

11-2018

## Professional Responsibility

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### Recommended Citation

James McCauley, *Professional Responsibility*, 53 U. Rich. L. Rev. 111 (2018).  
Available at: <https://scholarship.richmond.edu/lawreview/vol53/iss1/7>

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## PROFESSIONAL RESPONSIBILITY

*James McCauley* \*

### INTRODUCTION

This article briefly describes some recent amendments to the Virginia Rules of Professional Conduct adopted by the Supreme Court of Virginia in 2016 and 2017. The changes affect the lawyer's duty to protect confidential client information in this digital age, lawyer advertising and solicitation, and candor with a tribunal. The article also discusses two legal ethics opinions adopted by the court addressing a lawyer's obligations when faced with another lawyer suffering from an impairment.

#### I. CYBERSECURITY AND THE DUTY TO PROTECT CLIENT DATA

Because law firms' information technology ("IT") systems contain sensitive, important, and valuable data, firms are increasingly the subject of attacks by cybercriminals.<sup>1</sup> In 2017 alone, large ransomware attacks ravaged legal organizations globally.<sup>2</sup> The international law firm of DLA Piper suffered a cyberattack resulting in the near stoppage of its operation for several days.<sup>3</sup> Lawyers were forced to work from their own personal electronic devices and email

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1. A ransomware virus can enter a company's network through various means. When it does, it locks up stored data, including the network, files, and other aspects of the target's IT system through encryption. It then provides instructions to where the attacked organization can send money, usually in Bitcoin, for the release or decryption of the hostage data. See generally Selena Larson & Jose Pagliery, *Ransomware: A Malicious Gift That Keeps on Giving*, CNN (July 31, 2017, 8:12 AM), <https://www.cnn.com/2017/07/28/us/ransomware-overview-declassified/index.html> (discussing recent ransomware attacks against various companies).

2. James Booth, *DLA Piper Hit by Cyber Attack, Phones and Computers Down Across the Firm*, LEGALTECH NEWS (June 27, 2017, 10:55 AM), <https://www.law.com/legaltechnews/sites/legaltechnews/2017/06/27/dla-piper-hit-by-cyber-attack-phones-and-computers-down-across-the-firm/>.

3. *Id.*

accounts.<sup>4</sup> In May 2017, another attack called “WannaCry” affected over 230,000 computers across 150 countries.<sup>5</sup> In 2016, hackers broke into the IT systems of Cravath, Swaine & Moore, LLP and Weil, Gotshal & Manges, LLP.<sup>6</sup>

In addition to a lawyer’s ethical duty to protect a client’s confidential information, data protection laws like the Health Insurance Portability and Accountability Act (“HIPAA”)<sup>7</sup> and the European Union’s General Data Protection Regulation (“GDPR”)<sup>8</sup> impose legal duties on businesses, including lawyers and law firms, to protect information. State and federal laws mandate privacy protection, security, and data breach notification for certain types of information.<sup>9</sup> Perhaps the most well-known are regulations promulgated under HIPAA, but there are many other laws. To date, all fifty states have enacted breach notification statutes.<sup>10</sup>

The Supreme Court of Virginia made changes to Rules 1.1 and 1.6 of the Rules of Integration of the Virginia State Bar, effective March 1, 2016.<sup>11</sup> Rule 1.1 addresses a lawyer’s duty to maintain competence.<sup>12</sup> The court added one sentence to Comment 6: “Atten-

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4. Jacob Gershman & Kate Fazzini, *Global Law Firm DLA Piper Faces Disruption After Cyber Attack*, WALL ST. J. (June 29, 2017, 3:16 PM ET), <https://www.wsj.com/articles/glob-bal-law-firm-dla-piper-faces-disruptions-after-cyberattack-1498763817>.

5. ABA CYBERSECURITY TASK FORCE, THE ABA CYBERSECURITY HANDBOOK 4 (Jill D. Rhodes & Robert S. Litt eds., 2d ed. 2018).

6. Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, WALL ST. J. (Mar. 29, 2016, 9:14 PM ET), <https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504>.

7. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.); Brent T. Wilson, *HIPAA for Lawyers—Taking Care with Patient Information*, 59 ADVOC. 44, 45 (2016).

8. Commission Regulation 2016/679, 2016 O.J. (L 119) 1–4, 16–18 (EU). United States law firms that do business with EU citizens and companies may be subject to the GDPR. Helen Gunnarsson, *U.S. Law Firms Must Prepare for GDPR, Panel Warns*, BLOOMBERG (Feb. 21, 2018), <https://biglawbusiness.com/u-s-law-firms-must-prepare-for-gdpr-panel-warns/>.

9. See generally BAKERHOSTETLER, DATA BREACH CHARTS (2018), [https://www.bakerlaw.com/files/Uploads/Documents/Data%20Breach%20documents/Data\\_Breach\\_Charts.pdf](https://www.bakerlaw.com/files/Uploads/Documents/Data%20Breach%20documents/Data_Breach_Charts.pdf).

10. For a list of states and their corresponding notification statutes, see *Security Breach Notification Laws*, NAT’L CONF. ST. LEGISLATURES (Sept. 29, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>.

11. Order Amending Part Six, Section II, Rule 1.1 and Rule 1.6, Rules of Supreme Court of Virginia (Dec. 17, 2015) (effective Mar. 1, 2016), [http://www.courts.state.va.us/courts/scv/amendments/2015\\_12\\_17\\_part6\\_section2\\_rule\\_1\\_1\\_1\\_6.pdf](http://www.courts.state.va.us/courts/scv/amendments/2015_12_17_part6_section2_rule_1_1_1_6.pdf).

