

1990

Annual Survey of Virginia Law: Professional Responsibility

Timothy M. Kaine
University of Richmond

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

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

Recommended Citation

Timothy M. Kaine, *Annual Survey of Virginia Law: Professional Responsibility*, 24 U. Rich. L. Rev. 715 (1990).
Available at: <http://scholarship.richmond.edu/lawreview/vol24/iss4/13>

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

PROFESSIONAL RESPONSIBILITY

*Timothy M. Kaine**

This year, like many years, has been marked by increasing public concern over legal ethics. Public attention has been drawn to lawyers' participation in scandals such as the misuse of funds by the Department of Housing and Urban Development, the collapse of the savings and loan industry, and numerous ethical breaches by members of Congress.

Despite increasing concern there has been no radical change in the basic regulatory landscape affecting lawyer behavior. In the absence of dramatic change, however, there have been a few important developments that may lay the groundwork for more widespread reform in the future.

This survey will focus on four major subjects in the area of professional responsibility. Part I will examine significant judicial decisions affecting the substantive scope of the Virginia Code of Professional Responsibility.¹ Part II will discuss developments in disciplinary enforcement by the Virginia State Bar Association, the professional association with mandatory jurisdiction over all lawyers practicing in the Commonwealth.² Part III will focus specifically on the growing use of sanctions in state and federal litigation as a way to regulate trial conduct.³ Finally, Part IV will examine the growing ethical critique of hourly billing methods.⁴

I. ETHICAL OBLIGATIONS

Virginia lawyers are governed by the Virginia Code of Professional Responsibility (the "Code" or "Code of Virginia"), an ethical code adopted as part of the Rules of the Supreme Court of

* Director, Mezzullo & McCandlish, Richmond, Virginia; Adjunct Associate Professor of Law, T.C. Williams School of Law, University of Richmond; J.D., 1983, Harvard Law School; 1979, A.B., University of Missouri.

1. See *infra* text accompanying notes 5-18.

2. See *infra* text accompanying notes 19-24.

3. See *infra* text accompanying notes 25-33.

4. See *infra* text accompanying notes 33-39.

Virginia in 1983.⁵ The Code is modeled closely after the Model Code of Professional Responsibility (the "Model Code") promulgated by the American Bar Association ("ABA") in 1970.⁶ While the ABA replaced the Model Code with its Model Rules of Professional Conduct ("Model Rules") in 1983, the Virginia bar continues to operate under its version of the Model Code.⁷

The Code is composed of a series of Canons that express broad duties of lawyers (e.g., "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law").⁸ Within each Canon are mandatory Disciplinary Rules and hortatory ethical considerations. The Code is enforced principally through a lawyer's own conformity to required behaviors. Apart from self-enforcement, the most active enforcer of the Code is the Virginia State Bar.

During the past year, certain state and federal cases have significantly interpreted the provisions of the Code. In *Gunter v. Virginia State Bar*,⁹ the Supreme Court of Virginia considered the question of what type of misconduct by a lawyer will support a disciplinary sanction. The conduct at issue was a lawyer's arrangement to have a private investigator place a bugging device on his client's home phone to determine whether the client's wife was involved in an extramarital affair. The wife discovered the plan and initiated criminal charges against the lawyer for conspiracy to violate the Commonwealth's wiretapping statute. Although the lawyer was acquitted of criminal charges, the Virginia State Bar ordered that his license be suspended for thirty days, finding that he had violated Disciplinary Rule 1-104(A)(4), which prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law."¹⁰ The impor-

5. VA. SUP. CT. R. pt. 6, § II (1990).

6. While the Code of Virginia tracks the Model Code, there are some significant differences. Compare ABA MODEL CODE DR 7-106(B)(1) (1980) (requiring a lawyer to disclose to a tribunal controlling precedent contrary to his/her position) with VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105 (Repl. Vol. 1990) (no disclosure requirement).

7. Lawyers practicing in the United States District Court for the Eastern District of Virginia operated under both ethical guidelines until recently. Prior to February 15, 1989, the Local Rules of Practice for the Eastern District required practitioners to follow the ethical rules promulgated by the ABA and the Virginia State Bar. Because the Code of Virginia and Model Rules differ and even contradict one another in part, the obligation was difficult to fully perform. The Local Rules were amended effective February 15, 1989, however, and now simply require that federal practitioners comply with the Virginia Code of Professional Responsibility. LOCAL R. OF THE E.D. VA. 7(I) (1990).

8. VA. CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (Repl. Vol. 1990).

9. 238 Va. 617, 385 S.E.2d 597 (1989).

