

1985

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Roderick B. Mathews

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Recommended Citation

Roderick B. Mathews, *The Virginia Code of Professional Responsibility*, 19 U. Rich. L. Rev. 467 (1985).

Available at: <http://scholarship.richmond.edu/lawreview/vol19/iss3/4>

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THE VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY

*Roderick B. Mathews**

The purposes of my comments are to: (1) outline the historical development of the Code of Professional Responsibility (CPR) in the organized bar in the United States; (2) summarize the important differences between the Virginia Code of Professional Responsibility (Virginia CPR) and its predecessor in Virginia; (3) discuss the reasons for the most significant of those changes; and (4) compare the important differences between the American Bar Association model adopted in August 1983 (the Kutak Model) and the Virginia CPR. For the sake of brevity, I will make no reference to the multiple editorial revisions in the Virginia CPR which do not involve changes of substance.

I. HISTORICAL DEVELOPMENT OF CODES OF PROFESSIONAL RESPONSIBILITY

The development of the organized bar began in 1870 with the founding of the Bar of the City of New York. In 1887, the American Bar Association (ABA) was organized.¹ One year later the Virginia State Bar Association (now the Virginia Bar Association) was founded.²

During these infancy years of the organized bar, several codes of professional responsibility (CPRs) were developed. Alabama published the first code of professional responsibility in 1887.³ It was not until 1908, however, twenty years after its founding, that the ABA published its first model—the Canons of Professional Ethics. That first model included thirty-two canons which survived un-

* Partner, Christian, Barton, Epps, Brent & Chappell; B.A., 1963, Hampden-Sydney College; LL.B., 1966, University of Richmond. Mr. Mathews was the Chairman of the Special Committee to Study the Virginia Code of Professional Responsibility and is currently Chairman of the Standing Committee on Legal Ethics. This article is adapted from a speech presented in a Symposium on Legal Ethics at T.C. Williams School of Law on November 16, 1984.

1. E. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* 3 (1953).

2. See VIRGINIA STATE BAR ASSOCIATION, *1888 ANNUAL REPORT* 5 (1889).

3. See ALA. SUP. CT. R. *Canons of Judicial Ethics*, Preamble (1984).

changed for twenty years. Between 1928 and 1937, the ABA model was expanded to forty-seven canons.⁴ This expanded version, the 1908 ABA model, as amended, remained in effect until 1969.⁵ The 1908 model was voluntarily subscribed to by the Virginia State Bar Association (VSB) and its members. In 1938, the Virginia State Bar was created by the General Assembly and adopted the 1908 model, as amended, as the Code of Professional Responsibility applicable to all Bar members.

The 1908 ABA model was characterized by aspirational and regulatory concepts which are now outmoded, at least in the sense that they are probably unenforceable today. It reflected a preoccupation with professionalism and reputable, decent and gentlemanly conduct. Consider, for example, the following excerpts from the 1908 ABA model:

Canon 1. "Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor."

Canon 3. "Marked attention and unusual hospitality on the part of a lawyer to a Judge . . . should be avoided."

Canon 17. "Clients, not lawyers, are the litigants [I]t is indecent to allude to the . . . particular peculiarities and idiosyncracies of counsel on the other side."

Canon 23. "All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional."

Canon 24. "[N]o client has a right to demand that his counsel shall be illiberal" in such matters as forcing trial on a particular day to the injury of the opposing lawyer.

Canon 28. "It is disreputable to hunt up defects in titles . . . or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients"

The developing body of law by which self-regulation by a mandatory organization is measured necessitates the deletion of such language. Although professionalism still has an essential role

4. E. SUNDERLAND, *supra* note 1, at 110-11.

5. ABA COMM. ON PROFESSIONAL ETHICS, ANNUAL REPORT 526 (1969).

in the business of lawyering, the mandatory bar, as distinguished from a voluntary organization such as the Virginia Bar Association, must consider specificity and enforceability in establishing mandatory standards by which self-regulation may be accomplished.

In August 1969, the ABA Second Model CPR was published. This ABA code featured nine canons—axiomatic norms governing a lawyer's relationships with the public, the judicial system and the profession; Disciplinary Rules (DRs)—mandatory statements of minimum standards of conduct; and Ethical Considerations (ECs)—aspirational, non-mandatory statements for guidance.

