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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

*James M. McCauley **

I. AMENDMENTS TO THE RULES OF THE SUPREME COURT OF VIRGINIA

A. *Advertising*

1. Requirement To Designate Lawyer Responsible for Advertising

How does the Virginia State Bar (the “Bar”) determine who in a law firm is subject to discipline for a misleading advertisement? An amendment to Rule 7.2(e) of the Rules of the Supreme Court of Virginia (the “Rules”), effective June 30, 2005, allows attorneys who advertise to file a written statement with the Bar identifying the lawyer responsible for all firm advertising, rather than having to include that identifying information in each and every advertisement.¹

2. Use of Deceased Lawyer’s Name in Law Firm Name

Rule 7.5 addresses the use of law firm names.² An amendment to Comment [1], effective June 30, 2005, clarifies that a law firm may continue to use the name of a retired or deceased member in the law firm’s name, if the lawyer was a member of that law firm, if doing so is authorized by law or by contract, and if the public is not misled as a result.³ This concept was formerly stated in Ethical Consideration 2-13 of the Virginia Code of Professional Re-

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1. VA. SUP. CT. R. pt. 6, § II, R. 7.2(e) (Repl. Vol. 2008).

2. *Id.* R. 7.5 (Repl. Vol. 2008).

3. *Id.* cmt. [1] (Repl. Vol. 2008).

sponsibility, but not included in the Virginia Rules of Professional Conduct (the “Rules of Professional Conduct”).⁴

B. *Conflicts and Joint Representation—Family Law*

On June 30, 2005, the Supreme Court granted the Bar’s petition to amend Rule 1.7, which addresses concurrent and multiple representation,⁵ by adopting a series of Comments formerly under Rule 2.2 [Lawyer As Intermediary].⁶ The Court also approved an amendment to Comment [8] which states that “a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation—specifically, child custody, child support, visitation, spousal support and maintenance or division of property.”⁷

C. *Contingency Planning for Disability or Death*

Does a lawyer have an ethical duty to plan for a successor to assume responsibility for client matters in the event the lawyer dies or becomes disabled? On February 28, 2006, the Supreme Court of Virginia approved the addition of Comment [5] to Rule 1.3 (Diligence), explaining that a lawyer’s duty of diligence to the client should embrace planning for client protection in the event of the attorney’s death or disability.⁸

D. *Settlement of a Suit or Controversy—Restriction on Right To Practice Law*

As a condition of settlement of a suit or controversy, a defendant might require a plaintiff’s counsel to agree that the plaintiff’s counsel will not bring more suits against that particular defendant in the future. Until September 1, 2006, Rule 5.6(b) prohibited an attorney in settlement of a suit or controversy from entering into an agreement that *broadly* restricted the attorney’s ability to practice law.⁹ The presence of “broadly” in Virginia’s

4. *Id.* pt. 6, § II, Canon 2, EC 2–13 (Repl. Vol. 1999).

5. *Id.* R. 1.7 (Repl. Vol. 2008).

6. *Id.* R. 2.2 cmts. 1–9 (Repl. Vol. 2004).

7. *Id.* R. 1.7 cmt. 8 (Repl. Vol. 2008).

8. *Id.* R. 1.3 cmt. 5 (Repl. Vol. 2008).

9. *Id.* R. 5.6(b) (Repl. Vol. 2005).

rule was unique. The American Bar Association's ("ABA") Model Rule 5.6(b), and the numerous states that have adopted the ABA Model Rules, prohibit *any* restriction on the ability to practice in this context.¹⁰ In contrast, the presence of "broadly" in Virginia's Rule 5.6 has the effect, in some circumstances, of permitting defense counsel, in the settlement of a civil claim, to restrict plaintiff's counsel from ever bringing similar claims against the defendant. Virginia's move to prohibit *any* restriction, effective September 1, 2006, places Virginia in line with the rest of the states on this issue.¹¹

E. *Foreign Attorneys: Pro Hac Vice Rule*

Effective July 1, 2007, the requirements governing when a non-Virginia attorney may appear in a Virginia court, in association with local counsel, changed substantially. The new amendments to Rule 1A:4¹² of the Supreme Court of Virginia completely rewrote and overhauled *pro hac vice* practices. The amendments were necessary due to problems created by the prior rule. The prior rule contained few requirements, leaving *pro hac vice* admission essentially unregulated.¹³ For example, the prior rule required no written motion or any verification that a foreign lawyer was licensed to practice law; there were no limits on the number of appearances the foreign lawyer could make, nor any means of tracking those appearances.¹⁴ Under the prior rule, the foreign lawyer could practice generally and systematically in Virginia without being admitted to practice in Virginia.¹⁵ The prior rule stated:

An attorney from another jurisdiction may be permitted to appear in and conduct a particular case in association with a member of the Virginia State Bar, if like courtesy or privilege is extended to members of the Virginia State Bar in such other jurisdiction. The court in which such case is pending shall have full authority to deal with the resident counsel alone in all matters connected with the litigation. If it becomes necessary to serve notice or process in the case upon counsel, any notice or process served upon the associate resident

10. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2008).

11. VA. SUP. CT. R. pt. 6, § II, R. 5.6(b) (Repl. Vol. 2008).

12. *Id.* R. 1A:4 (Repl. Vol. 2008).

13. See *id.* (Repl. Vol. 2006).

14. See *id.*

15. *Id.*

counsel shall be as valid as if personally served upon the nonresident attorney.

Except where a party conducts his own case, a pleading, or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is signed by a member of the Virginia State Bar.¹⁶

The new rule requires, *inter alia*, a written application and motion to appear *pro hac vice*, as well as supporting documentation that the applicant is a licensed attorney in good standing in another U.S. jurisdiction.¹⁷ Under the new rule, a non-Virginia lawyer may only appear in twelve cases in a twelve-month span, is required to pay an application fee of \$250, must submit to the disciplinary authority of the Bar, and must agree to be governed by the Rules of Professional Conduct while practicing *pro hac vice* in Virginia.¹⁸

II. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Sanctions Order as a Basis for Discipline*

Rule 3.1 of the Rules of Professional Conduct makes it professional misconduct for a lawyer to file a frivolous pleading.¹⁹ In *Toothman v. Virginia State Bar*, the Supreme Court of Virginia held that an order entered by a circuit court awarding sanctions against a respondent lawyer is not sufficient evidence, standing alone, that the lawyer engaged in misconduct.²⁰ The trial court held that the respondent violated Virginia Code section 8.01-271.1 "by filing pleadings that were not well grounded in fact and were interposed for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."²¹ The respondent had appealed the sanction imposed by the circuit court but his petition was refused by the Supreme Court of Vir-

16. *Id.*

17. *Id.* (Repl. Vol. 2008).

18. *Id.*

19. *Id.* R. 3.1 (Repl. Vol. 2008) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.")

20. No. 062630, slip op. at 2-3 (Va. Sept. 11, 2007).

21. *Id.* at 2.

ginia.²² The Bar initiated disciplinary proceedings before a three-judge court and had “based its case principally on the transcript of the sanctions hearing held in the Circuit Court.”²³ The respondent had “sought to adduce evidence purporting to explain his actions” during the course of the underlying litigation.²⁴ The three-judge court had refused to permit the evidence, stating that the respondent could not “collaterally challenge the findings of [the trial court].”²⁵ The respondent had also been prohibited from introducing such evidence to mitigate any resulting disciplinary sanction.²⁶ On appeal the Bar conceded that the three-judge court’s evidentiary rulings had been erroneous.²⁷ The rulings not only had prevented the respondent from contesting the charges brought against him by the Bar, but they also had prevented the respondent from introducing mitigation evidence.²⁸ The supreme court reversed and remanded the case for further proceedings.²⁹

B. *Premature Publication of Disciplinary Decision Not a Basis for Reversal of Decision*

A respondent lawyer argued that his agreed disposition of a public reprimand ought to be vacated because the Bar prematurely published a press release about his case.³⁰ The respondent appealed a public reprimand with terms imposed by a three-judge court.³¹ The reprimand was imposed after a telephonic hearing in which an assistant bar counsel for the Bar recited the terms of an agreed disposition which had been signed by the respondent and the assistant bar counsel.³² At the conclusion of the telephonic hearing, the respondent stated he had nothing to add to the assistant bar counsel’s statements, and the three-judge court, “after conferring, stated that it considered the Agreed Disposition a ‘suitable disposition, and that it would enter an order approving

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 3.

27. *Id.*

28. *Id.*

29. *Id.* at 4.

30. *Brown v. Va. State Bar, ex rel. Second Dist. Comm., No. 070162, slip op. at 2 (Va. Oct. 19, 2007).*

31. *Id.* at 1.

32. *Id.*

the disposition.”³³ The respondent subsequently refused to endorse the final order and contended that the matter should be dismissed because the Bar had issued a press release about the disposition prior to the entry of the final order.³⁴ The respondent also argued to the three-judge court “that he had not agreed to the ‘disposition typed by the Bar Counsel’ and would not agree to ‘any agreed disposition of these matters.’”³⁵ The three-judge court entered an order adopting the agreed disposition over the respondent’s objections.³⁶ On appeal, the Supreme Court of Virginia indicated that the respondent had signed the agreed disposition and had raised no objections to the terms of the agreed disposition.³⁷ The court affirmed the imposition of the sanction, finding that execution of the agreed disposition and failure to object to its terms during the telephonic conference precluded the respondent’s challenge to the imposition of the sanction.³⁸ The court also found that premature publication of the sanction was not a basis for dismissal of the charges.³⁹

In an earlier case, a respondent lawyer challenged a press release issued by the Bar and urged the Supreme Court of Virginia to reverse a disciplinary order because the press release was premature.⁴⁰ The press release had stated that the respondent violated the disciplinary rules of the Virginia Rules of Professional Conduct (the “Disciplinary Rules”) and that his license to practice law had been suspended.⁴¹ The court found that the Virginia State Bar Disciplinary Board (the “Disciplinary Board”) abused its discretion in refusing to admit the respondent lawyer’s proffered evidence regarding the adverse impact the press release had on his law practice and reputation.⁴² Such evidence was relevant to the question of whether the Disciplinary Board should lessen the severity of the sanction to be imposed for the respondent’s professional misconduct.⁴³ Although the court gave the

33. *Id.*

34. *Id.* at 1–2.