12. VA. SUP. CT. R. 1.1 (Repl. Vol. 2018) (“A lawyer shall provide competent represen-

tion should be paid to the benefits and risks associated with relevant technology.”<sup>13</sup>

Rule 1.6 requires a lawyer to keep client information confidential.<sup>14</sup> The court amended Rule 1.6 by adding a subsection (d) that reads: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.”<sup>15</sup>

The court also added four paragraphs of comments to Rule 1.6, recognizing that a breach of information security can occur in an office setting, even when reasonable precautions are taken.<sup>16</sup> The comments include several important points, namely:

\* “The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure.”<sup>17</sup>

\* “[A] lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information.”<sup>18</sup>

\* “Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms.”<sup>19</sup>

\* Reasonableness can depend on the size of a law firm and the nature of the practice and information.<sup>20</sup>

\* A lawyer need not be the one with the required technical competence.<sup>21</sup> A lawyer can, and often must, turn to

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tation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

13. R. 1.1 cmt. 6 (Repl. Vol. 2018).

14. R. 1.6(a) (Repl. Vol. 2018).

15. R. 1.6(d) (Repl. Vol. 2018).

16. R. 1.6 cmt. 19–21 (Repl. Vol. 2018).

17. R. 1.6 cmt. 19 (Repl. Vol. 2018).

18. R. 1.6 cmt. 20 (Repl. Vol. 2018).

19. *Id.*

20. *Id.*

21. *Id.*

the expertise of staff or an outside technology professional.<sup>22</sup>

\* Law firms should address practices such as staff training, access policies, procedures for third-party access, backup and storage, passwords, and protective measures.<sup>23</sup>

As the Virginia State Bar's Special Committee on the Future of the Practice of Law ("Futures Committee") observed in its 2016 Report, cybersecurity must not remain static:

There is no such thing as "set it and forget it" when it comes to security. The threats and the defenses to those threats change constantly and firms must strive to keep up with the changes.

Lawyers once thought that we could stop attackers from entering law firm networks and we focused all our energies there. We now realize that a skilled hacker with sufficient funding and advanced technology is likely to succeed in attacking us. So the new mantra is Identify (assets that need to be protected), Protect, Detect, Respond, and Recover.

Even with our best efforts, a data breach may occur. We have only to look around to see major law firms that have been breached—and major companies as well. So the essential message of our new rules is "Don't let perfection be the enemy of the good." The focus is on reasonable efforts, which will certainly vary by size of law firm.<sup>24</sup>

For solo practitioners, small firms, and medium-sized law firms, the Futures Committee recommends the National Institute of Standards and Technology Cybersecurity Framework ("NIST Framework"),<sup>25</sup> which was recently updated.<sup>26</sup> Larger law firms often choose certification under the International Organization for Standardization Information ("ISO") Security Standard 27001.<sup>27</sup>

Although ethics rules and opinions are not where an attorney might normally look for practical guidance on protecting client data from cyberattack, the Supreme Court of Virginia did articulate some specific data protection measures when it adopted Comment 21 to Rule 1.6<sup>28</sup>:

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22. *Id.*

23. R. 1.6 cmt. 21 (Repl. Vol. 2018).

24. VA. STATE BAR, REPORT: THE STUDY COMMITTEE ON THE FUTURE OF LAW PRACTICE 6 (2016) [hereinafter FUTURES COMMITTEE REPORT].

25. *See id.* at 7.

26. *NIST Releases Version 1.1 of Its Popular Cybersecurity Framework*, NAT'L INST. STANDARDS & TECH. (Apr. 16, 2018), <https://www.nist.gov/news-events/news/2018/04/nist-releases-version-11-its-popular-cybersecurity-framework>.

27. FUTURES COMMITTEE REPORT, *supra* note 24, at 7.

28. R. 1.6 cmt. 21 (Repl. Vol. 2018).

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

- (a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;
- (b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;
- (c) Procedures addressing security measures for access of third parties to stored information;
- (d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
- (e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
- (f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.<sup>29</sup>

In addition, further and more specific guidance is found in the appendix to the Futures Committee Report and is entitled "Cybersecurity Best Practices."<sup>30</sup>

A lawyer's duty under Rule 1.6(d) includes the duty to exercise reasonable care when communicating with a client using email.<sup>31</sup> The Virginia State Bar has not addressed when and under what circumstances a lawyer must use encryption when communicating with a client. The consensus in the late 1990s was that, except in special circumstances, the use of email, including unencrypted email, was a proper method of communicating confidential information.<sup>32</sup> Given the frequency with which emails are misdirected to the wrong person, and the ease with which email communications are intercepted or hacked, some states' ethics opinions warn that under some circumstances lawyers need to encrypt emails sent to a client.<sup>33</sup>

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29. *Id.*

30. FUTURES COMMITTEE REPORT, *supra* note 24, app. at 23–24.

31. VA. SUP. CT. R. 1.6 cmt. 19 (Repl. Vol. 2018).

32. *See, e.g.*, ABA Comm'm on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999); Alaska Bar Ass'n Ethics Comm., Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998); Ill. State Bar Ass'n Advisory Op. on Prof'l Conduct, Op. 96-10 (1997); State Bar Ass'n of N.D. Ethics Comm., Op. No. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Vt. Bar Ass'n, Advisory Ethics Op. No 97-05 (1997).

33. *See, e.g.*, State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010); Prof'l Ethics Comm. for the State Bar of Tex., Op. No. 648 (2015).

A Texas State Bar ethics opinion has indicated that there may be circumstances under which lawyers have to encrypt email communications with their clients.<sup>34</sup> The Texas Bar's Ethics Committee concluded that attorneys who handle divorce, employment, or criminal defense matters may in some circumstances have a duty "to consider whether it is prudent to use encrypted email" to communicate with clients.<sup>35</sup> The opinion also addresses an issue that many experts have urged bar authorities to look at anew: whether technological changes and escalating concerns over computer hacking have made it necessary to revisit existing guidance on using email to communicate with clients.<sup>36</sup>

What are the circumstances that would require encryption? The Texas Bar Ethics Committee identifies these examples:

1. communicating highly sensitive or confidential information via email or unencrypted email connections;
2. sending an email to or from an account that the email sender or recipient shares with others;
3. sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer . . . ;
4. sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
5. sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
6. sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.<sup>37</sup>

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34. Prof'l Ethics Comm. for the State Bar of Tex., Op. No. 648 (2015).

35. *Id.* at 4.

36. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999). At an ABA Center for Professional Responsibility Conference session in 2015 on developments in confidentiality, it was noted that:

[T]he consensus on communicating with clients through unencrypted email—driven by a 1999 ABA ethics opinion that approved the practice—may be giving way as authorities reconsider the risks of email interception . . . [and that] "we have come a long way in [the] 16 years" since the ABA opinion was issued, and that a number of state ethics panels have shown a willingness to impose more onerous security requirements on lawyers.