Shortly after the 1969 ABA model took effect, the now familiar litany of opinions began to invalidate many of the underlying assumptions of the ABA models and the Virginia CPR then in effect. This line of cases established the limited right of lawyers to commercial speech protection under the first amendment,⁶ established that a blanket prohibition against trial comment violates the first amendment,⁷ determined that the antitrust laws are applicable to the practice of law,⁸ and established that fitness to practice law, not moral character, is the standard by which qualifications to take the bar examination is to be measured.⁹

The ABA responded to these decisions by creating the Commission on Evaluation of Professional Standards which came to be known as the Kutak Commission in recognition of its first chairman, the late Robert J. Kutak. On January 1, 1980, the Kutak discussion draft was published, proposing drastic changes in the ABA CPR. Those proposed changes included: (1) change of the title to "Rules of Professional *Conduct*"; (2) abandonment of the traditional format and implementation of the code format—a statement

6. See *Bates v. State Bar*, 433 U.S. 350, 383 (1977) (holding that a general prohibition against legal advertising violates the first amendment); see also *In re R.M.J.*, 455 U.S. 191, 207 (1982) (holding that state has authority to regulate lawyer advertising that is inherently misleading or misleading in practice; however, the first and fourteenth amendments require that this regulation be done with care and be no more extensive than reasonably necessary); *Ohrlick v. Ohio State Bar Ass'n*, 436 U.S. 447, 467-68 (1978) (limiting the first amendment right where the attorney's conduct of solicitation is found to be overreaching).

7. See *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

8. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780-93 (1975) (holding that the Fairfax County Bar Association minimum fee schedule for title examinations is a violation of the Sherman Antitrust Act).

9. *Cord v. Gibb*, 219 Va. 1019, 254 S.E.2d 116 (1979).

of the "black-letter" rule followed by committee comment; and (3) expression of the rules by reference to the various functions of a lawyer, such as advocate and intermediary, rather than as previously by canon topic. Deletion of the word "responsibility" from the title was enough to alienate a significant element of the organized bar.

Finally, in August 1983, after much debate, the ABA House of Delegates adopted the new Kutak model. However, many of the most controversial proposals had been debated out of the document. Nonetheless, this model is still very different from its predecessors. Indeed, the Kutak model is very conservative in the application of the first amendment to issues relating to advertising, solicitation and trial comment.

The Virginia Code of Professional Responsibility has undergone an evolution similar to the ABA's. The VSB was organized by the Virginia General Assembly in 1938. The 1908 ABA Model Code was promptly adopted, becoming the first CPR applicable to all Virginia lawyers. The 1969 ABA model was adopted by the Virginia Supreme Court and took effect in Virginia on January 1, 1971.¹⁰ In response to the Supreme Court decisions invalidating certain code provisions, the VSB appointed a special committee in September, 1978, to study the Virginia CPR. The Virginia CPR, which took effect on October 1, 1983, is the collective work product of the VSB special committee, the VSB Counsel and the Supreme Court of Virginia, with input from the Virginia Bar Association at the VSB Counsel level. Today, the Virginia CPR is an updated, streamlined version of the 1969 ABA Model with roots in both the 1908 ABA model and the 1887 Alabama Code. The Virginia CPR retains the traditional format for precedential value except for the reversal of the ethical considerations to the disciplinary rules. The traditional format is retained because a substantial portion of Virginia's lawyer population has lived with that format since its effective date of January 1, 1971. However, the Virginia CPR is less aspirational and more specific, enforceable, and legalistic, particularly in the application of the first amendment provisions dealing with advertising, solicitation and trial comment by attorneys. Furthermore, the Virginia CPR is somewhat condensed. It is a very current statement of the developing law of regulation of our profession. Interestingly, when the the United States Department of

10. See VA. SUP. CT. R. Pt. 6 (1977).

Justice wrote to the chief justices of the courts of last resort, criticizing the Kutak model on first amendment and antitrust/Trade Commission grounds, the Virginia CPR was cited favorably.

The more important changes in the Virginia CPR are summarized as follows:

1. "Fitness to practice law" is the standard by which a lawyer's conduct is measured.

2. The Virginia CPR has extraterritorial effect as to members of the Virginia Bar practicing in other jurisdictions subject to the CPR of the place of the lawyer's conduct.

3. Provisions affected by the first amendment, particularly advertising, solicitation and trial comment, are very different from the predecessor Virginia and ABA model codes as well as the Kutak model.

4. Provisions regarding fees, including reasonableness, division of fees between lawyers and contingent fee agreements, are substantially revised.

5. Provisions concerning preserving the confidences and secrets of clients are fundamentally different from both the predecessor Virginia and ABA model codes including the Kutak model.

6. Provisions concerning withdrawal from representation and conflicts in representation are revised and expanded.

II. MAJOR CHANGES IN THE VIRGINIA CPR AND COMPARISON TO THE ABA KUTAK MODEL

Canon One states that "[a] lawyer should assist in maintaining the integrity and competence of the legal profession."

