” Coverage begins in 1963.

⁶ <http://leo.mcguirewoods.com/>.

3. Casefinder. Casefinder contains LEOs and UPL opinions issued by the VSB. As with the rules, the LEOs and UPL opinions can be found in two ways: (i) by selecting the database, “Legal Ethics and Unauthorized Practice Opinions” from the home page; or (ii) by clicking on the “Library” tab and selecting either the LEO or the UPL opinion. There is a separate tab for recent opinions. Coverage begins in 1980 for the LEOs and in 1983 for the UPL opinions.

4. LexisNexis CD-ROM Virginia Primary Law. The Virginia Primary Law CD-ROM produced by LexisNexis contains all of the LEOs as well as the UPL opinions. The opinions can be searched using Boolean search terminology, or they can be searched by number.

10.5 DISCIPLINARY ACTIONS

Pursuant to part 6, section IV, paragraph 13 of the Rules of the Supreme Court of Virginia, the VSB has the authority to discipline, suspend, or disbar lawyers. Disciplinary action begins when an attorney is accused of misconduct. Misconduct is defined as violation of the rules, conviction of a crime, or commission of a deliberately wrongful act that reflects adversely on an attorney’s honesty, trustworthiness, or fitness as an attorney. Sanctions can range from an admonition or reprimand to a public reprimand to suspension to revocation of the lawyer’s license. Disciplinary hearings are public as are the findings of the Disciplinary Board.

10.501 Finding Disciplinary Actions in Print. Disciplinary actions can be found in print in two locations: (i) *Virginia Lawyer* and *Virginia Lawyer Register* and (ii) *Virginia Lawyers Weekly*.

A. *Virginia Lawyer and Virginia Lawyer Register*.⁷ Published bi-monthly by the VSB, the *Register* contains notices of disciplinary actions taken by the VSB.

B. *Virginia Lawyers Weekly*.⁸ Published by Virginia Lawyers Media, *Virginia Lawyers Weekly* contains a column that summarizes recent disciplinary actions.

10.502 Finding Disciplinary Actions Online. Just as results of disciplinary actions are published in two places in print, they can also be found in two places online: (i) the VSB website and (ii) Westlaw.

A. VSB Website. On the “Professional Regulation” page, there is a link to disciplinary actions in the left-hand frame. Disciplinary actions from 1999 to the present are available. They are presented in six-month increments, from January to June and July to December.

B. Westlaw. From the Westlaw home page the researcher should select “Administrative Decisions and Guidance” and then “Virginia Administrative Decisions and Guidance.” The decisions are listed as “Legal Disciplinary Opinions.” Coverage begins in 1988. Legal disciplinary opinions are presented in reverse chronological order and are also searchable by keyword.

10.6 FINDING CASES

A lawyer who has been sanctioned by the Disciplinary Board has the right to appeal that decision to the Supreme Court of Virginia. Opinions resulting from those appeals are available in the same sources as any other Supreme Court opinion.

⁷ www.vsb.org/site/publications/valawyer.

⁸ <http://valawyersweekly.com/>.

10.601 Annotated Code. The *Code of Virginia 1950, Annotated*, published by LexisNexis, contains annotations for the Rules of Professional Conduct. *West's Annotated Code of Virginia*, published by Thomson Reuters, does not.

10.602 West's Virginia and West Virginia Digest. *West's Virginia and West Virginia Digest*, published by Thomson Reuters, is a powerful and often overlooked resource for finding cases. It provides information about decisions issued by any court (federal or state) sitting within the geographic confines of Virginia and West Virginia.

A quick perusal of the title index for “Attorney and Client” identifies key numbers for a variety of ethical issues. Matters dealing with admission to the bar and the unauthorized practice of law are covered in key numbers 1 through 12. All aspects of the disciplinary process are covered in key numbers 34 through 61.

It is also possible to search by topic and key number on Westlaw. Each topic in the topic and key number system has been assigned a number. “Attorney and Client” is number 45. To find cases dealing with disbarment, the search would be 45K59.14. The K alerts the system that this is not a citation search. Westlaw will search headnotes looking for the corresponding topic and key number.