35. *Id.* at 2.

36. *Id.*

37. *Id.*

38. *Id.* at 2–3.

39. *Id.* at 3.

40. *Green v. Va. State Bar*, 272 Va. 612, 614, 636 S.E.2d 412, 413 (2006).

41. *Id.* at 613–15, 636 S.E.2d at 413–14.

42. *Id.*

43. *Id.* at 616, 636 S.E.2d at 415.

Disciplinary Board discretion to determine what weight, if any, to give to such evidence, the court found it was nevertheless relevant evidence to the mitigation of sanctions and therefore admissible.⁴⁴

C. *Revocation of Law License for a Felony Conviction Based on an Alford Plea*

The Disciplinary Board revoked the respondent lawyer's law license after the respondent entered a plea in a criminal case, pursuant to *North Carolina v. Alford*,⁴⁵ that resulted in her conviction in a state court on the felony charge of embezzlement.⁴⁶ Based on that plea and conviction, the Bar initiated separate proceedings under Part 6, Section IV, Paragraph 13(I)(5)(b) which authorizes suspension or revocation based on a guilty plea or adjudication of a crime.⁴⁷ The Disciplinary Board revoked the respondent's license to practice law.⁴⁸ On appeal the respondent argued, among other things, that her revocation pursuant to Paragraph 13(I)(5)(b) was improper.⁴⁹ The Supreme Court of Virginia affirmed the revocation, finding that the respondent's plea "constituted an admission that the facts presented by the Commonwealth at the hearing on the felony charge would justify a finding of guilt."⁵⁰

D. *Garnishment of Client Funds Held in Lawyer's Trust Account*

In *Marcus, Santoro & Kozak v. Hung-Lin Wu*, a judgment debtor hired two Virginia law firms to contest judgments entered against him and a number of business entities with which he was affiliated.⁵¹ The debtor paid each firm a retainer pursuant to a representation agreement that permitted each firm to place the retainer funds into trust accounts and periodically disburse funds to themselves as they incurred legal fees over the course of the

44. *Id.*

45. 400 U.S. 25 (1970).

46. *Lee v. Va. State Bar*, No. 071464, slip op. at 1 (Va. Dec. 7, 2007).

47. *Id.* at 1–2; *see also* VA. SUP. CT. R. pt. 6, § IV, para. 13(I)(5)(b) (Repl. Vol. 2008).

48. *Lee*, No. 071464, at 1.

49. *Id.* at 2.

50. *Id.*

51. 274 Va. 743, 746–47, 652 S.E.2d 777, 779 (2007).

representation.⁵² The Supreme Court of Virginia affirmed the circuit court's order requiring the two firms to cease disbursing funds from their trust accounts in satisfaction of accrued legal fees and to pay those funds to a judgment creditor effective with the issuance of the writ of *feri facias*.⁵³ The court held that an "attorney who receives funds from a client for the future payment of legal fees for services not yet rendered holds those funds in trust."⁵⁴ The funds, the court stated, compose a trust of which the lawyer is the trustee and the client the beneficiary.⁵⁵ "The Firms, as garnishees, held the intangible equitable property interest of [the judgment debtor] in their trust accounts and were under a fiduciary duty not only to hold that interest but return the property to [him] when the trust obligation ends."⁵⁶ As such, the judgment debtor's interest in the trust accounts could be attached in garnishment by the judgment creditor, who enforces the lien of his execution against property of the judgment debtor in the hands of a third person, the garnishee (here, the firms).⁵⁷

E. *Power of Circuit Court To Revoke Attorney's Privilege To Practice in That Court*

In *In re Moseley*, the respondent lawyer filed a contract action for his client contending that a consulting agreement in question did not have an arbitration clause.⁵⁸ The defendant in the underlying case argued the agreement did, but both parties were unable to find a copy of the document.⁵⁹ During an evidentiary hearing on the matter, the plaintiff testified he had since found the contract, that it contained an arbitration clause, and that he had given it to Moseley, his attorney.⁶⁰ The circuit court levied sanctions against Moseley for failure to inform the court and opposing counsel that he had found the document, as well as for filing frivolous pleadings and motions in the matter.⁶¹ Moseley then filed

52. *Id.* at 747, 652 S.E.2d at 779.

53. *Id.* at 758, 652 S.E.2d at 785.

54. *Id.* at 750, 652 S.E.2d at 781.

55. *Id.* (citing *In re Equip. Serv., Inc.*, 290 F.3d 739, 746 (4th Cir. 2002)).

56. *Id.* at 755, 652 S.E.2d at 783.

57. *Id.* (quoting *U.S. v. Harkins Builders, Inc.*, 45 F.3d 830, 833 (4th Cir. 1995)).

58. 273 Va. 688, 691, 643 S.E.2d 190, 191 (2007).

59. *Id.*

60. *Id.*

61. *Id.* at 691, 643 S.E.2d at 191-92.

a second motion for judgment alleging substantially the same claims as in the first action.⁶² The defendant moved to disqualify Moseley and ultimately asked for a rule to show cause.⁶³ Prior to hearing on the rule, Moseley wrote in an e-mail that opposing counsel was “certainly demonically empowered. I have never seen anyone who reeks of evil so much.”⁶⁴ He also described the monetary sanctions award entered by the judge in the case as “an absurd decision from a whacko judge, whom I believe was bribed.”⁶⁵ The court found that Moseley had a conflict of interest and ordered that he terminate his representation of the plaintiff.⁶⁶ The court also ruled that “Moseley’s right to practice before the Circuit Court . . . be and hereby is revoked.”⁶⁷

On appeal, Moseley argued that the circuit court did not have the authority to revoke his license in that court as the revocation of an attorney’s license is governed by Virginia Code sections 54.1-3928 and 3934 through 3938.⁶⁸ The Supreme Court of Virginia affirmed the revocation of Moseley’s license to practice in the Arlington County Circuit Court, acknowledging that “a court has ‘an inherent power’ to discipline and regulate attorneys practicing before it . . . [and] that ‘[t]his power, since the judiciary is an independent branch of government, is not controlled by statute.’”⁶⁹

F. *Improper Criticism of a Court by a Lawyer*

Lawyers using intemperate or reckless language to criticize a court faced substantial punishment for doing so in recent decisions by the Supreme Court of Virginia. In *Taboada v. Daly Seven, Inc.*, the court held that a Virginia-licensed attorney violated Code section 8.01-271.1 by filing a petition for rehearing containing intemperate language critical of the court’s opinion issued in the underlying appeal.⁷⁰ After the court issued an adverse opi-

62. *Id.* at 691–92, 643 S.E.2d at 192.

63. *Id.* at 692, 643 S.E.2d at 192.

64. *Id.* at 693, 643 S.E.2d at 193.

65. *Id.*

66. *Id.* at 694, 643 S.E.2d at 193.

67. *Id.*

68. *Id.* at 695, 643 S.E.2d at 194.

69. *Id.* at 697, 643 S.E.2d at 195.

70. 272 Va. 211, 215–16, 636 S.E.2d 889, 891 (2006).

nion in the underlying case, the lawyer petitioned the court for rehearing and included in his petition language critical of the court's ruling, including language that the court's decision was irrational and lacking in common sense.⁷¹ The lawyer appeared before the court and apologized for his intemperate language, acknowledging that it was inappropriate.⁷² Measured under an objective standard of reasonableness, the lawyer's petition did not assist the court in determining whether to grant or deny the petition.⁷³ Thus by interposing the petition for an improper purpose, specifically to harass the court, the lawyer was subject to sanctions under the cited statute.⁷⁴ Not wishing to punish the client for the lawyer's behavior, the client was granted leave to file another petition.⁷⁵ After considering the lawyer's unblemished service to the Bar of more than twenty years, including service on the Disciplinary Board and Eighth District Committee, the court fined the lawyer \$1000 and suspended his privilege to practice before the Supreme Court of Virginia for one year.⁷⁶

In *Anthony v. Virginia State Bar ex rel. Ninth District Committee*, the Virginia State Bar filed charges of misconduct against a lawyer for derogatory statements the lawyer had made against several jurists, including a Virginia circuit court judge, the entire Supreme Court of Virginia, and several judges on the United States Court of Appeals for the Fourth Circuit.⁷⁷ The respondent, in various pleadings, letters, and other court papers, accused the jurists of conspiring against his client to deny her equal protec-

71. *Id.* at 213, 636 S.E.2d at 890. The lawyer made numerous assertions in the petition for rehearing regarding the court's opinion. The lawyer described the court's opinion as "irrational and discriminatory" and "irrational at its core." *Id.* He wrote that the court's opinion makes "an incredible assertion" and "mischaracterizes its prior case law." *Id.* The lawyer stated: "George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to reach such an absurd result." *Id.* He argued in his petition that the court's opinion "demonstrates so graphically the absence of logic and common sense." *Id.* The lawyer wrote in boldface type that "Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged from the dark to attack him. But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence." *Id.* at 214, 636 S.E.2d at 890. The lawyer also included the following statement in the petition: "[I]f you attack the King, kill the King; otherwise, the King will kill you." *Id.*

72. *Id.*

73. *Id.* at 215-16, 636 S.E.2d at 891.

74. *Id.* at 216, 636 S.E.2d at 891.