Samson Habte, *Ethics Conference Speakers Warn Lawyers: Technological Ignorance Has Consequences*, BLOOMBERG (June 3, 2015), <https://www.bna.com/ethics-conference-speakers-n17179927326>.

37. Prof'l Ethics Comm. for the State Bar of Tex., Op. No. 648 (2015) (citations omitted).

In 2011, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued Formal Opinion 2011-200 that states:

Compounding the general security concerns for email is that users increasingly access webmail using unsecure or vulnerable methods such as cell phones or laptops with public wireless internet connections. Reasonable precautions are necessary to minimize the risk of unauthorized access to sensitive client information when using these devices and services, possibly including precautions such as encryption and strong password protection in the event of lost or stolen devices, or hacking.<sup>38</sup>

Comment 19 to Virginia Rule 1.6 embraces this concept, warning that lawyers must take reasonable precautions and providing a safe harbor from professional discipline if they do:

Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).<sup>39</sup>

Thus, in the nineteen years since the American Bar Association ("ABA") issued Formal Opinion 99-413, allowing communication with clients through unencrypted email, regulators have focused on additional precautions lawyers should take when transmitting sensitive confidential information, and the particular circumstances under which those communications are made.<sup>40</sup> Finally, on May 22, 2017, the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Standing Committee") issued Formal

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38. Pa. Bar Ass'n Comm. of Legal Ethics & Prof'l Responsibility, Formal Op. 2011-200, at 12 (2011).

39. VA. SUP. CT. R. 1.6 cmt. 19 (Repl. Vol. 2018).

40. See *id.*; Pa. Bar Ass'n Comm. of Legal Ethics & Prof'l Responsibility, Formal Op. 2011-200, at 12 (2011).



Opinion 477R on lawyers' responsibility as to encryption.<sup>41</sup> This opinion is an update to ABA Formal Opinion 99-413, published in 1999.<sup>42</sup> The newer opinion does not mandate the use of encryption to protect confidentiality in attorney-client email exchanges; nor does the opinion overrule the earlier 1999 opinion.<sup>43</sup> In writing Formal Opinion 477R, the ABA Standing Committee recognized that, unlike in 1999 when Formal Opinion 99-413 was issued, lawyers today "primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients."<sup>44</sup> It also recognized the explosion of varied devices and methods to create, store, and transmit confidential communications, all of which necessitated an update to the 1999 Formal Opinion.<sup>45</sup>

Instead of mandating encryption, the ABA Standing Committee found that lawyers need to employ a more flexible "fact-based analysis" to determine what measures, including encryption, meet the "reasonable efforts" standard required by Rule 1.6.<sup>46</sup> The ABA Standing Committee:

[R]ejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.<sup>47</sup>

For guidance as to what actions are "reasonable efforts" to protect confidential information, the ABA Standing Committee pointed to the factors set out in Comment 18 to ABA Model Rule of Professional Conduct 1.6—similar factors are set out in Comment 19 to Virginia Rule 1.6:

[T]he sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional

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41. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

42. *Id.* at 1.

43. *Id.* at 1, 4–5.

44. *Id.* at 1.

45. *Id.* at 1–2.

46. *Id.* at 4–5 ("A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances.")

47. *Id.* at 4 (quoting ABA CYBERSECURITY TASK FORCE, THE ABA CYBERSECURITY HANDBOOK 48–49 (Jill D. Rhodes & Vincent I. Polley eds., 1st ed. 2013)).

safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).<sup>48</sup>

With continued advances in relevant technology, attorneys' duties to their clients to protect confidential data will continue to evolve and require attorneys to keep abreast of developments in this area.<sup>49</sup> While the ethics opinions do not *require* lawyers to encrypt confidential client data, undoubtedly lawyers must use encryption or some other heightened measure of security that meets the "reasonable efforts" standard of Rule 1.6 where circumstances require it.<sup>50</sup> Encryption was once a difficult, expensive, time-consuming process; however, it is now easy, inexpensive, and fast.<sup>51</sup> There are many reputable third-party solutions for lawyers to explore.<sup>52</sup> These offerings generally work by filtering sent emails (from whatever email platform used) through a secure server/system or hardware device for encryption, providing the recipient with an email containing a hyperlink to retrieve the encrypted email.<sup>53</sup> For stored data, "cloud" and server-based systems provide encryption that is easily initialized and applied.<sup>54</sup> Lawyers need to become familiar with and consider employment of encryption in the course of their practice.

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48. VA. SUP. CT. R. 1.6 cmt. 19 (Repl. Vol. 2018); MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 18 (AM. BAR ASS'N 2018).

49. See ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

50. *Id.* at 4–5.

51. See generally SHARON D. NELSON & JOHN W. SIMEK, D.C. BAR, ENCRYPTION IS NOW CHEAP AND SIMPLE AND MAY BE ETHICALLY REQUIRED 1 (2016), <https://www.dcb.org/bar-resources/practice-management-advisory-service/upload/Cheap-Simple-Encryption-final.pdf>.

52. See ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 7 (2017).

53. See *id.* See generally David G. Ries & John W. Simek, *Encryption Made Simple for Lawyers*, 29 GPSOLO, Nov.–Dec. 2012, at 18, 22–23, [https://www.americanbar.org/content/dam/aba/publications/gp\\_solo\\_magazine/November\\_December\\_2012/gpsolo\\_november\\_december\\_2012.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/gp_solo_magazine/November_December_2012/gpsolo_november_december_2012.authcheckdam.pdf).