According to DR 1-102(A), fitness to practice law is the standard by which alleged misconduct is measured. References to conduct "involving moral turpitude" and conduct "prejudicial to the administration of justice" are deleted in favor of the fitness to practice law standard. The Kutak model is quite similar.¹¹ DR 1-102(B) is a new provision which establishes that the Virginia CPR is applicable to a member of the Virginia Bar practicing in another jurisdiction subject, however, to the provision of the CPR of the ju-

11. Compare VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1983) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

risdiction where the questioned conduct occurs.

Canon Two states that "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

DR 2-101 deals with publicity and advertising. While the Virginia CPR deals with this subject matter in the negative, the effect is that a lawyer may communicate by advertising unless the communication is false, fraudulent, misleading or deceptive.

Like DR 2-101, DR 2-103 is expressed in the negative. DR 2-103 permits solicitation unless the communication is false, fraudulent, misleading, deceptive, or has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harrassing conduct, taking into account the person's 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. Solicitation is defined as in-person communication, which encompasses face-to-face communication and telephone communication. Advertising is defined as all other communication.

The Kutak model provides for advertising in much the same manner as the Virginia CPR.¹² Solicitation, however, is prohibited in the Kutak model unless under exceptions to the prohibition previously created by the judiciary based on the exercise of associational rights.

DR 2-105 pertains to attorneys' fees. The laundry list of factors in the predecessor code by which "reasonableness" is measured is now deleted. However, this list remains a part of the common law of Virginia.¹³ By contrast, the ABA model retains the "laundry list."¹⁴ The Justice Department has expressed concern that such lists tend to become exclusive considerations to the disadvantage of consumers of legal services. Both the ABA model and DR 2-105 include an affirmative requirement of reasonableness rather than the former prohibition against an excessive fee.¹⁵ DR 2-105 now

12. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1 -2 (1983).

13. See *County of Campbell v. Howard*, 133 Va. 19, 112 S.E. 637 (1922).

14. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983).

15. Compare VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) (1983) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a)(1983). The Justice Department is critical of such provisions on the ground that the requirement of reasonableness tends to exclude the possibility of an unreasonably low fee.

contains specific requirements for the content of a contingent fee agreement which include the method by which the fee is to be determined and a closing statement at the conclusion of the representation. Finally, DR 2-105 provides for the division of fees between lawyers on any basis agreed upon by the lawyers, provided that the client consents after disclosure and further provided that joint, not apportioned, responsibility to the client exists. The provision in the predecessor Virginia CPR apportioned responsibility in proportion to services rendered. The Kutak model is similar except that disproportionate fee disbursement is retained as an alternative.¹⁶

DR 2-108 deals with the termination of an existing attorney-client relationship. DR 2-108 provides for two new grounds for permissive withdrawal. The first ground permits withdrawal at any time, if possible without material prejudice to the client. The second ground permits withdrawal if continued representation will cause an unreasonable financial burden, or if the representation has been rendered unreasonably difficult by the client. The ABA model is comparable.¹⁷

Canon Three states that “[a] lawyer should assist in preventing the unauthorized practice of law.”

DR 3-104 is a new CPR provision dealing for the first time with nonlegal personnel, particularly legal assistants and paralegals. This rule provides that a licensed attorney may delegate work to a nonlawyer, provided that there be direct supervision and that the delegation has no effect whatsoever on the attorney-client relationship or the lawyer’s duties and responsibilities for things such as accuracy or promptness. A nonlawyer is expressly prohibited from counseling in legal matters, appearing in court as counsel, engaging in the unauthorized practice of law and communicating with third parties without disclosure of nonlawyer status. Nonlawyers acting pursuant to delegation by a lawyer must comply with the Virginia CPR.

The Kutak model also deals with nonlegal personnel, but more by reference to the effect on the attorney-client relationship than the Virginia CPR.¹⁸ Thus, the Virginia CPR is more specific and instructive as to what activities a nonlawyer may and may not undertake.

16. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983).

17. See *id.* Rule 1.16(a), (b).

18. See *id.* Rule 5.3.

Canon Four states that “[a] lawyer should preserve the confidences and secrets of a client.” Herein lie some of the sharpest distinctions between the provisions of the Kutak model and the Virginia CPR. The Virginia CPR, for the first time, provides for compulsory disclosure by a lawyer when his client expresses the intent to commit a crime or when his client has perpetrated a fraud on the tribunal in the course of the representation. The Kutak model, however, contains no such *compulsory* disclosure exceptions to the general prohibition against disclosure of confidences and secrets. The Virginia CPR contains an additional permissive ground for disclosure of a confidence or secret when the client has perpetrated a fraud on a third party in the course of the representation. The ABA model provides for permissive disclosure only to prevent a crime involving death or bodily injury.¹⁹

Canon Five states that “[a] lawyer should exercise independent professional judgment on behalf of a client.”

