

## **Scenes From A Superbowl Party**

I'Anson Hoffman Inn of Court Practice Group III

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### **Introduction**

From the day a prospective lawyer receives his or her letter of admission to law school, social interactions take on a whole new aspect. When someone finds out they are talking to a current or future lawyer, talk inevitably turns to legal issues and problems. When the setting is a house of worship or non-profit/community service facility or group, an explicit or implied request for legal services is likely to include an expectation that the services will be performed on a gratuitous basis. Similarly, law students, the majority of whom are not subject to formal third year practice rules, are often eager to perform supervised legal services as part of their networking and job seeking activities. Lawyers and law students may enter into these situations with the best of intentions but still run afoul of the unauthorized practice of law rules as well as state and federal labor laws.

The Virginia Rules of Professional Conduct (Va. S. Ct. R. Pt. 6, § II) ("VRPC"), Legal Ethics Opinions ("LEO"), and case law offer very little guidance in terms of attorney-client relationships and the duties that accompany them when they arise through social interaction. There is some consideration of the duty of confidentiality to a prospective client that may arise in such a situation, and to imputed conflicts of interest as well. Similarly, the rules and authorities provide very little explicit guidance concerning law students who have not achieved the requirements of third-year practice. Finally, as lawyers, we are obligated to aspire to perform *pro bono publico* service, but what *pro bono* service entails and what many lawyers consider to be *pro bono* may actually not constitute *pro bono* service as contemplated by the VRPC.

This evening's discussion revolves around scenarios that may arise where lawyers, law students, and members of a nonprofit entity join for a social event, in this case a Superbowl party.

### **Agenda and Timetable**

This skit-based program involves a Super Bowl party being held at a local church. In attendance are church members who are a senior and junior lawyer from a local firm, a law student, and the pastor of the church. Their interactions lead to several issues regarding formation of the attorney-client relationship and other duties arising from communications with prospective clients in a social setting; conflicts of interest; provision of *pro bono* services; unauthorized practice of law; and competent representation of clients. Following each 5-minute enacted vignette, members will discuss the ethical issues arising from the interaction of the participants.

#### **Roles:**

Newby, junior associate

Jones, senior partner

Pastor

Woods, law student

Moderators/Discussion Leaders

Scene 1: James/Jamie Newby, a new associate at Bigly & Huge, the area's largest law firm, speaks to the pastor about why the meeting room is so cold. The pastor explains that they hired Bandit Heating and Cooling to install a new boiler in the church. Bandit's technician installed the boiler and explained to the church staff how to operate it, including the importance of making sure that the water was turned on to the boiler before lighting it. Unfortunately, a well-meaning parishioner lit the boiler one morning without turning on the water valve, causing a crack in the vessel. Bandit now refuses to replace the boiler, citing operator error.

Newby tells the pastor he/she is not a litigator and doesn't know much about contract law but she is willing to read the installation contract. The pastor hands it to him/her and blesses him/her for having such a charitable spirit and states that he knows he/she will do what's necessary to make sure the flock stays warm through the winter.

Enactment: 5 minutes

Discussion of formation of attorney client relationship, duty of confidentiality, and considerations of fee payment: 15 minutes

Scene 2: While reading the contract, Newby sees Eli/Ellen Woods, a law student. Woods wants a job at B&H and knows that Newby works there. They strike up a conversation in which Newby states that he/she has an exciting new pro bono case and she then proceeds to tell Woods the facts of the case. Newby states he/she doesn't think the firm will allow him/her to use their expensive electronic research program to do research. Woods states that he/she has unlimited access to Westlaw and Lexis and would be happy to do some research, especially for a pro bono case. Newby asks Woods to research whether binding arbitration clauses are legal in Virginia. Woods agrees to email her answer by noon the next day, stating that he/she will stay up all night working on it if necessary. Newby thanks Woods and promises to put in a good word with the recruiting committee.