54. See ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 7 (2017).

## II. LAWYER ADVERTISING AND SOLICITATION IN THE 21ST CENTURY

Effective July 1, 2017, the Supreme Court of Virginia amended Rules 7.1 through 7.5 of the Virginia Rules of Professional Conduct.<sup>55</sup> The 2017 amendments were a sequel to substantial revisions made in 2013, the earlier amendments having resulted in the removal of a per se ban on in-person solicitation in cases involving personal injury and wrongful death.<sup>56</sup> The combined result of the 2013 and 2017 amendments was the elimination of Rules 7.2, 7.4, and 7.5, leaving only Rules 7.1 and 7.3 to address all lawyer advertising and solicitation issues.<sup>57</sup>

The impetus for the 2017 amendments to Rules 7.1, 7.4, and 7.5 was a report and recommendation issued by the Regulation of Lawyer Advertising Committee of the Association of Professional Responsibility Lawyers (“APRL Advertising Committee”) in 2015 (“APRL Advertising Committee Report”).<sup>58</sup> The APRL Advertising Committee Report identified numerous problems with many state bar advertising regulations and discussed the need to simplify and modernize lawyer advertising regulations, especially in light of changes caused by the rise of internet marketing and communications and increasing concerns about constitutional and antitrust challenges to advertising regulations.<sup>59</sup> The APRL Advertising Committee included regulators, law professors, and experts in the field of professional responsibility.<sup>60</sup> The committee has actively promoted and encouraged adoption of its recommendations with

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55. Order Amending Part Six, Section II, Rules 7.1 through 7.5, Rules of Supreme Court of Virginia (Apr. 17, 2017) (effective July 1, 2017), [http://www.courts.state.va.us/courts/scv/amendments/part\\_6\\_sect\\_ii\\_para\\_7\\_1\\_thru\\_7\\_5.pdf](http://www.courts.state.va.us/courts/scv/amendments/part_6_sect_ii_para_7_1_thru_7_5.pdf).

56. Order Amending Part Six, Section II, Rules 7.1 through 7.5, Rules of Supreme Court of Virginia (Apr. 15, 2013) (effective July 1, 2013), [http://www.courts.state.va.us/courts/scv/amendments/2013\\_0415\\_rules\\_7\\_1\\_7\\_5.pdf](http://www.courts.state.va.us/courts/scv/amendments/2013_0415_rules_7_1_7_5.pdf).

57. Order Amending Part Six, Section II, Rules 7.1 through 7.5, Rules of Supreme Court of Virginia (Apr. 17, 2017) (effective July 1, 2017), [http://www.courts.state.va.us/courts/scv/amendments/part\\_6\\_sect\\_ii\\_para\\_7\\_1\\_thru\\_7\\_5.pdf](http://www.courts.state.va.us/courts/scv/amendments/part_6_sect_ii_para_7_1_thru_7_5.pdf); Order Amending Part Six, Section II, Rules 7.1 through 7.5, Rules of Supreme Court of Virginia (Apr. 15, 2013) (effective July 1, 2013), [http://www.courts.state.va.us/courts/scv/amendments/2013\\_0415\\_rules\\_7\\_1\\_7\\_5.pdf](http://www.courts.state.va.us/courts/scv/amendments/2013_0415_rules_7_1_7_5.pdf).

58. ASS’N OF PROF’L RESPONSIBILITY LAWYERS, 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE (2015), [hereinafter APRL ADVERTISING COMMITTEE REPORT] [https://aprl.net/wp-content/uploads/2016/07/APRL\\_2016\\_Lawyer-Advertising-Supplemental-Report\\_04-26-16\\_w-Attach.pdf](https://aprl.net/wp-content/uploads/2016/07/APRL_2016_Lawyer-Advertising-Supplemental-Report_04-26-16_w-Attach.pdf).

59. *See id.* at 5.

60. *Id.* at 3.

the goal of making states' lawyer advertising rules more uniform, consistent, sensible, and enforceable.<sup>61</sup>

In its report, the APRL Advertising Committee stated that “[t]he rules of professional conduct governing lawyer advertising in effect in most jurisdictions are outdated and unworkable in the current legal environment and fail to achieve their stated objectives.”<sup>62</sup> The committee also observed that increasing regulation of lawyer advertising by state bars has been met with constitutional challenges in the courts, with little or no consumer protection to justify the regulation:

The trend toward greater regulation in response to diverse forms of electronic media advertising too often results in overly restrictive and inconsistent rules that are under-enforced and, in some cases, are constitutionally unsustainable under the Supreme Court's *Central Hudson* test. Moreover, anticompetitive concerns, as well as First Amendment issues, globalization of the practice of law, and rapid technology changes compel a realignment of the balance between the professional responsibility rules and the constitutional right of lawyers to communicate with the public.<sup>63</sup>

The APRL Advertising Committee conducted a survey and received responses from thirty-four of fifty-one jurisdictions regarding the enforcement of lawyer advertising violations in their respective jurisdictions.<sup>64</sup> Based upon empirical data—reviewing bar reports, public surveys and studies, relevant constitutional law decisions, and anecdotal material—the committee found that:

Simply stated, current regulations of lawyer advertising are unworkable and fail to achieve their stated objectives. Survey results show that there are too many state deviations from the ABA Model Rules, actual formal lawyer discipline imposed for advertising violations is rare, lawyers are disheartened by the burden of attempting to determine which regulations apply to the ever-changing technological options for advertising, and consumers of legal services want *more*, not

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61. *Id.* The APRL Advertising Committee members have given presentations to bar leaders all over the United States. Many of the APRL Advertising Committee Report's recommendations are supported by the ABA's Standing Committee on Ethics and Professional Responsibility. Proposed amendments to the ABA Model Rules 7.1 through 7.5 were adopted by the ABA House of Delegates at their Annual Meeting in August 2018. See ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT TO THE ABA HOUSE OF DELEGATES 1 (2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_dar\\_resolution\\_and\\_report\\_advertising\\_report\\_as\\_amended\\_by\\_rules\\_and\\_calendar\\_for\\_submission\\_004.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_dar_resolution_and_report_advertising_report_as_amended_by_rules_and_calendar_for_submission_004.authcheckdam.pdf).