75. *Id.*

76. *Id.*

77. *Anthony v. Va. State Bar, ex rel. Ninth Dist. Comm.* 270 Va. 601, 604-07, 621 S.E.2d 121, 122-24 (2005).

tion of the laws and the relief she sought in a legal malpractice case before the Supreme Court of Virginia.⁷⁸ A three-judge court found the respondent had violated Rule 8.2 of the Virginia Rules of Professional Conduct⁷⁹ and imposed a public reprimand.⁸⁰ On appeal, the Supreme Court of Virginia affirmed the decision, holding that the three-judge court had properly found by clear and convincing evidence that the respondent had made statements about a number of judges involving their qualifications and integrity and that he made those statements with reckless disregard for their truth.⁸¹ The respondent argued that his criticism of the jurists was speech protected under the First Amendment.⁸² The court disagreed, stating that “[a] lawyer’s right to free speech is ‘extremely circumscribed’ in the courtroom and, in a pending case, is limited outside the courtroom as well, to a degree that would not apply to an ordinary citizen.”⁸³ The court further stated that those restrictions on a lawyer’s First Amendment rights are based upon a lawyer’s obligation, as an officer of the court, to refrain from public debate that would obstruct the administration of justice.⁸⁴ In addition, the court stated, “[b]ecause lawyers have special access to information within the judicial system, their statements may pose a threat to the fairness of a pending proceeding, such statements being likely perceived as especially authoritative.”⁸⁵ The court stated:

[A] derogatory statement concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity, tends to diminish the public perception of the qualifications or integrity of the judge. Such a statement creates a substantial likelihood of material prejudice to the administration of justice as a matter of law and is not, therefore, constitutionally protected speech.⁸⁶

78. *Id.* at 605–06, 621 S.E.2d at 123–24.

79. VA. SUP. CT. R. pt. 6, § II, R. 8.2 (Repl. Vol. 2008) (“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.”).

80. *Anthony*, 270 Va. at 604, 621 S.E.2d at 122–23.

81. *Id.* at 610–11, 621 S.E.2d at 126–27.

82. *Id.* at 609, 621 S.E.2d at 126.

83. *Id.* (quoting *Gentile v. State Bar at Nev.*, 501 U.S. 1030, 1071 (1991)).

84. *Id.* (citing *Gentile*, 501 U.S. at 1074).

85. *Id.* at 609–10, 621 S.E.2d at 126 (citing *Gentile*, 501 U.S. at 1074).

86. *Id.* at 610, 621 S.E.2d at 126–27.

In another Supreme Court of Virginia case, the respondent lawyer was the object of a show cause summons issued by a general district court for failing to appear at a scheduled hearing where he was later found in contempt of court.⁸⁷ After reargument was completed, the respondent filed a reply "to clarify the errors which [the judge] has so negligently and carelessly, (a second time) failed to give consideration to, in these matters."⁸⁸ The respondent accused the judge of "skewing . . . the facts' and 'fail[ing] to tell the truth,'" and of lying to the circuit court, to him, to the Judicial Review Commission, and to the Bar.⁸⁹ The respondent appealed his contempt conviction to the circuit court which found him guilty and sentenced him to four days in jail.⁹⁰ Subsequently, a subcommittee of the Bar certified charges of misconduct to the Disciplinary Board.⁹¹ The Disciplinary Board found the respondent in violation of Rule 8.2 and imposed a ninety-day suspension based on his prior disciplinary record which included two public reprimands.⁹² On appeal, the respondent argued that his criticism of the judge was purely opinion to which Rule 8.2 did not apply.⁹³ The court rejected this argument and affirmed the Disciplinary Board's decision, stating:

We find no merit in Pilli's contention that he did not violate Rule 8.2 because his statements about [the judge] were merely statements of opinion, rather than of fact. Pilli's repeated accusations that [the judge] lied were assertions of fact that were plainly within the scope of remarks proscribed by Rule 8.2.⁹⁴

The court also noted its displeasure with the conduct of the respondent:

Finally, we observe that these written statements by a member of the bar of this Commonwealth, published in the form of a "pleading" filed with a court, are more than merely a troubling reflection of the author's lack of professionalism. Such statements also may have the undeserved effect of diminishing the public's perception of the nu-

87. *Pilli v. Va. State Bar*, 269 Va. 391, 393-94, 611 S.E.2d 389, 390 (2005).

88. *Id.* at 394, 611 S.E.2d at 390.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 395, 611 S.E.2d at 391.

93. *Id.* at 395-96, 611 S.E.2d at 391.

94. *Id.* at 397, 611 S.E.2d at 392.

merous lawyers and judges who so ably serve the citizens of this Commonwealth.⁹⁵

G. *Disciplinary Board Lacks Power To Amend Charges of Misconduct Certified by a District Committee*

In *Pappas v. Virginia State Bar*, a district committee certified charges of misconduct to the Disciplinary Board.⁹⁶ After the certification, but pending hearing by the Disciplinary Board, the Bar sought leave to amend the charges of misconduct.⁹⁷ The Disciplinary Board granted the motion and permitted amendment of the charges.⁹⁸ The Supreme Court of Virginia reversed, holding that the Disciplinary Board lacked the authority to amend charges of misconduct certified by a district committee.⁹⁹ The court said that the amendment was tantamount to a new charge and the respondent lawyer was not afforded reasonable notice and opportunity to respond to that charge at the district committee level, as provided in the court's rules of procedure for the discipline of lawyers.¹⁰⁰

H. *False Statement in Application for Admission to Bar*

In *Bailey v. Virginia State Bar*, a three-judge court found that the respondent lawyer violated Rule 8.1, which prohibits an applicant for admission to the bar from "knowingly mak[ing] a false statement of material fact" in connection with a bar admission application.¹⁰¹ As part of the application process, the respondent indicated that he had never been "a party to or otherwise involved" in "any civil or administrative action or legal proceeding;" or "any criminal or quasi-criminal action or legal proceeding (whether involving a felony, misdemeanor, minor misdemeanor, or any traffic offense)."¹⁰² The respondent, however, had been convicted in 1997 of manslaughter in Jamaica and served a pris-

95. *Id.*

96. *Pappas v. Va. State Bar*, 271 Va. 580, 584, 628 S.E.2d 534, 536 (2006).

97. *Id.* at 585, 628 S.E.2d at 536.

98. *Id.*

99. *Id.* at 588–89, 628 S.E.2d at 539.

100. *Id.* at 587, 628 S.E.2d at 538.

101. *Bailey v. Va. State Bar, ex rel. First Dist. Comm.*, No. 060098, slip op. at 1–2 (Va. June 23, 2006).

102. *Id.* at 1.

on sentence of sixteen months.¹⁰³ He had also been the subject of a United States Marine Corps administrative action and a Board of Inquiry proceeding to determine whether he should be separated from the Marine Corps for misconduct.¹⁰⁴ The respondent had also been charged with—and convicted of—four traffic offenses in the continental United States.¹⁰⁵

On appeal, the respondent stated that he “did not ‘knowingly’ make false statements on the application.”¹⁰⁶ He argued that an employee of the Pennsylvania Disciplinary Committee told him that he was not required to report the conviction because it occurred outside the United States.¹⁰⁷ Further, he did not report the Marine Corps proceedings because they too were based on the Jamaica incident and because he was not dishonorably discharged.¹⁰⁸ The respondent also relied on *Small v. United States* for the proposition that foreign convictions cannot provide the basis for disciplinary action.¹⁰⁹ The respondent also contended that his false answers did not involve matters of “material fact.”¹¹⁰

The Supreme Court of Virginia rejected the respondent’s reliance on advice from another jurisdiction and his reliance on *Small*.¹¹¹ The Court also held that “[i]t strains logic to suggest that participation in criminal and military disciplinary proceedings, as well as repeated traffic violations, *while not dispositive* to the admission decision, *would not be material* to that decision.”¹¹²

I. *Lawyer as Pro Se Litigant in His Own Divorce Is Subject to Discipline for Ethical Duties a Lawyer Owes to a Client*

*Barrett v. Virginia State Bar*¹¹³ confirms the oft-repeated adage “a lawyer who represents himself has a fool for a client.”¹¹⁴ The

103. *Id.* at 2.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*; see *Small v. United States*, 544 U.S. 385, 385–86 (2005).

110. *Bailey*, No. 060098, slip op. at 3.

111. *Id.* at 2–3.

112. *Id.* at 3 (emphasis added).

113. *Barrett v. Va. State Bar, ex rel. Second Dist. Comm.*, 272 Va. 260, 634 S.E.2d 341 (2006).

114. See, e.g., *Kay v. Ehrler*, 499 U.S. 432, 438 (1991).

respondent lawyer engaged in litigation misconduct in a hotly contested divorce from his wife and was found to have violated several rules of conduct.¹¹⁵ The three-judge court found that in the course of representing himself in three cases, the respondent used tactics calculated to embarrass, delay, or burden other persons; committed a deliberately wrongful act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer; made frivolous claims; and acted incompetently as an attorney.¹¹⁶ The respondent appealed the three-judge court's suspension of his law license for thirty months to the Supreme Court of Virginia.¹¹⁷

On appeal to the supreme court, the respondent contended that the three-judge court erred in failing to grant his demurrer to the Bar's complaint; that the violations of Rules 1.1,¹¹⁸ 3.1,¹¹⁹ 3.4(j),¹²⁰ and 4.4¹²¹ did not apply as he was not representing a "client," but merely representing himself in the litigation;¹²² and that the finding of a violation of Rule 3.1 was not proven.¹²³ The supreme court ruled that a demurrer cannot lie against a bar complaint because "these proceedings do not authorize a reviewing body to dismiss a complaint against a lawyer on demurrer."¹²⁴ The court also held,

The Rules . . . are designed to insure the integrity and fairness of the legal process. It would be a manifest absurdity and a distortion of

115. *Barrett*, 272 Va. at 265–66, 634 S.E.2d at 343–44.

116. *Id.*

117. *Id.* at 265, 634 S.E.2d at 343.

118. VA. SUP. CT. R. pt. 6, § II, R. 1.1 (Repl. Vol. 2008) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

119. *Id.* R. 3.1 (Repl. Vol. 2008) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.")

120. *Id.* R. 3.4(j) (Repl. Vol. 2008) ("A lawyer shall not . . . [f]ile a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.")

121. *Id.* R. 4.4 (Repl. Vol. 2008) ("In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.")

122. *Barrett*, 272 Va. at 267, 634 S.E.2d at 345.