10. *Id.* at 622, 385 S.E.2d at 600.

tance of *Gunter* is its discussion of the kinds of misconduct for which disciplinary sanctions are appropriate. The wiretapping incident at issue violated no specific disciplinary rule in the Code, nor was the conduct considered criminal, at least in the eyes of the jury. But, the Supreme Court of Virginia affirmatively noted that mere compliance with the law was not sufficient for a lawyer.¹¹ Even following the specific requirements of the Code may not be enough to satisfy one's professional obligation: "[t]he traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility."¹²

The court affirmed the Virginia State Bar's sanction on the grounds that the behavior was clearly "deceit" within standard dictionary definitions of that term. The court did not explicitly find that Gunter's deceit "reflects adversely on his fitness to practice law." Likewise, the court did not specifically sanction the "deceit" because it occurred in Gunter's practice rather than his personal life. Perhaps it concluded that any deceit by a lawyer would affect his/her ability to practice. If so, the ruling highlights the broad extent to which discipline may be meted out for conduct that is legal and not in violation of any specific disciplinary rule.

In another substantive area, the United States Supreme Court continues to struggle with the extent to which professional attempts to regulate the content of lawyer advertising, such as those contained in Canon 2 of the Code of Virginia, can be reconciled with first amendment protection of "commercial" speech.¹³ In *Peel v. Lawyer Registration and Disciplinary Commission of Illinois*,¹⁴ the Court reviewed disciplinary sanctions imposed against an Illinois lawyer who held himself out as a "certified trial specialist," in violation of Illinois' Code of Professional Responsibility.¹⁵ The cer-

11. *Id.* at 622, 385 S.E.2d at 600.

12. *Id.*

13. The United States Supreme Court decided two other cases during the 1990 term dealing with the First Amendment rights of lawyers. In *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990), the Court held that a group of lawyers "on strike" for higher pay in local court appointments violated the Sherman Act. The Court rejected the lawyers' claims that their boycott was speech protected by the first amendment. In *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990), the Court unanimously held that the State Bar of California could not, consistent with the first amendment, require members to pay bar fees, a portion of which were used to advocate political and ideological causes that the petitioners did not support.

14. 110 S. Ct. 2281 (1990).

15. ILL. CODE OF PROFESSIONAL RESPONSIBILITY Rule 2-105(a)(3) (1985) (repealed Aug. 1,

tification, granted by a private organization of trial lawyers, provoked a bizarre split of opinions in which the sanctions were reversed on first amendment grounds even though a six-member majority of the Court found the advertised certification was at least potentially misleading so as to justify state regulation.¹⁶

The decision in *Peel* announces no new standard for review of commercial speech—the majority used the standard announced by Justice Powell in the 1982 case of *In Re R.M.J.*,¹⁷ which focuses on the state's right to prohibit deceptive speech and otherwise regulate speech with the capacity to mislead. But, the fractured nature of the opinion does suggest that, except in the most obvious cases of deceptive advertising, review of state regulation of professional advertising will be on a case-by-case basis, providing little guidance for behavior away from the extremes. The reason for this lack of clarity is the Court's confusion over the justification for restrictions on advertising. The need for such restrictions depends directly upon one's assumptions about the sophistication of consumers of legal services, but the Court (and profession generally) has failed to articulate consistent assumptions on that critical issue.¹⁸

1990). This rule generally provided that a lawyer may not "hold himself out as 'certified' or a 'specialist.'" *Id.* The provision is similar to that contained in Rule 2-104 of the Virginia Code of Professional Responsibility. See VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 (Repl. Vol. 1990).

16. In *Peel*, a four-member plurality stated that the certification label was not misleading and could not, therefore, subject the petitioning lawyer to disciplinary sanctions. *Peel*, 110 S.Ct. at 2290 (plurality opinion of Justices Stevens, Kennedy, Brennan and Blackmun). Justice Marshall, joined by Justice Brennan, concurred separately, finding that the advertised certification was *potentially* misleading so as to justify some regulation, but not problematic enough to support a total prohibition. *Id.* at 2294. Justice White dissented, finding the ad "potentially misleading" and concluding that the burden should be on the lawyer to eliminate any potential problem. *Id.* at 2297. Finally, Justice O'Connor authored a dissent, joined by Chief Justice Rehnquist and Justice Scalia, finding the certification "inherently likely to deceive" the public and arguing for deference to state regulation of its content. *Id.* at 2298.

17. 455 U.S. 191 (1982). The opinion defines the extent of proper regulation as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a list of areas of practice, if the information also may be presented in a way that is not deceptive.