Enactment of scene: 5 minutes

Discussion of supervision of nonlawyer staff and volunteers, unauthorized practice of law issues, and ethical issues concerning unpaid law student internships: 15 minutes

Scene 3: Newby's senior partner, Johnny "Football" Jones, also a member of the church attending the party, sees her reading the contract and asks her what it is. He/she informs Jones that it's the installation contract between the church and Bandit and that the church wants Bandit to replace the boiler. He/she says he/she is excited to have a chance to do some pro bono work helping the church. Johnny informs him/her that Bandit is one of his best clients and instructs him/her not to say another word about the case, and, by the way he/she wasn't hired to do pro bono work. While being berated, James/Jamie sees that the contract requires that a formal notice of claim must be served on Bandit within 30 days of installation, which is the next day, otherwise all claims are forfeited. She informs Jones and he fires her on the spot. Just at that moment, the pastor ambles up and asks her what she things about the contract.

Enactment of scene: 5 minutes

Discussion of duty of attorney upon termination of representation, imputed conflicts of interest, and provision of pro bono public legal services: 15 minutes

## **Questions for Discussion (to be handed out at the beginning of the program)**

### **Scene 1**

Jamie Newby, a new associate at Bigly & Huge, the area's largest law firm, speaks to the pastor about why the meeting room is so cold. The pastor explains that they hired Bandit Heating and Cooling to install a new boiler in the church. Bandit's technician seemed to be unfamiliar with how to install the boiler but was eventually able to complete the job, though the pastor suspects it may not have been done correctly. After Bandit's technician installed the boiler, he explained to the church staff how to operate it, including the importance of making sure that the water was turned on to the boiler before lighting it. Unfortunately, a well-meaning parishioner lit the boiler one morning without turning on the water valve, causing a crack in the vessel. Bandit is unaware of this but has nevertheless refused to repair or replace the boiler, citing operator error.

Newby tells the pastor she is not a litigator and doesn't know much about contract law but she is willing to read the installation contract. The pastor hands it to her and blesses her for having such a charitable spirit and states that he knows she will do what's necessary to make sure the flock stays warm through the winter.

- (1) Has J formed an attorney-client relationship with the church?
- (2) What is the scope of representation that Newby is obligated to provide?
- (3) What are Newby's duties to the church if she declines representation?
- (4) Has J agreed to represent the church without compensation or could she charge for her services?

### **Scene 2**

While reading the contract, Newby sees Eli/Ellen Woods, a second-year law student. Woods wants a job at B&H and knows that Newby works there. They strike up a conversation in which Newby states that he/she has an exciting new case and she then proceeds to tell Woods the facts of the case. Newby states he/she doesn't think the firm will allow him/her to use their expensive electronic research program to do research. Woods states that he/she has unlimited access to Westlaw and Lexis and would be happy to do some research, especially for a pro bono case. Newby asks Woods to research whether binding arbitration clauses are legal in Virginia. Woods agrees to email her answer by noon the next day, stating that he/she will stay up all night working on it if necessary. Newby thanks Woods and promises to put in a good word with the firm's recruiting committee.

- (5) What is the relationship between Newby and Woods based on their interaction?
- (6) Is Newby subject to sanction for telling Woods confidential facts about the case?
- (7) Does Woods have a duty to maintain the confidentiality of the information provided by Newby?
- (8) Does Newby have an ethical duty to consider whether having Woods work on the case on a volunteer basis constitutes UPL and/or a violation of the Fair Labor Standards Act?

### **Scene 3**

Newby's senior partner, Johnny "Football" Jones, also a member of the church attending the party, sees her reading the contract and asks her what it is. He/she informs Jones that it's the installation contract between the church and Bandit and that the church wants Bandit to replace the boiler. He/She says

he/she is excited to have a chance to do some pro bono work helping the church. Johnny informs him/her that Bandit is one of his best clients and instructs him/her not to say another word about the case, and, by the way he/she wasn't hired to do pro bono work. While being berated, James/Jamie sees that the contract requires that a formal notice of claim must be served on Bandit within 30 days of installation, which is the next day, otherwise all claims are forfeited. Just at that moment, the pastor ambles up and asks her what she thinks about the contract.