62. APRL ADVERTISING COMMITTEE REPORT, *supra* note 58, at 3.

63. *Id.*

64. *Id.*

less, information about legal services. The basic problem with the current state patchwork of lawyer advertising regulations lies with the increasingly complex array of inconsistent and divergent state rules that fail to deal with evolving technology and innovations in the delivery and marketing of legal services. The state hodge-podge of detailed regulations also present First Amendment and antitrust concerns in restricting the communication of accurate and useful information to consumers of legal services.<sup>65</sup>

To the APRL Advertising Committee, “a practical solution to these problems is best achieved by having a single rule that prohibits false and misleading communications about a lawyer or the lawyer’s services.”<sup>66</sup>

The APRL Advertising Committee Report greatly influenced the Virginia State Bar’s movement to overhaul its lawyer advertising rules in a substantial and meaningful way.<sup>67</sup> In its petition to the Supreme Court of Virginia, the Virginia State Bar observed:

The regulation of lawyer advertising has been problematic for decades. State bars and regulatory officials have struggled attempting to address and balance legitimate regulatory goals with the constitutional restrictions on regulating commercial speech, and the understandable, but legally infirm, goal of “promoting professionalism” or promoting the public perception of lawyers. More recently, the explosion of the internet and media age has compounded these difficulties, with radical changes in the ways people exchange information, make decisions, and select professionals, and likewise the manner in which professionals network and promote their services.<sup>68</sup>

In recommending the amendments to the Supreme Court of Virginia, the Virginia State Bar articulated these fundamental goals:

(1) the advertising rules should be focused on the appropriate regulatory purpose, protecting the public; (2) the rules must facially and as applied withstand constitutional scrutiny; (3) the rules must be legally and practically enforceable; and (4) the rules should be practical in application to evolving means of communication and promotion of legal services.<sup>69</sup>

The 2017 revisions refocus the lawyer advertising rules to a single regulatory standard: communications about a lawyer’s services

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65. *Id.* at 5.

66. *Id.* at 3.

67. Petition at 3–4, *In re* Supreme Court Rules, Part Six, Section II, Rules 7.1 through 7.5 (Va. Mar. 14, 2017) <http://www.vsb.org/docs/prop-rules-7-scvpetition-031417.pdf>.

68. *Id.* at 1–2.

69. *Id.* at 2.

may not be false or misleading.<sup>70</sup> The amendments deleted Rule 7.4, regarding specialization claims and certifications, and Rule 7.5, regarding the use of firm and trade names, while importing certain principles from those rules into the new comments.<sup>71</sup> Revisions to Rule 7.3 reinforce appropriate but less restrictive limitations on the solicitation of potential clients.<sup>72</sup> Claims of specialization and the content of firm names—previously addressed by Rules 7.4 and 7.5, respectively—are covered in comments to Rule 7.1, since they are specific applications of the general obligation not to make false or misleading statements.<sup>73</sup> The amendments deleted the required disclaimer for advertising specific case results from Rule 7.1, again shifting to a general false or misleading standard rather than imposing a mandatory, technical “one-size-fits-all” disclaimer.<sup>74</sup> Rule 7.3, which addresses solicitation of clients, is amended to more explicitly define the term “solicitation” and to expand the comments to more clearly explain its application to issues such as paying for marketing services or lead generation.<sup>75</sup>

After a thorough review and exposition of all the relevant lawyer advertising and commercial speech decisions of the Supreme Court of the United States and pertinent lower court cases, the APRL Advertising Committee stated:

The clear direction in which the United States Supreme Court has taken the regulation of commercial speech emphasizes that government must prove that the regulation it is defending does in fact advance an important regulatory interest, refusing to accept mere “common sense” or speculation as a sufficient basis for restrictions on advertising. In other words, the government must present objective evidence to support a ban or restriction on truthful commercial speech and cannot simply ban or restrict speech by fiat grounded in subjective intuition that the advertising is “potentially misleading.” For example, in *Florida Bar v. Went For It, Inc.*, the Court went out of its way to compare the empirical evidence presented to support a thirty-day ban on targeted direct mail solicitation of accident victims to the lack of similar data in *Edenfield v. Fane*, in which the Court invalidated a Florida ban on in person solicitation by certified public accountants.<sup>76</sup>

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70. *Id.*

71. *Id.* at 24–26.

72. *Id.* at 20–21.

73. *Id.* at 15–19.

74. *Id.* at 15–16.

75. *Id.* at 20, 22.

76. APRL ADVERTISING COMMITTEE REPORT, *supra* note 58, at 18.

With the adoption of the amendments to the lawyer advertising rules by the Supreme Court of Virginia in 2017, Virginia is the first state to embrace the recommendations of the APRL Advertising Committee.<sup>77</sup> These changes will not weaken enforcement of lawyer advertising regulation, but will strengthen enforcement by focusing on the content of a lawyer's statement or claim and the context in which it is made to determine whether the communication is actually false or misleading.

### III. TO TELL THE TRUTH: A LAWYER'S DUTY WHEN A CLIENT INTENDS TO COMMIT PERJURY

Effective December 1, 2016, the Supreme Court of Virginia adopted amendments to Rules 1.6<sup>78</sup> and 3.3<sup>79</sup> of the Virginia Rules of Professional Conduct.<sup>80</sup> Although some other significant changes were adopted, the Virginia State Bar petitioned the court to adopt these rule changes primarily to clarify a lawyer's ethical duties when the client has stated an intent to commit perjury.<sup>81</sup> The result of these amendments is that withdrawal from representation, with leave of court if the subject of the representation is in pending criminal or civil litigation, is a sufficient remedial measure if a lawyer knows that a client intends to commit perjury.<sup>82</sup> The amendments leave intact the lawyer's traditional obligations when faced with this situation: to remonstrate the client not to commit perjury, to advise the client of the legal consequences of doing so, to inform the client that the lawyer will seek leave to withdraw, and to inform the court of the perjury if the client takes the stand and lies under oath.<sup>83</sup>

#### A. *The 2016 Amendments to Rule 1.6*

The amendments approved by the court removed the client's stated intent to commit perjury as a matter which the lawyer may

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77. Joan C. Rogers, *Virginia Is the First to Streamline Lawyer Advertising Rules*, BLOOMBERG (May 4, 2017), [https://www.bna.com/virginia-first-streamline-n730144\\_50472/](https://www.bna.com/virginia-first-streamline-n730144_50472/).

78. VA. SUP. CT. R. 1.6 (Repl. Vol. 2018).

79. R. 3.3 (Repl. Vol. 2018).

80. Order Amending Part Six, Section II, Rule 1.6 and Rule 3.3, Rules of Supreme Court of Virginia (Sept. 30, 2016) (effective Dec. 1, 2016), [http://www.courts.state.va.us/courts/scv/amendments/2016\\_0930\\_rule\\_1\\_6\\_rule\\_3\\_3.pdf](http://www.courts.state.va.us/courts/scv/amendments/2016_0930_rule_1_6_rule_3_3.pdf).

81. *Id.* at 2, 4.

82. *Id.* at 4–6.