Id. at 203.

18. As Justice Stevens' plurality opinion notes, the dissent by Justice O'Connor is particularly erratic in this regard, assuming that potential clients have little sophistication in some areas and great discernment in others without providing any meaningful distinction. 110 S.Ct. at 2290, n.13.

II. DISCIPLINARY PROCEDURE

Enforcement of the Virginia Code of Professional Responsibility is primarily carried out via lawyers conforming their own behavior to its requirements. When self-regulation does not work, the Virginia State Bar Association acts to investigate behavior and enforce the Code.

The Virginia State Bar acts on the basis of complaints received from third parties or initiated internally. The number of complaints has generally increased in the past 6 years; in 1984 there were 569 complaints initiated while 1065 complaints were filed during fiscal year 1989. The type of complaints is instructive; in 1989, 36% of the complaints alleged general neglect or poor communication with the client, 16% alleged fraud, 12% alleged general incompetence, and the remaining complaints were spread across a wide range of problems including conflicts of interest, misappropriation of funds and excessive fees. During 1989, sanctions, ranging from suspension to private reprimand to dismissal with terms, were imposed on 89 lawyers involved in 125 complaints.¹⁹

In June of this year, the Supreme Court of Virginia approved changes to the lawyer discipline system established by the Virginia State Bar. That procedure is contained in part 6, section IV of the Rules of the Supreme Court of Virginia.²⁰ The basic procedure calls for complaints to be referred from the State Bar to one of ten district committees following a preliminary investigation by Bar Counsel.²¹ Complaints were traditionally resolved in confidential proceedings before either the district committees or a statewide Disciplinary Board appointed by the supreme court.

Major changes to the system in 1990 include the creation of three-member district sub-committees in each of the ten districts. When complaints are referred from Bar Counsel, the sub-committee will take initial action at the district level. The sub-committees have the power to accept "plea bargains" under certain circumstances if there is unanimous consent of the sub-committee with

19. M. Rigsby, ANNUAL PROFESSIONAL REGULATION REPORT TO VIRGINIA STATE BAR ASSOCIATION, pp. 2-4 (1989). Although final figures for complaints during fiscal year 1990 have not been tabulated by the Virginia State Bar, the office has informed the author that complaints increased during the year above the 1989 level.

20. VA. SUP. CT. R. pt. 6, § IV (1990).

21. *Id.* ¶ 13(B)(5).

agreement by the Bar Counsel and respondent lawyer.²² The creation of "plea bargain" remedies is a significant change to the enforcement mechanism.

Another significant change in procedure concerns the confidentiality of disciplinary proceedings. While proceedings before district committees and sub-committees will remain confidential, most proceedings that occur before the Disciplinary Board will now be open to the public for the first time.²³ An additional element of public scrutiny results from the addition of two non-lawyer members to the Disciplinary Board.²⁴

III. LITIGATION SANCTIONS

An ethical issue of increasing concern is the use of sanctions to punish the conduct of lawyers and litigants proceeding in state or federal courts. In 1983, Rule 11 of the Federal Rules of Civil Procedure was amended to require a federal district court to apply sanctions against a party or its lawyer if it concludes that the party has filed a pleading that is not adequately supported in law or fact, or has been filed for an improper purpose.²⁵ An essentially identical provision was passed by the Virginia General Assembly in 1987.²⁶

The impact of sanctions in litigation has been widely debated. A study of Rule 11 sanctions within the United States Court of Appeals for the Third Circuit concluded that sanctions are meted out disproportionately against plaintiffs and particularly against plain-

22. *Id.* ¶ 13 (B)(5)(b)(4).

23. *Id.* ¶ 13(k)(5).

24. *Id.* ¶ 13(C)(1).

25. FED. R. CIV. P. 11 (1988). The Rule states, in relevant part, as follows:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Id.

26. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1990). The sanction provisions are identical to those contained in FED. R. CIV. P. 11, but the state provision extends to oral motions as well as written pleadings. See VA. CODE ANN. § 8.01-271.1.

tiffs in civil rights cases.²⁷ Such a trend raises concerns about whether the Rule improperly chills creativity in pleading, thereby slowing new development in the law. Based on these concerns, the United States Judicial Conference will decide in early 1991 whether to recommend any revision of Rule 11.