- (9) Can Jones represent Bandit in an ensuing arbitration or suit concerning the boiler?
- (10) Assuming Jones refers the case to another parishioner who is not conflicted and that lawyer promptly and timely files an arbitration claim against Bandit and represents the church in arbitration, would this qualify as pro bono legal services? What if the arbitration agreement includes a provision for the prevailing party to receive an award of attorney's fees?

## **Program Script**

### **Scene 1**

(background music plays; sound of football game, crowd etc.)

James/Jamie: Wow, this is a great game, Father! What's your favorite football team?

Pastor: (Back to audience, turns to reveal jersey, beads, puts on bishop hat) Well the Saints of course. I hope you'll forgive the attire, it's a bit above my station.

J: Of course. Say Father, this is a great party but it is a little chilly in the fellowship hall tonight. What gives?

P: Yes, it's a sad story indeed. We hired a company to replace the boiler last month, and the new boiler doesn't work and the company won't fix it.

J: Oh no!

P: Yes, it's unfortunate. The young man who installed it showed me how to light it, and he pointed out the water valve that has to be open when you light it. Well, one of our members came early to services one day and took it upon himself to light it, and darned if he didn't remember to open the valve and he put a big crack in it and now we can't use it. Say, you're a lawyer aren't you?

J: Yes, I'm an associate with Bigly & Huge here in town.

P: Well, it's just a shame because the company that installed it won't fix or replace it for us. They won't even come and look at it. I think the installer may not have installed it right and that's what caused it to crack. He was here all day and I heard a lot of clanging and foul language like he didn't know what he was doing. Of course what happened after that is just between us and the Lord, right?

J: Uh, of course. That is a shame. Who installed it?

P: Bandit Heating and Cooling. I heard the young man who owns it on a radio ad and he sounded trustworthy. I guess not. Say, aren't you lawyers supposed to do pro bono service?

J: Yes we are ... I guess I could read the installation contract if you still have it. I don't do any kind of litigation or contract work though so all I could really do would be-

P: (interrupting) Well I happen to have it right here. Bless you child! Bless you for your spirit of charity. I know you will do whatever it takes to keep our flock warm this winter! Hallelujah, we're saved!(Walks away)

J: (concerned face).

Scene 2

EW: Wow, this is a great game!

J: (Still reading the contract) Sure I guess. Sorry, the work never ends for a lawyer.

EW: I thought I recognized you, we met at the alumni networking event, you're at Bigly & Huge. I'm Eli/Ellen Woods, I'm a first year law student.

J: James/Jamie Newby, nice to meet you.

E: Nice to meet YOU! I'd love to learn more about your firm some time. Do you do a lot of pro bono work? I'm really interested in working for a firm that does pro bono work. It's an important part of being a citizen lawyer after all.

J: Uh, definitely. Say, now that you mention it, I am working on a pro bono case right now, for the church. You may have noticed it's a little chilly in here, right?

E: I did.

J: Well, that's because the church paid a contractor to replace the boiler and now the new boiler doesn't work and the contractor won't fix it. I'm reading the contract right now.

E: Wow, that is super interesting. Why won't the contractor fix it?

J: The pastor thinks they didn't install it right, but he also told me that one of the members lit it without any water in it. The contract requires that any claims be submitted to binding arbitration, but I'm not sure if that's enforceable. Unfortunately I don't think the firm will let me use Westlaw or Lexis to research that – those services are very expensive.

E: Hmm. As a law student I have unlimited access to Westlaw and Lexis. Maybe I could help. I'm pretty sure we're allowed to use it for pro bono work.

J: Really? That would be awesome. And I'll be sure to put in a good word for you with the recruiting committee at the firm.

E: Thanks so much! I'll get right on it after the party and email you an answer by noon tomorrow, even if I have to stay up all night working on it!

J: That's just the type of attitude we look for in potential associates. Thanks!