10.7 SECONDARY SOURCES

As with any other area of law, there are secondary sources providing expert commentary and references to cases, rules, regulations, and statutes. In short, one source can provide the researcher with many different types of resources. The sources listed here are either recently published or updated yearly.

10.701 Treatises and Loose-leaf Services.

- *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013.*

Art Garwin ed. Chicago: Center for Professional Responsibility, American Bar Association, 2013. The *Legislative History* traces the Model Rules of Professional Conduct from the appointment of the ABA Commission on Evaluation of Professional Standards (“Kutak Commission”) in 1977 through 2013. It includes the first presentation of the Model Rules format to the American Bar Association House of Delegates (“House”) at the January 1982 ABA Midyear Meeting by the Kutak Commission, the adoption of the Model Rules at the August 1983 ABA Annual Meeting, and the many amendments to the Model Rules that have been adopted or proposed through 2013. The material in the *Legislative History* is drawn from many sources, including Reports with Recommendations presented to the House, transcripts of House debates, and agenda books of meetings of the House Committees on Drafting and on Rules and Calendar. The *Legislative History* is intended to lead researchers to a better understanding of the Model Rules as they existed on December 31, 2013 and to aid all those who interpret or apply the Model Rules: courts, disciplinary agencies, regulatory bodies, and, not least, practicing lawyers.

- *ABA/BNA Lawyer’s Manual of Professional Conduct*. Washington, D.C.: Bloomberg BNA, 1984–Current. This loose-leaf service can be a rich source of information for a researcher who is seeking a broader interpretation of a particular rule. It is easy to use as it is arranged in rule number order. Under each rule the researcher will find ethics opinions from the ABA and a variety of state and local bar associations. In addition to the ethics opinions, the set contains a current awareness newsletter, which summarizes recent opinions issued by courts or bar associations, and articles on ethical issues facing

attorneys written by members of the practicing bar. An index provides subject access to both the opinions and the newsletters. (Available on Bloomberg Law and Lexis.)

- John M. Burkoff. *Criminal Defense Ethics: Law & Liability*. Eagan, MN: Thomson Reuters, 2016. This single-volume resource reviews the underlying ground rules and the range of resolutions applicable to particular ethical and legal dilemmas. Coverage includes forfeiture of legal fees, abuse of the subpoena process, liability in malpractice suits, and conflicts of interest. The book discusses disqualification motions, ineffective assistance of counsel, and trial publicity and other public statements. (Available on Westlaw.)
- Geoffrey C. Hazard et al. *The Law of Lawyering*. 4th ed. New York, NY: Wolters Kluwer, 2014, updated annually. *The Law of Lawyering* shows how to approach concrete problems that arise in everyday practice while staying within the letter and spirit of the ABA Model Rules of Professional Conduct. It provides the full text of each Model Rule provision in sequence, followed by the authors' guidance and commentary, which put the rule into context, help identify its key features, and show its relation to other rules and the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*. Clear, realistic examples demonstrate how each rule is applied in practice.
- Lee F. Peoples. *Legal Ethics: A Legal Research Guide*. 2d ed. Buffalo, N.Y.: William S. Hein & Co., Inc., 2006. An annotated guide to finding cases, statutes, ethics opinions, and secondary sources dealing the Model Rules and other ethical issues.

- *Restatement (Third) of the Law of the Law Governing Lawyers*. Eagan, MN.: Thomson Reuters, 2000, updated annually. This American Law Institute publication was first issued in 2000. According to the introduction, it covers much but not all of the law governing lawyers. At present, the *Restatement* addresses primarily the lawyer-client relationship, confidentiality, and conflicts of interest. Like all *Restatements*, it includes comments on the principles stated, illustrations of the principles in action, and a table of cases that construe the principles addressed. (Available on Lexis and Westlaw.)
- Ronald D. Rotunda, John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*. Eagan, MN: Thomson Reuters, 2017-2018. This book provides commentary on the ABA's Model Rules of Professional Conduct as well as references to current case law and the *Restatement (Third) of the Law of the Law Governing Lawyers*. (Available on Westlaw.)
- Ronald D. Rotunda. *Legal Ethics in a Nutshell*. 4th ed. Eagan, MN: West Academic Publishing, 2013. *Legal Ethics in a Nutshell* digests the Model Rules in an analytical, and often critical, way. This book places the Model Rules in a historic context that lets the researcher understand problems with prior versions of the Model Rules and the Model Code. *Legal Ethics in a Nutshell* also analyzes the American Law Institute's *Restatement (Third) of the Law of the Law Governing Lawyers*.