83. *Id.* at 5.

be required to report under Rule 1.6(c)(1), and also redefined what intended “crimes” a lawyer may have a duty to report under that rule.<sup>84</sup> As amended, the *current* rule states:

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3.<sup>85</sup>

In contrast, the *former* version of Rule 1.6(c)(1) literally required the lawyer to report the client’s stated intent to commit *any* crime, including the client’s intent to commit perjury:

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.<sup>86</sup>

Because of its inclusion of perjury as an intended crime, the former rule seemed to require that the lawyer report the client’s intent to commit perjury, unless the client had abandoned his or her intent, regardless of the stage of the proceedings, and regardless of whether the lawyer successfully withdrew from the case or never entered an appearance in the first place.<sup>87</sup>

Further, the amendments deleted Rule 1.6(c)(2), which required a lawyer to report a client’s fraud on a tribunal, because current Rule 3.3 addresses that same issue and provides better guidance

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84. VA. SUP. CT. R. 1.6 (Repl. Vol. 2018).

85. *Id.*

86. Petition at 13, *In re* Supreme Court Rules, Part Six, Section II, Rules 1.6 and 3.3 (Va. June 28, 2016) [http://www.vsb.org/docs/prop-rpc-1\\_6-3\\_3-SCVpetition-062816.pdf](http://www.vsb.org/docs/prop-rpc-1_6-3_3-SCVpetition-062816.pdf).

87. *Id.*



on a lawyer's obligations when confronted with a situation in which the client either intends to commit perjury or has already given false testimony under oath in a legal proceeding.<sup>88</sup>

The amendments also added a permissive disclosure exception to Rule 1.6(b) that would allow a lawyer to reveal confidential information that the lawyer believes is reasonably necessary "to prevent reasonably certain death or substantial bodily harm."<sup>89</sup> This provision mirrors ABA Model Rule 1.6(b)(1) and permits the lawyer to disclose information about actions by the client or third parties that are reasonably certain to lead to death or substantial bodily harm, even if the harm is not the result of a crime.<sup>90</sup> The Committee revised various comments to the Rule to reflect these changes, including adding Comment 8(a) from the ABA Model Rules to elaborate on the disclosure permitted by Rule 1.6(b)(7).<sup>91</sup>

### B. *The 2016 Amendments to Rule 3.3*

Having established that Rule 3.3 is the sole source of a lawyer's obligations in situations involving client perjury, the court adopted amendments to Rule 3.3 to clarify and reinforce a lawyer's duty to take remedial measures if the lawyer is aware that he has made false statements or presented false evidence to a tribunal in the course of the proceeding.<sup>92</sup> As Comment 10 to Rule 3.3 explains:

[A] lawyer may be surprised when the lawyer's client, or another witness, offers testimony during that proceeding that the lawyer knows to be false. In such situation or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal

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88. *Id.*; R. 3.3 (Repl. Vol. 2018).

89. R. 1.6(b)(7) (Repl. Vol. 2018).

90. *Id.*; MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1) (AM. BAR ASS'N 2018).

91. R. 1.6 cmt. 8(a) (Repl. Vol. 2018).

92. Order Amending Part Six, Section II, Rule 1.6 and Rule 3.3, Rules of Supreme Court of Virginia (Sept. 30, 2016) (effective Dec. 1, 2016), [http://www.courts.state.va.us/courts/scv/amendments/2016\\_0930\\_rule\\_1\\_6\\_rule\\_3\\_3.pdf](http://www.courts.state.va.us/courts/scv/amendments/2016_0930_rule_1_6_rule_3_3.pdf); see Petition, *supra* note 86, at 2–3.

information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.<sup>93</sup>

At the same time, the Supreme Court of Virginia adopted the Ethics Committee's recommendation that the duty to take remedial measures under Rule 3.3 be limited in duration.<sup>94</sup> As a result, the court added paragraph (e)<sup>95</sup> and accompanying Comment 15,<sup>96</sup> both from the ABA Model Rule, to establish and explain a definite time limit on the lawyer's duty to disclose and rectify false evidence or false statements made to the court.<sup>97</sup> The rules continue to require that if a lawyer knows that a client has committed perjury, the lawyer must report that fact to the court promptly.<sup>98</sup> The change only affects perjury or false evidence that is revealed to the lawyer *after* a final order has been entered and the time for an appeal has expired.<sup>99</sup> The Ethics Committee's recommendation noted:

While recognizing the laudatory premise underlying the current rule, the Committee concluded that the duty to report should be subject to a sensible time limit on and the conclusion of the proceeding—after a final order has been entered and the time for an appeal has run—provided a practical and objective framework . . . . [T]his time limit strikes an appropriate balance by requiring disclosure of the client's perjury when the matter is still before the court and there is the opportunity for effective remedial action, but protecting the client's confidences regarding past conduct once the matter is final.<sup>100</sup>

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93. R. 3.3 cmt. 10 (Repl. Vol. 2018).

94. R. 3.3 cmt. 15 (Repl. Vol. 2018); Order Amending Part Six, Section II, Rule 1.6 and Rule 3.3, Rules of Supreme Court of Virginia (Sept. 30, 2016) (effective Dec. 1, 2016), [http://www.courts.state.va.us/courts/scv/amendments/2016\\_0930\\_rule\\_1\\_6\\_rule\\_3\\_3.pdf](http://www.courts.state.va.us/courts/scv/amendments/2016_0930_rule_1_6_rule_3_3.pdf); Petition, *supra* note 86, at 31.

95. R. 3.3(e) (Repl. Vol. 2018) ("The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.").

96. R. 3.3(e) cmt. 15 (Repl. Vol. 2018) (The obligation to rectify false evidence or false statements of law and fact should have a practical time limit. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.).

97. *Id.*; MODEL RULES OF PROF'L CONDUCT r. 3.3(c) cmt. 13 (AM. BAR ASS'N 2018).