Scene 3

JFJ: Touchdown! Man if coach would have just put me in, I know we would have won state. Hey there Newby, what'cha reading? I hope it's billable!

JN: No, it's for the church. The pastor asked me to read the installation contract for the boiler.

JFJ: I thought it was a little cold in here. What gives?

JN: The new boiler doesn't work and the contractor that installed it refuses to come fix it. Hopefully there's something in this contract that the church can use to get them to fix or replace it or at least refund the money.

JFJ: Yeah hopefully. Who's the contractor?

JN: Bandit Heating and Cooling.

JFJ: Whoa whoa whoa! Bandit's one of my biggest clients! Don't say another word and put that contract down. Do you know how much money this could cost me?

JN: I just told the pastor I'd read it, I didn't say we'd do anything.

JFJ: I don't want to hear it. (Plugs ears)

JN: Oh no! It says the church has to notify Bandit of any claims within 30 days of installation which is (checks watch/phone) tomorrow!

JFJ: This is a disaster.

Pastor: (ambling up) Ah, my two favorite lawyers. (Referring to contract) So, I hope you have some good news for me!

(end scene)

**Answers (to be handed out at the conclusion of the program)**

**Scene 1: Pastor asks Newby for legal assistance with boiler problem**

(1) Has J formed an attorney-client relationship with the church?

The existence of an attorney-client relationship is determined by the definition of the practice of law set forth in Part 6, § 1 of the Virginia Rules of Court. LEO 1184 (1988): "Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill."

Furthermore, In Virginia, an attorney-client relationship can be formed by implication. Virginia recognizes both express and implied relationships between attorney and client. An attorney-client relation need not be formally established. "The contract may be express or implied, and it is sufficient that the advice and assistance of the attorney is sought and received, in matters pertinent to his profession." Nicholson v. Shockey, 192 Va. 270, 277, 64 S.E.2d 813, 817 (1951). "Whether a contract employing an attorney is express or implied, some indication that the advice and assistance of the attorney was sought and received is integral to the creation of the attorney-client relationship." Arriba Corp. v. Bostic, 69 Va. Cir. 505, 509-10 (2002) (citing Carstensen v. Chrisland Corporation, 247 Va. 433, 447, 442 S.E.2d 660, 669 (1994)).

While Newby advised the pastor that she is not a litigator or familiar with contract law, she did agree to review the installation contract. The pastor knew that she was a lawyer working for a sizeable law firm and thanked her for her willingness to help. An attorney-client relationship has most likely been formed, which gives rise to several issues going forward.

(2) What is the scope of representation that Newby is obligated to provide?

VRPC 1.2 pertains to the scope of representation that an attorney undertakes with a client. An attorney may limit the objectives of representation if the client consents after consultation. VRPC 1.2(b). Furthermore, the comments set forth that an attorney may not limit the scope of representation to the extent that the representation does not require the attorney to represent the client competently. Id. Cmt. 7.

In this case, Newby advised the pastor that she is not a litigator and does not consider herself an expert in contract law; however, she agreed to review the installation contract and the pastor stated that he knew she would do whatever needed to be done to serve the best interests of the church. Her agreement to review the contract in the context of the discussion is an agreement to perform services that constitute the practice of law, and she cannot therefore claim that she simply agreed to read the contract and not to provide legal services. See, e.g., LEO 1412 (1991) (a solo practitioner who contractually limited representation to research and brief writing could not claim he was not practicing law). She has also likely taken on an obligation to undertake a reasonable amount of research or study required to provide advice on the terms and provisions of the contract as would be required by VRPC 1.1. Without further consultation and consent by the pastor, Newby is also most likely obligated to take any action required to preserve the church's ability to act under the contract. Even if the pastor agreed that she would only review the contract and do no more, this limitation would likely run afoul of Comment 7.



(3) What are Newby's duties to the church if she declines representation?