123. *Id.* at 271, 634 S.E.2d at 347.

124. *Id.* at 266, 634 S.E.2d at 344.

these Rules if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing himself.¹²⁵

Finally, the court reversed the finding on the Rule 3.1 violation, stating that “[a]n erroneous position is not necessarily a frivolous position.”¹²⁶

J. *Jurisdiction: Respondent’s Election To Have Charges Heard by Three-Judge Panel*

By statute, a lawyer has the right to bypass the disciplinary system developed by the Supreme Court of Virginia and the Bar and elect to have the charges of misconduct tried by a three-judge court.¹²⁷ In *Brown v. Virginia State Bar*, a district committee certified charges of misconduct to the Disciplinary Board.¹²⁸ Under applicable rules of procedure, the respondent lawyer is required to file an answer or file a demand that the charges be heard by a three-judge court within twenty-one days after service of the certification.¹²⁹ When the respondent lawyer filed his demand for a three-judge court after the twenty-one day period had expired, counsel for the Bar filed an objection, which it then withdrew.¹³⁰ The Disciplinary Board ruled that the twenty-one day rule was jurisdictional and could not be waived by counsel for the Bar.¹³¹ The Disciplinary Board proceeded to hear the case and suspended the respondent’s law license for one year.¹³² On the respondent’s appeal to the Supreme Court of Virginia, the court ruled that while the twenty-one day rule was jurisdictional in nature, it did not involve subject matter jurisdiction.¹³³ Therefore, the twenty-

125. *Id.* at 268, 634 S.E.2d at 345.

126. *Id.* at 272, 634 S.E.2d at 348.

127. VA. SUP. CT. R., pt. 6, § IV, para. 13(H)(2)(b) (Repl. Vol. 2008). The rule provides that within twenty-one days of service of the charges of misconduct by a district committee, the respondent may demand that the proceedings be terminated and that the charges be brought before a three-judge court. A nearly identical provision applies to charges of misconduct filed with the Disciplinary Board. *Id.* para. 13(I)(1)(a)(1)(a) (Repl. Vol. 2008). 2007).

128. *Brown v. Va. State Bar*, 270 Va. 409, 411, 621 S.E.2d 106, 107 (2005).

129. *Id.* at 412, 621 S.E.2d at 108.

130. *Id.* at 411, 621 S.E.2d at 107.

131. *Id.* at 412, 621 S.E.2d at 107.

132. *Id.*, 621 S.E.2d at 108.

133. *Id.*

one day rule could be waived by the parties.¹³⁴ Because the Bar counsel withdrew the objection and the respondent had not filed an answer to charges with the Disciplinary Board, the Disciplinary Board lacked jurisdiction to hear the case.¹³⁵ The court reversed the Disciplinary Board's decision and remanded the case for hearing by a three-judge court.¹³⁶

On remand, a three-judge panel of a circuit court imposed a public reprimand with terms on the respondent, whose actions then went before the Disciplinary Board.¹³⁷ The Disciplinary Board noted that the respondent had "settled a wrongful death suit on behalf of an infant client without informing the court or counsel for the insurers about a potential, yet-to-be-born second heir."¹³⁸ In another matter, the United States District Court for the Eastern District of Virginia, Richmond Division, sanctioned the respondent \$9,885.43 for failing to respond to discovery and for making misrepresentations in the courtroom.¹³⁹ For these reasons, upon an agreed disposition of the charges, the respondent was placed on disciplinary probation for one year, during which time he could not commit any breach of the Rules of Professional Conduct and was required to complete six hours of ethics education for no annual credit.¹⁴⁰ On an appeal of right, the Supreme Court of Virginia affirmed the judgment of the three-judge court.¹⁴¹

In *Robinson v. Virginia State Bar*, the respondent lawyer's license was suspended for three years by the Disciplinary Board.¹⁴² The respondent argued on appeal that the Disciplinary Board erred in denying the appellant's request for a three-judge panel.¹⁴³ The Supreme Court of Virginia held that the Disciplinary Board did not err in concluding that the respondent's request for

134. *Id.* at 413, 621 S.E.2d at 108.

135. *Id.*

136. *Id.*

137. *In re* Curtis Tyrone Brown, No. 04-021-0897 and 04-021-1103 (VSB Disc. Bd. 2006).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Brown v. Va. State Bar, ex rel.* Second District Comm., No. 070162 (Va. Oct. 19, 2007).

142. *Robinson v. Va. State Bar*, No. 052638, slip op. at 1 (Va. May 19, 2006).

143. *Id.*

a three-judge panel was untimely.¹⁴⁴ The respondent's letter, sent by certified mail on the twenty-first day after service of the certification, was not received until the twenty-second day after service of the certification.¹⁴⁵ Moreover, the court stated, Rule 5:5(b) does not apply to pleadings filed with the Disciplinary Board.¹⁴⁶ The court also found that the respondent's unsigned request for a three-judge court, which was sent by facsimile on the twenty-first day after service of the certification, was without effect.¹⁴⁷

K. *Unbundling Legal Services: Preparation of a Lawsuit for a Pro Se Litigant*

Under Rule 1.2, a lawyer and a client may ethically agree to limit the scope of representation.¹⁴⁸ In *Walker v. American Ass'n of Professional Eye Care Specialists*, the plaintiff engaged a lawyer for a potential negligent medical treatment case and placed \$1500 in an escrow fund with him.¹⁴⁹ A few months later, the lawyer informed the plaintiff that he would not represent her in the case.¹⁵⁰ A different law office subsequently drafted a motion for judgment.¹⁵¹ The plaintiff, acting pro se, signed the pleading herself and no lawyer signed it.¹⁵² The original lawyer arranged for it to be delivered to the clerk of the circuit court with a cover letter asking for the paper to be filed on behalf of the plaintiff.¹⁵³ A check for the filing fee, drawn on the lawyer's trust account, accompanied the letter and pleading.¹⁵⁴ Defense counsel filed a motion to strike the pleading because it was signed by the plaintiff

144. *Id.*

145. *Id.*

146. *Id.* at 2; see VA. SUP. CT. R. pt. 5, R. 5:5(b) (Repl. Vol. 2008) ("Any document required to be filed with the clerk of this Court, or filed in the office of the clerk of this Court, shall be deemed to be timely filed if it is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the official receipt therefor be exhibited upon demand of the clerk or any party and it shows mailing within the prescribed time limits.").

147. *Robinson*, No. 052638, slip op. at 2.

148. VA. SUP. CT. R. pt. 6, § II, R.1.2(b) (Repl. Vol. 2008) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").

149. *Walker v. Am. Ass'n of Prof'l Eye Care Specialists*, 268 Va. 117, 119, 597 S.E.2d 47, 48 (2004).

150. *Id.*

151. *Id.*

152. *Id.* at 120–21, 597 S.E.2d at 48.

153. *Id.* at 119, 597 S.E.2d at 48.

154. *Id.*

and not counsel of record as required under the rules of procedure.¹⁵⁵ The circuit court agreed, finding that the plaintiff was “represented by counsel” and therefore her pleading was invalid because it was not signed by a member of the Bar.¹⁵⁶ On appeal, the Supreme Court of Virginia reversed and remanded the case, holding that the lawyer who filed the suit and filing fee on plaintiff’s behalf was not her “counsel of record” and that the plaintiff had properly signed the pleading as an unrepresented party in compliance with the rules.¹⁵⁷

III. OTHER SIGNIFICANT DECISIONS

A. *Ex Parte Contacts with Represented Parties*

Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer from communicating with a represented party.¹⁵⁸ If a corporation is represented by counsel in a case, the question becomes which employees in the company are considered to be “represented by counsel?” A related issue is whether a lawyer may conduct an *ex parte* interview of a *former* employee of a company that is represented by counsel. This issue is thoroughly addressed in *Bryant v. Yorktowne Cabinetry, Inc.*¹⁵⁹ The defendant company filed a motion for a protective order, seeking to prohibit the plaintiff’s counsel from interviewing former employees of the company.¹⁶⁰ The Supreme Court of Virginia, adopting the approach taken by the Virginia State Bar’s Standing Committee on Legal Ethics, held that Rule 4.2 generally does not prohibit an *ex parte* interview of a represented company’s former employee.¹⁶¹ However, if the interviewing lawyer inquires into matters that involve privileged communications by and between the former

155. *Id.* at 119–20, 597 S.E.2d at 48.

156. *Id.* at 120, 597 S.E.2d at 48.

157. *Id.* at 120–21, 597 S.E.2d at 48–49.

158. VA. SUP. CT. R. pt. 6, § II, R. 4.2 (Repl. Vol. 2008) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”).

159. 538 F. Supp. 2d 948 (W.D. Va. 2008).

160. *Id.*

161. *Id.* at 949.

employee and the company's counsel related to the subject of the representation, such conduct would be prohibited by Rule 4.2.¹⁶²

IV. LEGAL ETHICS OPINIONS ISSUED BY THE VIRGINIA STATE BAR'S STANDING COMMITTEE ON LEGAL ETHICS

A. *Partnership with a Non-Lawyer*

Rule 5.4 of the Rules of Professional Conduct prohibits lawyers from practicing in a firm if a non-lawyer has an ownership interest in or a controlling position in the firm.¹⁶³ The rule also prohibits lawyers from sharing legal fees with non-lawyers.¹⁶⁴ However, Legal Ethics Opinion 1843¹⁶⁵ of the Virginia State Bar's Standing Committee on Legal Ethics (the "Committee") addressed a conflicting federal regulation applicable to patent practitioners that allowed patent lawyers to partner with non-lawyer registered patent examiners.¹⁶⁶ The question presented was whether a member of the Bar who practices patent law can be employed by the firm as a patent attorney and share legal fees with a non-lawyer registered patent agent.¹⁶⁷ The opinion relies on federal regulations that essentially permit patent lawyers to form partnerships and share fees with registered patent agents to the extent the shared fees arise from the practice of patent law before the United States Patent and Trademark Office.¹⁶⁸ The opinion holds that this issue is pre-empted by federal law under

162. *Id.* at 953.