DR 5-104 no longer contains the former prohibition against the acquisition of publication rights from a client; however, other provisions of the new Virginia CPR deal with the lawyer’s conduct by requiring a fair, reasonable and conscionable transaction. DR 5-104 also contains a new provision prohibiting preparation by a lawyer of a document by means of which the lawyer or his family receives a gift by reason of kinship.

Finally, DR 5-105 deals with attorney conflict between clients. It contains a new provision providing that current representation of a client is prohibited if it would be adverse in any material respect to the former client in the same or a substantially related matter. This same concept appears in the ABA model in the context of engaging in private practice following public service.²⁰

Canon Six states that “[a] lawyer should represent a client competently.”

DR 6-101 contains new provisions relating to competence and promptness. These provisions are much more specific than the previous provisions. This rule limits the undertaking of representation to cases in which the lawyer can show: (1) competence or demonstrated skill, efficiency and preparation, or association with a law-

19. See *id.* Rule 1.6(b)(2).

20. Compare *id.* Rule 1.11(a) with VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(d) (1983).

yer who is competent; (2) promptness; and (3) that the client is currently informed of the lawyer's activities and any settlement opportunity.

Canon Seven states that "[a] lawyer should represent a client zealously within the bounds of the law."

DR 7-101 deals with zealous representation and contains the following new provisions: (1) a lawyer may limit or vary his client's objectives with the expressed or implied authority of his client; and (2) a lawyer may refuse to pursue an objective which is unlawful, repugnant or imprudent, as well as refuse to participate in "unlawful conduct."

DR 7-103 now contains an added provision that, in dealing with a party not represented by counsel, a lawyer must disclose his interest.

DR 7-104 contains a new provision which prohibits the use of a threat to present a "disciplinary charge" for the purpose of gaining advantage in a civil matter.

DR 7-105 deals with trial conduct. This rule underwent multiple revisions including: (1) the deletion of the duty to disclose adverse authority not revealed by opposing counsel (the Kutak model retains this requirement); (2) a new prohibition that "a lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know its falsity, the lawyer shall take reasonable remedial measures" (comparable new provision is in the ABA model);²¹ (3) the deletion of the former requirement that a lawyer appearing in a representative capacity identify his client; and (4) the deletion of the former requirements of compliance, as a matter of ethics. Added in lieu of these deleted provisions is a more specific and enforceable prohibition against habitual violations of established rules of procedure or evidence which disrupt the proceeding.²²

DR 7-106 deals with trial publicity. As revised, this rule limits trial comment only in a criminal case which may be tried to a jury where such comment would present a clear and present danger of interference with fairness. The Kutak model deals with this subject matter by reference to "an adjudicative procedure" and goes

21. Compare VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105(c)(6) (1983) with MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983).

22. See VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105(c)(5) (1983).

on to suggest, by means of a laundry list, statements that would not be ethical in "a civil matter triable to a jury" or "a criminal matter or proceeding that could result in incarceration."²³ Therefore, the Kutak model is much more restrictive than Virginia's CPR.

Canon Eight states that "[a] lawyer should assist in improving the legal system."

DR 8-102 details the special responsibilities of a prosecutor or government lawyer. The new provisions of DR 8-102: (1) prohibit inducing an unrepresented defendant to surrender important procedural rights; (2) prohibit discouraging a person from giving relevant information to a defendant; and (3) impose an affirmative duty on the prosecuting attorney or government lawyer to seek out all evidence, whether or not favorable to the defendant, and to disclose such evidence to the defendant as required by law. The ABA model is comparable to DR 8-102.²⁴

Canon Nine states that "[a] lawyer should avoid even the appearance of professional impropriety."

DR 9-102 deals with "preserving the identity of funds or the property of a client." It contains a new provision authorizing a procedure for the payment of interest on trust accounts in Virginia.

III. CONCLUSION

Since the Virginia CPR took effect on October 1, 1983, it has been established that: (1) the CPR provisions pertaining to the application of the first amendment and the federal antitrust laws to the practice of law were an accurate projection of the developing case law; and (2) the new CPR, together with the videotaped course required of every active member of the VSB, has heightened the bar's awareness of the CPR. This heightened awareness is best documented by the doubling of the number of informal opinions in response to requests from practicing attorneys published by the Standing Committee on Legal Ethics of the VSB during the year following the completion of the video course.

The CPR is a dynamic document which will continue to receive

23. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6(b)(1983).

24. See *id.* Rule 3.8.

the attention of the organized bar in Virginia, and indeed, that process is an institutional part of the bar.