As a preliminary matter, Newby must maintain the confidentiality of the information that the pastor has shared with her in the context of requesting legal assistance, even if no attorney-client relationship is formed. VRPC 1.18(b). Information shared during "a professional discussion at a social engagement" may not be revealed. LEO 629 (1984); see also LEO 452 (1982). Even if she later determines not to undertake representation, she must maintain as confidential the facts shared by the pastor, especially where he stated an expectation of confidentiality in disclosing them and that expectation is reasonable under the circumstances. See Arriba, 69 Va. Cir. at 510.

If Newby determines to terminate representation, she may do so only if withdrawing can be accomplished without material adverse effect on the church. VRPC 1.16(b). She must take reasonable steps to notify the church and protect its interests. VRPC 1.16(d).

(4) Has J agreed to represent the church without compensation or could she charge for her services?

A lawyer must adequately explain their fee to a client. VRPC 1.5(b). When the lawyer has not represented the client previously, the rate or amount of the fee must be communicated to the client, preferably in writing, before or within a reasonable amount of time after the representation has begun. Id.

In this case, the pastor thanked Newby for her "charitable spirit" and appears to be assuming that she is undertaking representation with no expectation of compensation. In order to be able to charge the church for her work, Newby would have to explain to the pastor that she expects compensation as well as the basis or rate of compensation either before doing work or within a reasonable period of time after beginning work. Under the circumstances, it would likely be unreasonable for Newby to demand compensation for work performed where the pastor believed she would be performing such services without fee.

**Scene 2: Newby enlists the assistance of Woods, a second year law student**

(5) What is the relationship between Newby and Woods based on their interaction?

Only law students who have achieved the requirements for third year practice are regulated under the Virginia Rules. Those requirements include the completion of four semesters of law school at an accredited law school in Virginia or in a state that allows accredited Virginia law school students to practice in that state on a reciprocal basis. To be eligible, students must also have completed coursework in ethics, criminal law, evidence, and procedure. Va. S. Ct. R. § IV, Para 15. Woods is in his or her second year of law school and is not eligible for certification for third year practice, and accordingly is deemed a non-lawyer under the Virginia rules. Specifically, Woods would likely be considered a non-lawyer "employed, retained by, or associated with" Newby under VRPC 5.3 Cmt. 1 (which specifically mentions "law student interns."). Woods has offered to perform legal services and Newby has requested those services. Accordingly, the obligations of VRPC 5.3 and 5.5 would likely apply to this relationship.

(6) Is Newby subject to sanction for telling Woods confidential facts about the case?

As may often be the case with newer attorneys, Newby, eager to talk about her case, has probably violated VRPC 1.6 by disclosing the facts of the case to Woods prior to their forming any kind of lawyer-nonlawyer relationship that would allow her to disclose the facts of the case to Woods.

(7) Does Woods have a duty to maintain the confidentiality of the information provided by Newby?

As a nonlawyer, Woods is not bound by the VRPC. Lawyers are required to ensure that nonlawyer employees, including law student interns, are instructed not to disclose confidential client information. VRPC 5.3 and cmt. 1. Lawyers must also take appropriate measures to screen employees who possess confidential information that may disqualify the lawyer from representing a client if disclosed. See LEO 1832 (2007).

(8) Does Newby have an ethical duty to consider whether having Woods work on the case on a volunteer basis constitutes UPL and/or a violation of the Fair Labor Standards Act?

Lawyers who aid nonlawyers in the unauthorized practice of law are subject to sanction or disbarment and lawyers have an affirmative duty to report their knowledge of a lawyer doing so to the state bar. Va. S. Ct. R. Pt. 6, § I. Lawyers are prohibited from assisting nonlawyers in engaging in the unauthorized practice of law under VRPC 5.5(c). However, the rule does not prevent lawyers from employing “paraprofessionals” to perform legal work so long as the lawyer supervises the work and retains responsibility for the conduct of the employee under VRPC 5.1. VRPC 5.5 cmt. 2.