163. VA. SUP. CT. R. pt. 6, § II, R. 5.4(d) (Repl. Vol. 2008).

164. *Id.* R. 5.4(a) (Repl. Vol. 2008).

165. VSB Comm. on Legal Ethics, Legal Ethics Op. 1843 (2008).

166. A practitioner is defined in 37 C.F.R. § 10.1(r) (2007) as "(1) an attorney or agent registered to practice before the Office in patent cases or (2) an individual authorized under 5 U.S.C. 500(b) or otherwise as provided by this subchapter, to practice before the Office in trademark cases or other non-patent cases."

167. VSB Comm. on Legal Ethics, Legal Ethics Op. 1843 (2008).

168. *Id.* 37 C.F.R. § 10.48 (2007) permits a lawyer/practitioner to share legal fees with a non-lawyer practitioner.

the *Sperry* doctrine¹⁶⁹ and the Supremacy Clause of the United States Constitution.¹⁷⁰

B. *Conflicts Arising When Lawyer Serves as a Public Official*

Rule 1.11(b) generally prohibits a lawyer from representing a private client in a matter in which the lawyer participated personally and substantially as a public official.¹⁷¹ Legal Ethics Opinion 1841 addresses the ethical obligations of a lawyer who is a member of a local town's governing body and recently voted for the adoption of the abusive driver fees statute as local law that was incorporated into the locality's traffic code.¹⁷² The lawyer then represented a defendant charged with a traffic code violation who wanted to challenge the constitutionality of the newly enacted ordinance.¹⁷³ The Committee opined that although there is no *per se* prohibition against the lawyer's representation in these circumstances, Rule 1.11(b) requires that the lawyer obtain the consent of both the private client and the government agency after full disclosure and consultation regarding the potential conflict.¹⁷⁴ Additionally, the lawyer must analyze the requirements of Rule 1.7(a)(2) as to any material limitation in his representation based upon personal interests.¹⁷⁵ Further, such a limitation on the lawyer's representation might involve foregoing a potential challenge of constitutionality, thereby raising issues concerning the lawyer's diligence and competence in the representation.¹⁷⁶

169. VSB Comm. on Legal Ethics, Legal Ethics Op. 1843 (2008); see *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 384–85 (1963) (holding that a state cannot enforce its unauthorized-practice laws to prohibit a non-lawyer registered patent agent from practicing before the Patent and Trademark Office if federal law authorizes the non-lawyer to do so); see also VA. SUP. CT. R. pt. 6, § I, Unauthorized Practice R. 9-102(A)(2) (Repl. Vol. 2008) (permitting a non-lawyer to practice before an administrative agency if the agency's rules permit non-lawyer practice).

170. Article Six of the Constitution of the United States states in pertinent part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI.

171. VA. SUP. CT. R. pt. 6, § II, R. 1.11(b) (Repl. Vol. 2008).

172. VSB Comm. on Legal Ethics, Legal Ethics Op. 1841 (2008).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

C. *Assisting a Client in Conduct That Is Fraudulent—Real Estate Practice*

In Legal Ethics Opinion 1840, an employee transfers real estate to a relocation company.¹⁷⁷ The relocation company purchases the employee's real estate using a deed which is not recorded.¹⁷⁸ When the ultimate buyer purchases the real estate, the lawyer for the relocation company drafts the deed transferring the property from the original seller to the buyer by substituting a second front page over the original deed from the seller to the relocation company.¹⁷⁹ The Committee opined that this conduct clearly involves fraud and is unethical.¹⁸⁰ The opinion concludes that the buyer's lawyer has a duty under Rule 8.3 of the Rules of Professional Conduct to report unethical conduct by the relocation company's lawyer.¹⁸¹

D. *Counsel for Corporation Providing Services to an Affiliated Company*

Legal Ethics Opinion 1838 addresses whether a corporation can lend its in-house counsel to a sister corporation to provide legal services when both corporations are owned by the same parent corporation.¹⁸² If so, may the corporation bill the sister corporation for those legal services, and to what extent? A patent lawyer, who is also a regular member of the Bar, is employed by Corporation A to draft and prosecute patent applications in order to protect the discoveries/inventions that Corporation A has acquired.¹⁸³ Corporation B has a need for legal advice regarding patent infringement and/or the validity of patents held by third par-

177. VSB Comm. on Legal Ethics, Legal Ethics Op. 1840 (2007).

178. *Id.*

179. *Id.*

180. *Id.*; see VA. SUP. CT. R. pt. 6, § II, R.1.2(c) (Repl. Vol. 2008) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.")

181. VSB Comm. On Legal Ethics, Legal Ethics Op. 1840 (2007); see VA. SUP. CT. R. pt. 6, § II, R. 8.3(a) (Repl. Vol. 2008) ("A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.")

182. VSB Comm. on Legal Ethics, Legal Ethics Op. 1838 (2007).

183. *Id.*

ties.¹⁸⁴ Corporation *A* and Corporation *B* are two of several privately held corporations in a Group, “all of which are directly or indirectly owned exclusively by a single corporate entity.”¹⁸⁵ Corporation *A* and Corporation *B*, although commonly owned by the same parent company, do not own any part of each other.¹⁸⁶ The Committee began its analysis with the well-established rule that a lay corporation generally may not employ a lawyer to provide legal services to third parties such as customers of Corporation *A*.¹⁸⁷ Nevertheless, the Committee opined that the patent lawyer “can provide legal services to Corporation *B* as long as [the patent lawyer] provides those services to Corporation *B* directly, independently, and free of any conflicts of interest and with the consent of Corporation *A*.”¹⁸⁸ In addition, because the lawyer is a regular, active member of the Bar, “he is authorized to practice law generally and may represent clients other than his employer, Corporation *A*.”¹⁸⁹

Lawyers admitted to practice as corporate counsel, a limited admission granted to out-of-state lawyers not generally admitted in Virginia, but who serve as in-house counsel to an employer in Virginia, may also render legal services to an affiliate of their employer.¹⁹⁰ The Committee cautioned, however, that the lawyer in question must always be clear who the lawyer’s client is and to whom counsel owes undivided loyalty and confidentiality.¹⁹¹ In fact, discharging the lawyer’s obligations may require the patent lawyer to work off-site at a physically separate office, rather than on the premises of Corporation *A*.¹⁹²

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* (citing *Richmond Ass’n of Credit Men v. Bar Assoc.*, 167 Va. 327, 189 S.E. 153 (1937)).

188. *Id.*

189. *Id.*; *see, e.g.*, VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law, Op. 211 (2006) (noting that a Virginia lawyer serving as corporate counsel does not need separate law office to provide legal services to *pro bono* clients).

190. VSB Comm. on Legal Ethics, Legal Ethics Op. 1838 (2007); *see* VA. SUP. CT. R. 1A:5 (Repl. Vol. 2008) (“Employer” includes: “for-profit or a non-profit corporation, association, or other business entity, *including its subsidiaries and affiliates. . . .*”) (emphasis added).

191. VSB Comm. on Legal Ethics, Legal Ethics Op. 1838 (2007).

192. *Id.*

Citing a prior legal ethics opinion, the Committee stated that

it is improper for a lawyer's corporate employer or parent company to charge and collect legal fees for work done by its corporate lawyer unless the fee is simply a reimbursement to the corporate employer for the actual cost of the legal work provided by the lawyer. . . . In other words, corporate counsel cannot be used to generate profits for an employer, as that would be considered fee splitting with a non-lawyer and a violation of Rule 5.4(a).¹⁹³

E. Confidentiality: A Prospective Client's Communications with Lawyer's Secretary

What happens when a prospective client communicates information about her legal matter to a secretary in a law firm who is currently representing the adverse party? Legal Ethics Opinion 1832 addresses the general conflict of interest for a lawyer currently representing an ex-husband when the wife, as a prospective client, discusses the details of her case with the attorney's secretary.¹⁹⁴ The lawyer does not take the case, and the question becomes whether or not it is ethically permissible for the lawyer to continue to represent the ex-husband against the wife. The opinion held that even though the wife never retained the lawyer and never became a client, the lawyer still owes a duty of confidentiality.¹⁹⁵ The Committee found, however, that because no information had been imparted to the attorney, the secretary could be screened and the lawyer could continue the representation of the ex-husband.¹⁹⁶

Citing to a prior opinion,¹⁹⁷ the Committee observed that "the ethical obligation to protect confidential information of a prospective client encourages people to seek early legal assistance and such persons must be comfortable that the information imparted to a lawyer while seeking legal assistance will not be used against them."¹⁹⁸ The fact that the wife in the present scenario never retained the lawyer and never became a client does not relieve the lawyer of this duty of confidentiality.¹⁹⁹ In this case, however, the

193. *Id.* (citing VA. SUP. CT. R. pt. 6, § II, R. 5.4(a) (Repl. Vol. 2008)).

194. VSB Comm. on Legal Ethics, Legal Ethics Op. 1832 (2007).

195. *Id.*

196. *Id.*

197. *Id.* (citing VSB Comm. on Legal Ethics, Legal Ethics Op. 1794 (2004)).