During 1990, both the United States Supreme Court and Supreme Court of Virginia considered, for the first time, legal issues governing the application of the federal and state sanction provisions. In *Pavelic & LeFlore v. Marvel Entertainment Group*,²⁸ the United States Supreme Court held that a district court lacked power under Rule 11 to sanction an entire law firm for the violation of a single partner.²⁹ The Court concluded that the language of Rule 11 only allows sanctions to be imposed upon the person who *signs* the offending pleading, or upon the party authorizing it.³⁰ In *Cooter & Gell v. Hartmarx Corp.*,³¹ the Court concluded that a district court could impose Rule 11 sanctions even after a plaintiff had voluntarily dismissed a case. In passing on this issue, the Supreme Court noted that an appeals court reviewing a Rule 11 sanction should use an "abuse of discretion" standard for all aspects of any such order. Justice Stevens dissented in *Cooter & Gell*, expressing his view that Rule 11 is unnecessary.³²

The Supreme Court of Virginia considered two cases in 1990 raising the issue of when a pleading is legally warranted as required by section 8.01-271.1 of the Code.³³ Unlike the United States Supreme Court, which adopted an "abuse of discretion" standard for judicial review of sanctions awards, the Supreme Court of Virginia maintains that a lower court ruling finding that a pleading is not legally warranted is an issue of law, not of fact. Thus, in each case, the Supreme Court of Virginia undertook a searching review of the legal issues involved and reversed lower court decisions imposing sanctions.

27. "Rule 11 Tremors Continue," Nat'l L. J., July 30, 1990, at 32.

28. 110 S. Ct. 456 (1989).

29. *Id.* at 458-60.

30. *Id.* at 459-60.

31. 110 S. Ct. 2447 (1990).

32. *Id.* at 2463-65.

33. *Tullidge v. Bd. of Supervisors of Augusta County*, 239 Va. 611, 391 S.E.2d 288 (1990); *County of Prince William v. Rau*, 239 Va. 616, 391 S.E.2d 290 (1990).

IV. CRITIQUE OF HOURLY BILLING

The ABA Model Code of Professional Responsibility provides that a lawyer shall not charge a fee that is "illegal or clearly excessive."³⁴ The Code of Virginia modifies the provision by eliminating any mandatory prohibition against excessive or illegal fees and simply requiring that fees be "reasonably and adequately explained to the client."³⁵ The Code also sets out, with great specificity, the explanation that a lawyer must provide if he charges a contingency fee.³⁶ This provision is in accord with the conventional view that contingency fees raise more serious ethical questions than other forms of billing.³⁷

While the profession has generally viewed fixed or hourly fees with less suspicion than contingency fees, there has been increasing criticism of hourly fees and their effect upon the nature of legal services. Chief Justice Carrico of the Supreme Court of Virginia has added his voice to this critique in a recent speech condemning the hourly billing method and its consequent emphasis on the number of "billable hours" achieved by practitioners. As Chief Justice Carrico notes:

The increasing use of time alone as a basis for billing has contributed to the loss of professionalism. Associates' advancement, as well as their compensation, is frequently determined as much by the hours that they bill as the quality of their work. . . . As billable hour quotas continue to grow and produce an upward salary spiral, the public's trust and esteem for the legal profession and respect for our system of justice decline in direct proportion. . . . The billable hour malaise has infected even more than the lawyer-client relationship and the efficient administration of justice. It has changed the Bar's attitude towards non-billable obligations and altered its members' lives at work and at home. . . . The billable hours phenomenon leads not only to dishonesty in billing and disruption of family life but also to neglect by lawyers of their responsibility to participate in bar activities and community affairs.³⁸

34. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980).

35. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) (Repl. Vol. 1990).

36. *Id.* DR 2-105(C).

37. *See, e.g., id.* EC 2-22 (cautioning that lawyers should normally decline contingency fee billing if the client is able to pay a fixed fee).

38. Address by Chief Justice Harry L. Carrico, Seminar on Professionalism (on file with the author).

The critique of the billable hour often fails to focus on the virtues of hourly billing. Such virtues include its relative clarity and its provision of a straightforward way for law firms to budget projected revenue. Moreover, there is nothing inherently wrong with billing by the hour if lawyers retain the flexibility to write off time to reach a bill that is generally equitable. The billable hour causes problems, however, if the salaries desired by lawyers (and overhead costs) create a need for an unreasonably elevated number of billable hours. When the billable hour expectation rises to such a level, the system encourages overbilling, dishonesty and reduces the freedom of lawyers to adjust bills.

Recognizing the potential problems with the billable hour, the ABA has recently published a book exploring the viability of alternative billing methods.³⁹ With further escalation in lawyer salaries and billable hour requirements, the need to explore such alternatives will increase.

39. REED, *BEYOND THE BILLABLE HOUR: AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS* (American Bar Association 1989).