98. R. 3.3(e) cmt. 15 (Repl. Vol. 2018).

99. *Id.*

100. Petition, *supra* note 86, at 9–10.

#### IV. AM I MY BROTHER'S KEEPER? ETHICAL DUTIES WHEN FACED WITH AN IMPAIRED LAWYER

“Work hard, play hard” is an expression used by many to describe the lifestyle of a hard-driven lawyer, defined by long hours at the office and destructive behavior involving substance abuse, poor eating habits, lack of exercise, and bad management of stress. David R. Brink, former President of the ABA put it like this: “Lawyers, judges, and law students are faced with an increasingly competitive and stressful profession. Studies show that substance use, addiction and mental disorders, including depression and thoughts of suicide—often unrecognized—are at shockingly high rates.”<sup>101</sup>

There is a new movement afoot for stakeholders in the legal system to be concerned about “lawyer well-being” and to recognize that being a good lawyer means being a healthy lawyer—physically, mentally, and emotionally.<sup>102</sup> On August 14, 2017, the National Task Force on Lawyer Well-Being (“Task Force”) issued a report<sup>103</sup> recommending that lawyers, judges, regulators, law schools, employers that hire lawyers, admissions officials, bar associations, lawyers assistance programs, and professional liability insurers take a serious and close look at lawyer well-being issues, and recommending practical steps for each stakeholder to take to improve the health of legal professionals.<sup>104</sup> The fifteen-member task force, which included Chief Justice Donald Lemons of the Supreme Court of Virginia, drew from prominent members of the legal community in the United States and representatives of the affected stakeholders.<sup>105</sup>

In Legal Ethics Opinion 1886, approved by the Supreme Court of Virginia on December 15, 2016, the committee cited a 2016 study funded by the ABA Commission on Lawyer Assistance Programs and the Hazelton Betty Ford Foundation.<sup>106</sup> The study reported

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101. BREE BUCHANAN & JAMES C. COYLE, NATIONAL TASK FORCE ON LAWYER WELL-BEING 2 (2017) [hereinafter TASK FORCE REPORT], <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>.

102. *Id.* at 1.

103. *Id.*

104. *Id.* at 22, 25, 31, 35, 41, 43, 45.

105. *Id.* at 1.

106. VA. CODE ANN. L. Ethics Op. 1886 (Repl. Vol. 2018) (citing Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MEDICINE 46 (2016)).

that lawyers experience depression, alcoholism, and other substance abuse at a rate much higher than other professional populations and two to three times that of the general population.<sup>107</sup> Surveying nearly 13,000 active practicing lawyers, the study found that over 20% qualified as problem drinkers, and that approximately 28%, 19%, and 23% were struggling with some level of depression, anxiety, and stress, respectively.<sup>108</sup> The study also found that younger lawyers in the first ten years of practice and those working in private firms experience the highest rates of problem drinking and depression.<sup>109</sup> A 2014 survey of fifteen law schools and 11,000 law students revealed that 17% experienced some level of depression, 14% experienced severe anxiety, 23% had mild or moderate anxiety, and 6% had reported serious suicidal thoughts in the past year.<sup>110</sup> As to alcohol use, 43% reported binge drinking at least once in the preceding two weeks and nearly one-fourth (22%) reported binge-drinking two or more times during that period.<sup>111</sup> Over one-fourth fell into the category of being at risk for alcoholism, for which further screening was recommended.<sup>112</sup>

These studies point to the dire reality that the seeds of self-destructive behavior and unhealthy living begin early in a lawyer's career, and that our profession is afflicted much more than the general population.<sup>113</sup> Aside from mental health disorders and alcohol abuse, the Task Force identified increasing dissatisfaction among lawyers with their work, "burnout," and higher levels of incivility and unprofessional conduct.<sup>114</sup> Lawyers are moving between law firms at an ever-increasing rate, and typically do so multiple times over the course of their careers.<sup>115</sup> The Task Force noted that "[t]he parade of difficulties also includes suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction, a "diversity crisis," complaints of work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception."<sup>116</sup>

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107. Krill et al., *supra* note 106, at 46.

108. *Id.*

109. *Id.* at 51.

110. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 124, 136–37, 139 (2016).

111. *Id.* at 128–29.

112. *Id.* at 131.

113. See Krill et al., *supra* note 106, at 46.

114. TASK FORCE REPORT, *supra* note 101, at 8, 15.

115. *Id.* at 8.

116. *Id.* at 7.

The Task Force's report exhorts a call to action to improve the culture and reduce the toxicity in our profession.<sup>117</sup> Lawyer well-being is important from a legal ethics perspective because lawyers owe a duty to represent clients competently and diligently.<sup>118</sup> Indeed, a lawyer who is physically or mentally impaired may be required to withdraw from representing a client pursuant to Rule 1.16(a)(2).<sup>119</sup>

Against this backdrop, the Supreme Court of Virginia adopted Legal Ethics Opinion 1886, which addresses the ethical obligations of lawyers in a law firm that have supervisory authority over a lawyer who is showing signs of impairment.<sup>120</sup> When working in a law firm, lawyers have a duty under Rule 5.1(a) of the Rules of Professional Conduct to have procedures in place to assure that lawyers under their direct supervisory authority comply with the Rules of Professional Conduct.<sup>121</sup> Rule 5.1 requires that a partner or supervisory lawyer make reasonable efforts to ensure that an impaired lawyer in the firm or under their supervisory authority does not violate the Rules of Professional Conduct.<sup>122</sup> When a partner or supervising lawyer knows or reasonably believes that a lawyer under their direction and control is impaired, Rule 5.1(b)<sup>123</sup> requires that they take reasonable steps to prevent the impaired lawyer from violating the Rules of Professional Conduct.<sup>124</sup>

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117. *See id.*

118. VA. SUP. CT. R. 1.1, 1.3 (Repl. Vol. 2018).

119. (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

...

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

R. 1.16(a) (Repl. Vol. 2018); *see also In re Taylor*, 959 P.2d 901, 902 (Kan. 1998) (alcoholic lawyer failed to withdraw from representation although he had failed to appear in court on behalf of his clients or otherwise provide competent counsel); *State ex rel. Okla. Bar Ass'n v. Southern*, 15 P.3d 1, 8 (Okla. 2000) (lawyer with B-12 deficiency publicly censured after failing to respond to requests for information from client and bar association).