198. *Id.*

199. *Id.*

prospective client spoke only with the secretary and has no direct contact with the lawyer.²⁰⁰

Thus, “[t]o avoid the imputation of confidential information to the lawyer, and possible disqualification, the lawyer has an ethical duty to establish a screen between the secretary and lawyer as to [the wife] and the ex-husband’s case.”²⁰¹ The lawyer must instruct the secretary that she cannot reveal to the lawyer any confidential information obtained from the wife.²⁰² Finally, the Committee noted, to preserve information protected by Rule 1.6,²⁰³ “the lawyer must use another staff person in lieu of the secretary for any work performed relating to the representation of the ex-husband against [the wife] and should send a written communication to [the wife] or her lawyer that these measures have been taken.”²⁰⁴

F. *Potential Conflicts for Attorney-Mediators When Clients Move from Mediation to Legal Representation*

Legal Ethics Opinion 1826 addresses potential conflicts of interest faced by two lawyers who, in addition to their work in their law firm, work as mediators in a separate mediation firm.²⁰⁵ In this scenario, members of the mediation firm refer customers to the law practice when mediation is unsuccessful.²⁰⁶ The opinion concludes that where the referring mediator is either of the two lawyers, Rule 2.10(e)²⁰⁷ creates a conflict of interest that is imputed to the other lawyer via Rule 1.10.²⁰⁸ Rule 2.10(e) would not let the lawyer who served as mediator in the matter cure the con-

200. *Id.*

201. *Id.*

202. *Id.*

203. VA. SUP. CT. R. pt. 6, § II, R. 1.6 (Repl. Vol. 2008) (duty to protect confidentiality of client information).

204. VSB Comm. on Legal Ethics, Legal Ethics Op. 1832 (2007).

205. VSB Comm. on Legal Ethics, Legal Ethics Op. 1826 (2006).

206. *Id.*

207. VA. SUP. CT. R. pt. 6, § II, R. 2.10(e) (Repl. Vol. 2008) (“A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.”).

208. VSB Comm. on Legal Ethics, Legal Ethics Op. 1826 (2006); see VA. SUP. CT. R. pt. 6, § II, R. 1.10(a) (Repl. Vol. 2008) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).”).

flict with consent.²⁰⁹ In contrast, the second lawyer could cure her *imputed* conflict via consent, as allowed in Rule 1.10.²¹⁰ Where the referring source is a mediator other than the two attorneys in the firm, Rule 2.10 would not apply, though the lawyers should review whether they would have a personal or business interest conflict under Rule 1.7 (as the referring mediator is in their mediation firm).²¹¹ Whether such a conflict exists in a particular instance depends on facts not presented in the opinion hypothetical (such as how the mediation firm operates and whether mediators discuss cases amongst themselves, etc.).

G. *Criminal Law—Scope of Representation—Decisions Made by the Client*

Rule 1.2 of the Rules of Professional Conduct addresses the scope of the representation and specifies particular decisions that only the client can make.²¹² In a criminal case, the lawyer must “abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”²¹³ In Legal Ethics Opinion 1823 a public defender waived his client’s right to a jury trial without consulting the client.²¹⁴ The public defender informed the court and the prosecutor of that election without mentioning that the lawyer had not consulted with the client.²¹⁵

This opinion concludes that the lawyer violated Rule 1.2 regarding scope of authority, as that rule expressly carves out the waiver of a jury trial as exclusively the prerogative of the client.²¹⁶ Given the unlikelihood that the public defender was ignorant of this fundamental legal principle, the opinion also concludes that the lawyer’s election of a bench trial was tantamount to a misrepresentation to the court, as the court and the prosecutor would have assumed the client had been consulted per Rule

209. VSB Comm. on Legal Ethics, Legal Ethics Op. 1826 (2006).

210. *Id.* (citing VA. SUP. CT. R. pt. 6, § II, R. 1.10(c) (Repl. Vol. 2008) (“A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.”)).

211. VSB Comm. on Legal Ethics, Legal Ethics Op. 1826 (2006).

212. VA. SUP. CT. R. pt. 6, § II, R. 1.2 (Repl. Vol. 2008).

213. *Id.* R. 1.2(a).

214. VSB Comm. on Legal Ethics, Legal Ethics Op. 1823 (2006).

215. *Id.*

216. *Id.*

1.2.²¹⁷ The Committee also cited other authorities holding that a lawyer cannot surrender a criminal defendant's right to a trial by jury.²¹⁸

H. *Lawyer Leaving a Law Firm—Notification to Clients*

When a lawyer leaves a law firm, the lawyers remaining in the firm are often concerned about the departing lawyer's contact with the firm's clients. In Legal Ethics Opinion 1822, the Committee addressed whether it is unethical for a departing associate to refuse the firm's request for copies of notice letters he wrote to clients advising them of his departure and a list of the clients he contacted.²¹⁹ The request for opinion also asked whether the particular text of the notice letter sent to clients is misleading:

After over 6 years, I have decided to leave First Firm to join Second Firm. The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: I can continue representing you in trademark matters, you can hire other counsel, or you can stay with First Firm.²²⁰

The opinion concludes that there is no ethical duty to provide the information regarding the notice letter to the firm, though the opinion does not endorse secrecy.²²¹ The opinion finds that the language of the particular notice, which conforms to the requirements established in Legal Ethics Opinion 1332,²²² was not misleading.²²³

217. *Id.*

218. *Id.* (citing VA. CODE ANN. § 19.2-257 (Repl. Vol. 2004) (allowing for bench trials for felony cases only where the accused consents after being advised by counsel); see VA. SUP. CT. R. 3A:13(b) (Repl. Vol. 2008) (allowing for a bench trial in circuit court only after the court determines that the accused's consent was voluntarily and intelligently given); see also *Jones v. Commonwealth*, 24 Va. App. 636, 641, 484 S.E.2d 618, 621 (Ct. App. 1997) (noting that an attorney may not, without client authorization, surrender an accused's right to a jury trial).

219. VSB Comm. on Legal Ethics, Legal Ethics Op. 1822 (2006).

220. *Id.*

221. *Id.*

222. VSB Comm. on Legal Ethics, Legal Ethics Op. 1332 (1990) (holding a departing lawyer's notice to clients should inform the client he can freely choose to go with the departing attorney, stay with the firm, or go with new counsel).

223. VSB Comm. on Legal Ethics, Legal Ethics Op. 1822 (2006).

I. *Conflict of Interest—Lawyer Suing Corporation When Partner Sits on Board*

In Legal Ethics Opinion 1821, the Committee determined that it is a conflict of interest for a lawyer to sue a corporate defendant when a lawyer's partner sits on the defendant's board of directors.²²⁴ Applying Rule 1.7(a)(2),²²⁵ the Committee found that the partner sitting on the defendant company's board has a fiduciary relationship that would materially limit the representation of the plaintiff against the corporation.²²⁶ This conflict is imputed to the other lawyers in the firm under Rule 1.10(a) and is, therefore, a conflict for the partner representing the plaintiff.²²⁷ The Committee stated that "[c]ourts have repeatedly found this tension between corporate fiduciary duty and the duty to a client as the source of a conflict of interest."²²⁸ The Committee then turned to the issue of whether the conflict can be cured. Conflicts under Rule 1.7 may be cured, the Committee noted, with the informed consent of the affected clients.²²⁹ The two lawyers wrote to the president of the defendant corporation and proposed that the partner serving on the board be recused from participating in any discussion or voting on any matter related to the lawsuit.²³⁰ Although recusal is not mentioned in the Rules of Professional Conduct as a means for curing a conflict, the Committee stated that it is a factor to consider if recusal resolves the tension between the

224. VSB Comm. on Legal Ethics, Legal Ethics Op. 1821 (2006).

225. VA. SUP. CT. R. pt. 6, § II, R. 1.7(a)(2) (Repl. Vol. 2008) (A conflict exists if "there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

226. VSB Comm. on Legal Ethics, Legal Ethics Op. 1821 (2006).

227. *Id.*; see also *supra* note 208.

228. *Id.* (citing *Allen v. Academic Games Leagues of Am., Inc.*, 831 F. Supp. 785, 788–90 (C.D. Cal. 1993) (disqualifying firm of organization's advisory board member from representation of party suing that entity); *Berry v. Saline Mem'l Hosp.*, 907 S.W.2d 736, 739–40 (Ark. 1995) (disqualifying firm of former hospital board member from representing patient against the Board); *William H. Raley Co. v. Superior Court*, 197 Cal. Rptr. 232, 236, 238 (Cal. Ct. App. 1983) (disqualifying firm of bank trustee from representation of plaintiff adverse to the bank); *Graf v. Frame*, 352 S.E.2d 31, 37–39 (W. Va. 1986) (disqualifying attorney who serves on a university's board of regents from representing persons with claims against faculty members)).

229. VSB Comm. on Legal Ethics, Legal Ethics Op. 1821 (2006). Both Rules 1.7 and 1.10 provide that it may be possible to cure a conflict with the consent of the clients. See VA. SUP. CT. R. pt. 6, § II, R. 1.7(b) (Repl. Vol. 2008); VA. SUP. CT. R. pt. 6, § II, R. 1.10(c) (Repl. Vol. 2008).

230. VSB Comm. on Legal Ethics, Legal Ethics Op. 1821 (2006).

attorney's fiduciary duty to the board and his professional obligation to his clients:

The Committee thinks that this is possible, if the board has approved of the recusal strategy, after consultation with its attorney. Presumably the Board would consider such matters as whether the litigation is "routine" or "non-routine" in the course of the board's business; whether the claim goes to matters that have been determined by the board, or by lower level administrative staff; and whether the claim involves matters on which Attorney B has voted or has been involved in. Under the right circumstances, the risk of diluted loyalty to this client could be significantly reduced. Attorney B's recusal could be effective in two ways. First that recusal would substantially reduce the opportunity for improper influence between Attorney B and the board. Similarly, Attorney B's recusal lessens the risk that Attorney C would be improperly loyal to the corporation at the expense of his clients. Attorney B's recusal could facilitate the competent, diligent representation of the plaintiffs.²³¹

The Committee also indicated that Attorney B's resignation more than likely cured the conflict, but that could not be guaranteed:

The end of Attorney B's role as a board member presumably would end his fiduciary duty to the Trust Company. As he never represented the company, Rule 1.9's requirements regarding duty of loyalty to former clients would not be triggered. However, if the corporate documents establishing the specifics of the duties of Trust Company board members included some duty to avoid adverse business actions regarding the Trust Company for some period after board membership, then Attorney B's resignation would not necessarily cure this conflict. That lingering duty could possibly create the sort of conflict already established for current board membership. Similarly, if the corporate documents establish a duty to keep certain corporate information confidential, that duty may also continue beyond the term of the attorney's service on the board.²³²

J. *Ex Parte Contacts with Represented Persons*

Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer from communicating with a party that is represented by counsel.²³³ Legal Ethics Opinion 1820 presents a scenario in