10.702 Journals. *Virginia Lawyer* and *Virginia Lawyer Register*, published bi-monthly by the Virginia State Bar. Every issue contains the column, "Ethics Counsel's Message." This column deals with issues surrounding the rules.

Virginia Lawyer Register, published bi-monthly by the Virginia State Bar. The *Register* contains more than summaries of disciplinary proceedings. It also reports on proposed rule changes or LEOs, Supreme Court actions of ethical issues, and announcements of vacancies on bar committees and district committees.

10.703 *American Law Reports.* *American Law Reports'* (ALR's) coverage of ethical rules and issues is extensive. The annotations are not jurisdictionally specific but collect cases, law, rules, and ethics opinions from all over the country. (Available on Lexis and Westlaw).

10.704 Citators. Since the Rules of Professional Conduct are part of the Rules of the Supreme Court, the researcher can use citators to find cases and other secondary sources that cite to the rules.

A. *Shepard's Virginia Citations.* *Shepard's Citations* can be found in both print and online through Lexis. In the print version of *Shepard's* the citations are found in the Statutes/Court Rules volume. To shepardize a rule online, the researcher enters: shep: Va. Sup. Ct. R. x.x in the search box. The default screen provides citations to the rule. The researcher will find citations to secondary sources by clicking on the link to "other citing sources."

B. KeyCite. There is no way to directly KeyCite a rule. The researcher must first pull up the rule by either searching or by browsing through the Rules of the Supreme Court on Westlaw. Once the rule is located, the researcher should click on the tab for "Citing References." The default screen lists the citing references displayed by date, most recent first. The researcher can filter by cases, secondary sources, trial court orders, and so forth.

C. BCite. There is no way to directly BCite a rule. The researcher must first locate the rule by searching in the Virginia Court Rules database on Bloomberg Law. Once the rule is located the by clicking on the link for "Smart Code," the re-

searcher will find cases that cite the rule. BCite does not provide citations to secondary sources.

10.8 WEB-BASED RESOURCES

10.801 American Bar Association. A mixture of free and paid resources are accessible at the webpage for the ABA Center for Professional Responsibility.⁹ On the home page of the Center, any visitor can view or download the latest LEOs issued by the ABA. There is also a news section on this page that highlights recent articles on ethical issues. Under the resources tab, the Model Rules of Professional Conduct along with the comments are available.

Non-members of the ABA can see a list of all of the formal LEOs issued by the ABA, and individual opinions may be purchased for \$20. Members are able to search the entire ethics database and download opinions for free. If a member does not want to search the database, he or she can take advantage of the Center's EthicSearch Research System. The Center's lawyers will research ABA, state, and local bar association opinions to help a lawyer understand or resolve ethical issues.

10.802 Google. Searching "ethics opinions" in Google brings up some very good results, including the ethics opinions of many state and local bar associations. Performing a Boolean search and limiting the results by domain will improve the search results immensely.

A search in Google for "internet advertising ethics opinions" garners millions of hits. The search "internet ~advertising "ethics opinions" site:org" yields slightly more than seven thousand hits. The tilde before the word advertising pulls websites using synonyms for advertising, such as solicitation. By placing ethics opinions in quotes, Google will look for those terms as a

⁹ www.americanbar.org/groups/professional_responsibility.html.

phrase. Finally, since most bar associations, as well as the ABA, have a .org domain, the results retrieved will be from reliable sites. It greatly benefits the researcher to use the advanced search feature of Google.

10.803 Google Scholar. Google Scholar should not be overlooked. Running the above search using the “Legal Document” option in Google Scholar narrows the number of results to the hundreds. The results include court cases and articles from scholarly journals. Results can be further sorted by relevance or limited by date. The researcher can select one of the dates provided or create a custom date range.