120. VA. CODE ANN. L. Ethics Op. 1886 (Repl. Vol. 2018).

121. R. 5.1(a) (Repl. Vol. 2018) ("A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.")

122. *Id.*

123. R. 5.1(b) (Repl. Vol. 2018) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.")

124. VA. CODE ANN. L. Ethics Op. 1886 (Cum. Supp. 2018).

In Legal Ethics Opinion 1886, the Legal Ethics Committee explained that a lawyer's impairment does not excuse the lawyer from fulfilling ethical duties the lawyer owes to a client:

Impaired lawyers have the same ethical obligations as any other lawyer. Like all lawyers, an impaired lawyer owes a duty to represent a client competently and with diligence and to communicate with the client. A lawyer's impairment does not excuse the lawyer from compliance with the Rules of Professional Conduct. The lawyer's impairment may very well be the reason for the lawyer's failure to act competently or with diligence, or to communicate with the client. However, the lawyer's impairment is neither a defense to, nor an excuse for, those ethical breaches.<sup>125</sup>

The Legal Ethics Committee also cited the ABA's Standing Committee on Ethics and Professionalism in ABA Formal Opinion 03-429:

The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.<sup>126</sup>

The Legal Ethics Committee further suggested other actions a law firm might take toward restricting an impaired lawyer's work or responsibility in the law firm:

The law firm may be able to work around or accommodate some impairment situations. For example, the firm might be able to reduce the impaired lawyer's workload, require supervision or monitoring, or remove the lawyer from time-sensitive projects. The impaired lawyer

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125. *Id.* at 3–4; *Columbus Bar Ass'n v. Korda*, 760 N.E.2d 824 (Ohio 2002) (impaired lawyer who filed a brief on behalf of her clients but failed to take any further actions in the case suspended for failing to act diligently); *Attorney Grievance Comm'n v. Wallace*, 793 A.2d 535, 545 (Md. 2001) (lawyer who claimed to be undergoing personal and psychological problems was disbarred for being negligent in his representation in six cases); *In re Sheridan*, 813 A.2d 449, 450, 455 (N.H. 2002) (impaired lawyer who failed to successfully file the articles of incorporation for his client and did not notify the client of his failure suspended for failing to communicate with his client); *In re Francis*, 4 P.3d 579, 580 (Kan. 2000) (depressed lawyer failed to respond to client's request for information, misrepresented the status of the client's case to her, and failed to communicate the problems he was experiencing in providing representation); *State ex rel. Okla. Bar Ass'n Southern*, 15 P.3d 1, 2 (Okla. 2000); see also ABA Standing Committee on Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003) (noting that a lawyer's impairment does not excuse failure to meet a lawyer's duty to a client).

126. ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003).

may not be capable of handling a jury trial but could serve in a supporting role performing research and drafting documents. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, the firm may have an obligation to supervise the work performed by the impaired lawyer or may have a duty to prevent the lawyer from rendering legal services to clients of the firm, until the lawyer has recovered from the impairment. The impaired lawyer's role might be restricted solely to giving advice to and drafting legal documents only for other lawyers in the firm who in turn can evaluate whether the impaired lawyer's work product can be used in furtherance of a client's interests.<sup>127</sup>

Additionally, the Legal Ethics Committee also explained that some other proactive measures may be necessary in order for a law firm to meet its ethical obligations under Rule 5.1 when faced with an impaired lawyer working in the firm:

In order to protect its clients, the firm should have an enforceable policy that would require, and a partner or supervising lawyer should insist, that the impaired lawyer seek appropriate assistance, counseling, therapy, or treatment as a condition of continued employment with the firm. For example, the firm could recommend, encourage or direct that the impaired lawyer contact Lawyers Helping Lawyers<sup>128</sup> for an evaluation and assessment of his or her condition and referral to appropriate medical or mental health care professionals for treatment and therapy. Alternatively, making a confidential report to Lawyers Helping Lawyers may be an appropriate step for the firm. The firm or its managing lawyers might instead find it necessary or appropriate to consult with a professional medical or health care provider for advice on how to deal with and manage an impaired lawyer, including considering options for an "intervention" or other means of encouraging the lawyer to seek treatment or therapy.<sup>129</sup>

If the supervising attorneys in a firm have taken reasonable measures in dealing with an impaired lawyer to prevent or reduce

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127. VA. CODE ANN. L. Ethics Op. 1886 (Cum. Supp. 2018).

128. Lawyers Helping Lawyers ("LHL") is an independent, non-disciplinary, and non-profit organization that has been assisting legal professionals and their families since 1985 deal with depression, addiction and cognitive impairment. LHL can assist law firms dealing with an impaired lawyer through a confidential environment by planning and implementing intervention, providing a free clinical evaluation, referral to appropriate medical and mental health care providers, peer support and group counseling, establishing contracts to monitor and report recovery and rehabilitation and assist and identify financial resources for treatment. LHL is not affiliated with the Virginia State Bar and does not share information with anyone except and unless the participating lawyer expressly consents in writing to share information with third parties.

VA. CODE ANN. L. Ethics Op. 1886, at n.9 (Repl. Vol. 2018); VA. LAWYERS HELPING LAWYERS, *Frequently Asked Questions*, <http://www.valhl.org/faqs> (last visited Oct. 1, 2018).

129. VA. CODE ANN. L. Ethics Op. 1886 (Cum. Supp. 2018).

the risk of further harm to clients, or when an impaired lawyer is in recovery and has yet to engage in any serious misconduct, it may not be necessary for the firm to make a report to the Virginia State Bar.<sup>130</sup> However, as stated in Legal Ethics Opinion 1886:

[I]f the past conduct of the impaired lawyer involves dishonesty, i.e., embezzlement of client funds, or stealing firm funds or assets, any other lawyer in the firm that knows of such misconduct must report it to the bar under Rule 8.3(a). This would be required even if the violating lawyer was participating with Lawyers Helping Lawyers and in recovery.<sup>131</sup>

### CONCLUSION

As suggested by the recent rule amendments, technological advancements in the practice of law will undoubtedly require more changes to the rules regulating lawyer conduct. The challenge for lawyer regulators is keeping pace with those changes in the future. Virginia is in the forefront in modernizing its lawyer advertising rules. Time will tell whether other states' lawyer regulatory authorities will follow suit so that lawyers practicing in multiple jurisdictions will ultimately see more uniform regulations from state to state. The legal profession faces a lawyer wellness crisis that threatens its integrity and public confidence in the competent delivery of legal services. Clients can expect more initiatives by the bar to address this problem.

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130. ABA Standing Comm. On Ethics & Prof'l Responsibility Formal Op. 03-429 (2003).

131. VA. CODE ANN. L. Ethics Op. 1886 (Cum. Supp. 2018).