231. *Id.*

232. *Id.*

233. VA. SUP. CT. R. pt. 6, § II, R. 4.2 (Repl. Vol. 2008) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the law-

which lawyers are working in-house for a railroad company as claims adjusters.²³⁴ As claims agents, they contact injured railroad workers, who have legal representation, to persuade them they do not need legal representation and to obtain information about their injuries and their medical needs.²³⁵ The central question is whether these lawyer/claims agents are governed by Rule 4.2's prohibition against contacting represented parties without consent of counsel.²³⁶ Critical to the analysis, the Committee noted, is the introductory language to Rule 4.2 "in representing a client."²³⁷ The opinion concludes that the work of these attorney/claims agents involved negotiating claims against the railroad and thus involved the provision of legal services.²³⁸ Accordingly, the attorney/claims agents must work within the restrictions of Rule 4.2 in their communications with the represented, injured workers.²³⁹ The opinion emphasizes the supervisory responsibilities of the attorney, who serves as head of the claims department under Rules 5.1 and 5.3, to ensure that the conduct of the lawyers and non-lawyers serving as claims agents perform their responsibilities ethically under the Rules of Professional Conduct.²⁴⁰

K. Conflict of Interest—Lawyer Working as a Lobbyist Rather Than in an Attorney-Client Relationship

Is a lawyer subject to the Rules of Professional Conduct when he or she is working as a lobbyist? In Legal Ethics Opinion 1819, the Committee reiterated its position that a lawyer may be subject to the Rules of Professional Conduct even when engaged in activity that falls outside the traditional attorney-client relationship.²⁴¹ Accordingly, the Rules of Professional Conduct apply to a

yer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”)

234. VSB Comm. on Legal Ethics, Legal Ethics Op. 1820 (2006).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. VSB Comm. on Legal Ethics, Legal Ethics Op. 1819 (2005) (citing VSB Comm. on Legal Ethics, Legal Ethics Op. 1764 (2002) (attorney fee sharing with finance company); VSB Comm. on Legal Ethics, Legal Ethics Op. 1754 (2001) (attorney selling life insurance products); VSB Comm. on Legal Ethics, Legal Ethics Op. 1658 (1995) (employment law

lawyer when working as a lobbyist in a lobbying firm.²⁴² This means, quite possibly, that the conflicts of interest rules that apply to lawyers may also apply to a lawyer working as a lobbyist who undertakes to represent customers that have directly adverse interests in matters on which the lawyer/lobbyist is working.²⁴³ However, this would be the case only if the lawyer/lobbyist held himself out or acted in such a way so as to cause the customer to reasonably believe that an attorney-client relationship was created during the lobbying engagement.²⁴⁴ In this opinion, the lobbying firm's promotional literature and website state that the lawyer/lobbyist "is an attorney with many years of experience in both business and government' who has 'dealt successfully with many legal, governmental and other crises.'"²⁴⁵ In meetings with the customer, the lawyer/lobbyist would often preface his remarks with statements like, "As a lawyer, I think you should emphasize these issues."²⁴⁶ The customer reasonably believed that the lawyer/lobbyist was giving legal advice and applying his skills as a lawyer in the course of the lobbying engagement and the firm's contract and literature said nothing to disavow that belief.²⁴⁷

In this opinion, the Committee warned:

While neither the lawyer, nor the firm, may have intended to establish an attorney/client relationship, the Committee is sympathetic to A's impression to the contrary. When a lawyer establishes a relation-

firm/human resources consulting firm); VSB Comm. on Legal Ethics, Legal Ethics Op. 1647 (1995) (employee-owned title agency); VSB Comm. on Legal Ethics, Legal Ethics Op. 1634 (1995) (accounting firm); VSB Comm. on Legal Ethics, Legal Ethics Op. 1584 (1994) (partnership with non-lawyer); VSB Comm. on Legal Ethics, Legal Ethics Op. 1579 (1994) (serving as fiduciary such as guardian or executor); VSB Comm. on Legal Ethics, Legal Ethics Op. 1442 (1991) (lender's agent); VSB Comm. on Legal Ethics, Legal Ethics Op. 1368 (1990) (mediation/arbitration services); VSB Comm. on Legal Ethics, Legal Ethics Op. 1345 (1990) (court reporting); VSB Comm. on Legal Ethics, Legal Ethics Op. 1318 (1990) (consulting firm); VSB Comm. on Legal Ethics, Legal Ethics Op. 1311 (1989) (insurance products); VSB Comm. on Legal Ethics, Legal Ethics Op. 1254 (1989) (bail bonds); VSB Comm. on Legal Ethics, Legal Ethics Op. 1198 (1989) (court reporting); VSB Comm. on Legal Ethics, Legal Ethics Op. 1163 (1988) (accountant; tax preparation); VSB Comm. on Legal Ethics, Legal Ethics Op. 1131 (1988) (realty corporation); VSB Comm. on Legal Ethics, Legal Ethics Op. 1083 (1988) (non-legal services subsidiary); VSB Comm. on Legal Ethics, Legal Ethics Op. 1016 (1987) (billing services firm); VSB Comm. on Legal Ethics, Legal Ethics Op. 187 (1982) (title insurance).

242. VSB Comm. on Legal Ethics, Legal Ethics Op. 1819 (2005).

243. *See id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

ship to provide other than legal services and the customer knows he is a lawyer, the lawyer must be cognizant of this opportunity for confusion. Unless the services clearly have no connection to legal training and expertise (e.g., a lawyer-owned restaurant), the lawyer should accept an affirmative duty to clarify the boundaries of the business relationship. The Committee suggests that such a duty is present in many nonlegal endeavors: for example, mediation, financial planning, and, as in the present hypothetical, lobbying services. This affirmative duty belongs on the part of the lawyer, rather than the customer, in that the lawyer is in the more informed position regarding the nature of his services and the details of the ethical rules.²⁴⁸

Assuming the lawyer/lobbyist had a conflict of interest in representing customers on lobbying matters that were directly adverse, is this conflict imputed throughout the lobbying firm as it would with a law firm? The Committee opined that because the other lobbyists in the firm were not lawyers, the lawyer/lobbyist's conflict is *not* imputed, making it possible for another non-lawyer lobbyist in the firm to take over the conflicting engagement.²⁴⁹

L. *Maintaining Client Files in Electronic or Digital Form*

In this digital age, some law firms are striving toward the "paperless office." Legal Ethics Opinion 1818 acknowledges the possibility that a client's file could be kept only in electronic format, rather than in paper as well, without violating any ethics rules.²⁵⁰ The opinion reaches three conclusions. First, there is no express ethical requirement regarding the form in which an attorney must maintain client files.²⁵¹ Therefore, a lawyer may generally maintain an electronic filing system but must accommodate those particular items for which a paper version is significant or required, such as a holographic will.²⁵² Second, although generally a lawyer may ask a client to consent to the destruction of paper documents, he should not ask for that consent where destruction of a particular item would prejudice the client.²⁵³ Third, a lawyer may generally ask a client to consent to an electronic-only file but must limit that request with regard to any paper

248. *Id.*

249. *Id.*

250. VSB Comm. on Legal Ethics, Legal Ethics Op. 1818 (2005).

251. *Id.*

252. *Id.*

253. *Id.*

document that is needed for protection of the client's interests.²⁵⁴ The opinion notes that a lawyer must not breach his duty of competence in his zeal to move to an all-electronic filing system and that the lawyer must instruct any outside computer technical assistants about the duty of confidentiality.²⁵⁵

M. Criminal Law—Defense Lawyer's Obligation upon Missing Deadline for Filing Client's Appeal

Legal Ethics Opinion 1817 addresses the proper course of action for a lawyer who is responsible for his client's missed appeal date.²⁵⁶ The opinion concludes that Rule 1.4's duty of communication²⁵⁷ requires the attorney to inform the client about the error and what is needed to correct it.²⁵⁸ Also, numerous other suggested steps regarding the filing of the *habeas* petition are deemed permissible in light of new Virginia Code section 19.2-321.1 (effective July 1, 2005).²⁵⁹ That statute requires the attorney to assist the defendant in preparing an affidavit and petition for a late appeal wherein the attorney acknowledges his or her complete responsibility for the error.²⁶⁰ The opinion holds that the statute overrules prior ethics opinions stating that the errant lawyer had a conflict of interest in assisting the client under these circumstances.²⁶¹ As permitted, if not required by the sta-

254. *Id.*

255. *Id.* at n.2.

256. VSB Comm. on Legal Ethics, Legal Ethics Op. 1817 (2005).

257. VA. SUP. CT. R. pt. 6, § II, R. 1.4 (Repl. Vol. 2008) (“(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.”).

258. VSB Comm. on Legal Ethics, Legal Ethics Op. 1817 (2005) (“If a lawyer fails to act on a client's case, the lawyer has a duty to promptly notify the client of this failure and of the possible claim the client may thus have against the lawyer, even if such advice is against the lawyer's own interests.” (citing *In re Higginson*, 664 N.E.2d 732, 734 (Ind. 1996); *Olds v. Donnelly*, 696 A.2d 633, 643 (N.J. 1997); *In re Tallon*, 447 N.Y.S.2d 50, 50 (N.Y. App. Div. 1982))). For example, a lawyer who fails to file suit within the statute of limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000).