Unpaid work by legal interns may pose an ethical issue but there does not appear to be any existing opinion to that effect. A lawyer may not “commit ... a deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.” VRPC 8.4(b). The Fair Labor Standards Act defines those who are “suffered or permitted to work” as employees and requires that they receive minimum wage and, where appropriate, overtime compensation. See U.S. Dept. of Labor Fact Sheet #71, available at <https://www.dol.gov/whd/regs/compliance/whdfs71.pdf>. Applying this broad definition, the DOL has identified a very narrow set of circumstances in which an unpaid intern is not being “suffered or permitted to work,” namely where the employer receives no immediate benefit from the intern’s work and the internship does not entitle the intern to an eventual paid position. Id.; but see Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 383 (2d Cir. 2015) (declining to adopt the DOL guidelines and instead applying a general test of whether the internship primarily benefits the intern or the employee). In this case, Newby stands to immediately benefit from Woods’ time and effort and access to electronic research resources, and has offered Woods something in return for it. This arrangement could be determined to be a wilful violation of the FLSA by Newby and her firm. However, it appears that the only ethical consideration to date regarding unpaid legal interns is actually whether a firm’s clients can be billed for work performed by unpaid legal interns. See New York State Bar Association Ethics Opinion 1090 (Mar. 31, 2016) (determining that nothing in Rule 1.5 prohibits a client being billed a reasonable amount for work performed by unpaid law student interns).

### **Scene 3: Newby and Jones discuss the case and discover a conflict of interest**

(9) Can Jones represent Bandit in an ensuing arbitration or suit concerning the boiler?

Assuming that Newby has undertaken representation of the church, Jones cannot represent Bandit so long as Newby represents the church and continues to be an associate of Bigly and Huge due to an imputed conflict of interest. VRPC 1.10(a).

However, if Newby is terminated by the firm, Jones can then continue to represent Bandit in arbitration as Jones did not appear to receive confidential information from Newby concerning the church's position in the case. VRPC 1.10(b)(1) and (2). The fact that Newby actively represented *the church just* prior to being terminated does not disqualify Jones from representing Bandit so long as he did not receive confidential information from Newby. Id. cmt. 5.

If we were to assume that Newby declined to represent the church and continues to work at Bigly and Huge, the question then becomes whether Jones may represent Bandit in the arbitration. VRPC 1.18 would allow Jones to represent Bandit if (1) both the church and Bandit provide informed consent or (2) Jones determines that Newby took reasonable measures to avoid exposure to disqualifying information when speaking with the pastor about the case; (2) Newby can be screened from participation in the case and can reasonably expect to be able to maintain the confidentiality of the information she received from the church, and (3) the church is provided with notice that Newby will be screened from the case. VRPC 1.18(c) and (d). In this case, it would not likely be correct for Jones to make the necessary determination that Newby took reasonable steps to limit her exposure to confidential information. This is a particular danger when discussions concerning possible representation arise in a social / nonprofessional setting.

(10) Assuming Jones refers the case to another parishioner who is not conflicted and that lawyer promptly and timely files an arbitration claim against Bandit and represents the church in arbitration, would this qualify as pro bono legal services? What if the arbitration agreement includes a provision for the prevailing party to receive an award of attorney's fees?

Under VRPC 6.1, pro bono publico services are those in the areas of poverty law, civil rights law, public interest law, and "volunteer activities designed to increase availability of pro bono legal services." Services performed without fee on behalf of a charitable, religious, or educational client do not appear to fall within the definition of pro bono services, unless the services are in the nature of assisting the institution to provide services to the poor or needy, such as in the case of a church setting up a homeless shelter. Id. cmt. 4.

Pro bono services must also be provided without fee or expectation of fee, so if representation of the church constituted pro bono services (e.g., if resolution of the boiler issue was necessary in the church setting up a homeless shelter), the attorney would have to undertake representation with a stated expectation to not receive a fee. Fees awarded by a tribunal may be donated to the nonprofit organization that the lawyer is representing. See LEO 1744 (2000).

Of course, Virginia's pro bono rule is currently aspirational and lawyers are not required to perform pro bono service at this time.