259. VA. CODE ANN. § 19.2-321.1 (Repl. Vol. 2008).

260. *Id.*

261. VSB Comm. on Legal Ethics, Legal Ethics Op. 1817 (2005). In Legal Ethics Opinion 1122, the Committee concluded that generally a lawyer should not represent his own client in raising a claim of ineffective assistance of counsel as “he would have to assert a

tute, the opinion holds that the attorney may assist with the *habeas* petition.²⁶²

N. *Criminal Law—Impaired Client Wants To Forego Defense in Capital Murder Case*

In Legal Ethics Opinion 1816, the Committee addressed the ethical dilemma of defense counsel in a capital murder case whose suicidal client instructs the lawyers to forego putting on a defense.²⁶³ In an earlier opinion, Legal Ethics Opinion 1737 (1999), the Committee had suggested that for a lawyer to properly follow a client's directive regarding an important decision, the lawyer should have a reasonable basis to believe that the client is able to make a rational, stable decision.²⁶⁴ In the earlier opinion, the client was competent and directed his capital defense lawyers to forego putting on mitigating evidence in the penalty stage, if the client was found guilty.²⁶⁵ In contrast, in the current opinion, the client's suicidal tendencies and other information give the defense counsel a reasonable basis that the client is not able to make informed, rational, stable decisions about his defense.²⁶⁶ When a client is impaired, the lawyer must take guidance from Rule 1.14 of the Rules of Professional Conduct.²⁶⁷ The Committee observed that the fact the client was found competent to stand trial did not dispose of the ethical considerations:

position which would expose him to personal liability." VSB Comm. on Legal Ethics, Legal Ethics Op. 1122 (1988). Similarly, in Legal Ethics Opinion 1558, the Committee concluded that an attorney could not argue on behalf of a client that the attorney himself had improperly pressured the client into accepting a guilty plea. The Ethics Committee found that the conflict between the attorney's need to pursue the interest of the client yet also protect himself meant that consent could not properly cure the conflict of interest. VSB Comm. on Legal Ethics, Legal Ethics Op. 1558 (1993). To the extent that those prior opinions are inconsistent with the assistance the lawyer is permitted, if not required, to provide under Va. Code section 19.2-321.1, they are overruled.

262. VSB Comm. on Legal Ethics, Legal Ethics Op. 1817 (2005).

263. VSB Comm. on Legal Ethics, Legal Ethics Op. 1816 (2005).

264. VSB Comm. on Legal Ethics, Legal Ethics Op. 1737 (1999).

265. *Id.*

266. VSB Comm. on Legal Ethics, Legal Ethics Op. 1816 (2005).

267. VA. SUP. CT. R. pt. 6, § II, R. 1.14(b) (Repl. Vol. 2008) ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.").

The facts state that a forensic psychologist evaluated the client and concluded that he is competent to stand trial. The committee suggests that the evaluation's conclusion does not necessarily remove this attorney and client from the application of Rule 1.14. The determination of competency to stand trial is specific enough such that a client may have been determined competent for trial but nonetheless under impairment with regard to making decisions involving the matter. Also, the facts do not state when the evaluation was done; if the client's mental state has deteriorated since that time, the attorney again should consider obtaining a new evaluation.²⁶⁸

The Committee therefore concluded that Rule 1.14 may nonetheless support defense counsel disregarding the client's "death wish" directive if counsel conclude that their client cannot make "adequately considered decisions" regarding the representation such that protective action is needed.²⁶⁹

O. *Lawyer Advertising—Use of the Terms "Affiliated with" or "Associated with"*

Can two law firms use the term "affiliated" or "associated" to describe the relationship between the firms on their letterhead? In Legal Ethics Opinion 1813, the Standing Committee on Legal Ethics and the Standing Committee on Lawyer Advertising and Solicitation issued a joint opinion answering this question in the affirmative, provided certain requirements and qualifications are met.²⁷⁰ The opinion looks to ABA Formal Ethics Opinion 84-351²⁷¹ to support the conclusion that two firms may use these terms only if they regularly work together on cases (as with the term "of counsel") and if the two firms share conflicts of interest.²⁷² In any other circumstances, use of the terms "affiliated

268. VSB Comm. on Legal Ethics, Legal Ethics Op. 1816 (2005).

269. *Id.*

270. VSB Comm. on Legal Ethics and VSB Comm. on Lawyer Adver. & Solicitation, Legal Ethics Op. 1813 (2005).

271. ABA Comm. on Legal Ethics and Professionalism, Formal Ethics Op. 84-351 (1984).

272. VSB Comm. on Legal Ethics and VSB Comm. on Lawyer Adver. & Solicitation, Legal Ethics Op. 1813 (2005).

with” or “associated with” violates Rules 7.1²⁷³ and 7.5²⁷⁴ in that they are misleading.²⁷⁵

P. Fee Agreements—Termination by Client—Conversion Clause

Can a lawyer permissibly include in a fee agreement a provision allowing for alternative fee arrangements should the client terminate representation mid-case without cause? Sometimes referred to as “conversion clauses,” the Committee addressed this issue in Legal Ethics Opinion 1812.²⁷⁶ An attorney who regularly represents plaintiffs in personal injury cases wants to include the following language in her standard contingent fee agreement:

Either Client or Attorney has the absolute right to terminate this agreement. In the event Client terminates this agreement, the reasonable value of Attorney’s services shall be valued at \$200 per hour for attorney time and \$65 per hour for legal assistant time for all services rendered. In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.²⁷⁷

The Committee could not determine whether the language in the second sentence is attempting to establish an alternative contractual hourly fee arrangement or attempting to establish an agreed upon hourly rate to be used in employing a quantum meruit calculation.²⁷⁸ Rule 1.5(b) requires that the fee arrangement be adequately explained to the client, preferably in writing.²⁷⁹ The Committee opined that the second sentence of the proposed language fails to meet this requirement of Rule 1.5(b).²⁸⁰ The opinion concludes that the third sentence “is likewise improper as

273. VA. SUP. CT. R. pt. 6, § II, R. 7.1(a) (Repl. Vol. 2008) (“A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim.”).

274. *Id.* R. 7.5(a) (“A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, website, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive.”).

275. VSB Comm. on Legal Ethics and VSB Comm. on Lawyer Adver. & Solicitation, Legal Ethics Op. 1813 (2005).

276. VSB Comm. on Legal Ethics, Legal Ethics Op. 1812 (2005).

277. *Id.*

278. *Id.*

279. VA. SUP. CT. R. pt. 6, § II, R. 1.5(b) (Repl. Vol. 2008).

280. VSB Comm. on Legal Ethics, Legal Ethics Op. 1812 (2005).

it is misleading and fails to fully and properly inform the client of the lawyer's entitlement to compensation in the event the client terminates the representation prior to a recovery from the defendant."²⁸¹

Q. *Lawyer's Obligation To Protect Former Client's Confidences and Secrets*

In Legal Ethics Opinion 1811, the Committee addressed a scenario in which two co-executors of an estate were separately represented by counsel.²⁸² The co-executors enter into a contract in which each agree to share financial information with the other so that they can carry out their fiduciary administration of the estate.²⁸³ Co-executor 1 discharges Attorney A, and Attorney A forwards the client's file to a successor attorney.²⁸⁴ Counsel for Co-executor 2 contacts Attorney A and asks for certain financial information from Attorney A's former client's file to complete a tax filing.²⁸⁵ However, Co-executor 1 will not consent to Attorney A's release of the documents.²⁸⁶ The question presented is whether Attorney A is obligated or permitted to release to counsel for Co-executor 2 the requested financial information.²⁸⁷

The Committee noted first that a lawyer's duty of confidentiality continues even after the representation is terminated.²⁸⁸ The next issue is whether the contract executed by the two co-executors permitted disclosure of the financial information as required by law under Rule 1.6 (b)(1).²⁸⁹ The Committee concluded that the contract between the co-executors was not "law" requiring Attorney A to reveal the financial information over the former client's objection:

281. *Id.*

282. VSB Comm. on Legal Ethics, Legal Ethics Op. 1811 (2005).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* ("Comment 22 to Rule 1.6 clarifies that the 'duty of confidentiality continues after the client-lawyer relationship has terminated.'"); *see also* VSB Comm. on Legal Ethics, Legal Ethics Ops. 812 (1986), 1207 (1989), 1664 (1996). Thus, even though Attorney A no longer represents Co-executor #1, he must nevertheless maintain the confidentiality of his former client's information.

289. *Id.*

Rule 1.6(b)(1) carves out an exception to the general ethical duty of confidentiality when needed to comply with "law." This committee opines that a contract is not "law." *Black's Law Dictionary* provides an extensive discussion of the concept encompassed by that term, with suggested definitions including, "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force," and "that which must be obeyed and followed by citizens subject to sanctions or legal consequences." The entry in *Black's* for "law" includes an extensive list of judicial authorities finding a laundry list of items within the reach of that term. In sum, that list is limited to statutes, judicial rulings, and various types of administrative regulations and rulings. Contracts, such as the agreement in this hypothetical, are not within that list.²⁹⁰

The Committee determined that Attorney A was proper in declining to provide the requested documents and instead referring the requester to the former client's new attorney.²⁹¹

R. Garnishment of Advanced Legal Fee Held in Trust Account

May a former attorney garnish a former client's advanced fee paid to a new lawyer? Legal Ethics Opinion 1807 concludes that this is permissible.²⁹² A client terminates his relationship with Attorney A during the course of litigation. The client then hires Attorney B.²⁹³ The client has an unpaid balance with Attorney A for attorney's fees, and Attorney A obtains a judgment against the client for them.²⁹⁴ Attempting to collect on the judgment, Attorney A causes a garnishment summons to be served on Attorney B as garnishee.²⁹⁵ The opinion concludes that it is permissible for the former attorney to garnish the funds in the new attorney's trust account.²⁹⁶ The opinion rests on the principle that money paid by a client held in the attorney's trust account to pay for future services remains the property of the client.²⁹⁷

290. *Id.*

291. *Id.*

292. VSB Comm. on Legal Ethics, Legal Ethics Op. 1807 (2004).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*; see also *Marcus, Santoro & Kozak v. Wu*, 274 Va. 743, 755, 652 S.E.2d 777, 783 (2007).

V. CONCLUSION

The practice of law is changing and the professional regulation of lawyers struggles to keep pace with these changes. Lawyers increasingly need guidance on legal ethics issues related to their practice. Although lawyers can be disciplined for violations of the Rules of Professional Conduct, they can also reduce the risks of receiving a bar complaint by contacting the Office of Ethics Counsel when confronted with an ethical dilemma. The law governing lawyers and legal ethics has evolved into a complex, specialized area of the law. Lawyers can no longer rely on the “smell test” to properly resolve an ethical dilemma.
