GEORGE MASON AMERICAN INN OF COURT

PRIVILEGE ISSUES IN LITIGATION – WAIVING GOODBYE TO POTENTIAL MALPRACTICE CLAIMS

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Introduction

Within the legal profession, the idea of legal malpractice has long been, and to an extent still is, a taboo subject. Often, lawyers feel that legal malpractice is simply a way to weed out the bad apples; that is, the negligent or lazy. However, a legal malpractice action can be brought against any attorney, even despite diligent and zealous representation of a client. True, most attorneys have legal malpractice insurance, which can cover the cost of an adverse decision in a legal malpractice action. Yet, a legal malpractice action, perhaps even an unfounded one, can tarnish the reputation of even the most reputable lawyers. Consider the following hypotheticals:

1. Ron Burgundy was attacked by a coworker in the office. Mr. Burgundy sues for personal injuries and includes a claim for lost wages for 2016. Mr. Burgundy's 2016 income tax returns were prepared by Mr. Burgundy before filing this current action. Mr. Burgundy supplied a copy of the return to his attorney to assist the attorney in evaluating this current case. News Channel 4, his employer and defendant, notices Mr. Burgundy's deposition and along with it sends a subpoena duces tecum for Ron's 2016 income tax return. Ron moves to quash the subpoena. How should a trial court rule?

2. The State decides to prosecute Derek Zoolander for a murder that took place in Chicago. At trial, Mr. Zoolander testifies that he was in New York at a modeling convention. On cross-examination, to impeach Mr. Zoolander's credibility, the prosecution asks Mr. Zoolander whether it isn't true that when Mr. Zoolander's lawyer, Mr. Hansel, initially interviewed him at the police station following his arrest, Mr. Zoolander told his lawyer that he was in Chicago at the time of the crime. Mr. Zoolander's lawyer asserts the attorney-client privilege. How should a trial court rule?

3. Mr. Ocean has an idea how to make big money. He wants to rob three casinos on the Las Vegas strip, and assembles a crew of 11 men. One of the men, the "conscientious thief," is worried about the tax ramifications of their planned heist, and is unsure how he can explain 13 million of new income when he files for his taxes. Mr. Ocean is curious, so he inquires with his lawyer—telling him all his plans. Unfortunately, Mr. Ocean is eventually busted in the course of his heist, and is charged with attempted robbery. The prosecution wants to bring Mr. Ocean's lawyer as a witness to testify regarding Mr. Ocean's plans. The lawyer claims attorney-client privilege. Can he do so?

Attorney-Client Privilege

Generally

The attorney-client privilege is the oldest privilege for confidential communications known to the common law. *See, e.g.,* 8 J. Wigmore, EVIDENCE § 2290 (McNaughton rev. 1961) (hereinafter, "Wigmore"). In Virginia, "[e]xcept as may be provided by statute, the existence and application of the attorney-client privilege . . . and the exceptions thereto, shall be governed by the principles of common law as interpreted by the courts of the Commonwealth in the light of reason and experience." Va. Sup. Ct. Rules, R. 2:502.

Virginia courts have established a general rule—that confidential communications between attorney and client made in the course of that relationship and concerning the subject matter of the attorney's representation "are privileged from disclosure, even for the purpose of administering justice." *Grant v. Harris*, 116 Va. 642, 648 (1914). "Communications between lawyer and client are privileged to the end that the client be free to make a full, complete and accurate disclosure of all facts, unencumbered by fear that such true disclosure will be used or divulged by his attorney, and without fear of disclosure by any legal process." *Seventh Dist. Comm. of Va. State Bar v. Gunter*, 212 Va. 278, 286–87 (1971).

The attorney-client privilege extends to any client communication made to the attorney's agents (including accountants) when the agent's services are indispensable to the attorney's effective representation of the client. *See Commonwealth v. Edwards*, 235 Va. 499, 509 (1988) (citations omitted). The privilege may also extend to communications among co-defendants and their attorneys when engaged in consultation about the defendant's legal defense. *See, e.g., Hicks v. Commonwealth*, 17 Va. App. 535, 537 (1994) (citing *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 836–42 (1871)). Thus, attorney-client privilege can extend a defendant's statements to a co-defendant's attorney. *Hicks*, 17 Va. App. at 538.

Under the Virginia Code, attorney-client privilege in Virginia further extends to a receiver appointed to discharge the responsibilities of a disabled attorney. VA. CODE § 54.1-3900.01. Additionally, governmental entities may invoke attorney-client privilege in civil litigation to protect communications between government officials and government attorneys. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 170 (2011) (citing 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74, comment b, p 574 (1998)).

Attorney-client privilege "is an exception to the general duty to disclose, is an obstacle to investigation of the truth, and should be strictly construed." *Edwards*, 235 Va. at 509. Attorney-client privilege only protects the disclosure of communications; it does not protect the disclosure of underlying facts by those who communicated with the attorney. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). A proponent invoking attorney-client privilege bears the burden of establishing "that the attorney-client relationship existed, that the communications under consideration are privileged, and that the privilege was not waived." *Edwards*, 235 Va. at 509 (citing *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982)).

"[T]he purpose of the privilege [is] 'to encourage clients to make full disclosure to their attorneys.'" *Upjohn*, 449 U.S. at 389 (quoting *Fisher v. United States*, 425 U.S. 391, 403

(1976)). Put differently, "the purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

The privilege exists in recognition of the fact that sound legal representation is in the public interest and that such sound representation often depends upon the attorney being fully informed by the client. *Id.* "The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980); *see also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

Attorney-client privilege belongs to the client, not the attorney. *Edwards*, 235 Va. at 509 (citing Wigmore, § 2237 at 635). Nevertheless, the privilege may be raised by the attorney under certain circumstances. *See, e.g., Fisher*, 425 U.S. at 402 n. 8 (citations omitted). Lastly, attorney-client privilege continues after the death of the client. *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399, 406 (1998) (citing Wigmore, § 2323; Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 78–79 (1992); 1 J. Strong, MCCORMICK ON EVIDENCE § 94, p. 348 (4th ed. 1992)).

Waiver of Attorney-Client Privilege, Generally

Attorney-client privilege is not absolute. *Banks v. Mario Indus. of Va., Inc.*, 274 Va. 438, 453 (2007). It may be expressly waived by the client; or, it may be implied from the client's conduct (*i.e.*, waiver by implication). *See, e.g., Grant*, 116 Va. at 648–49. That said, there is no established bright line rule for what actually constitutes waiver in Virginia. *See, e.g., Walton v. Mid–Atl. Spine Specialists, P.C.*, 280 Va. 113, 122 (2010) (citing *Grant*, 116 Va. at 648).

When determining whether attorney-client privilege has been waived by implication, Virginia courts will consider both the client's implied intent and the elements of fairness and constancy. *Edwards*, 235 Va. at 509 (citing Wigmore, § 2328 at 638). The inquiry is an objective one; whether a client has or has not waived attorney-client privilege will not rest on the subjective intent of the client. *Edwards*, 235 Va. at 509.

If the client's intent to abandon the privilege is not clear, a court will almost certainly find the privilege not to be waived. *Id.* (citing Wigmore, § 2328 at 638). Yet, where the client, through his or her conduct, discloses information initially disclosed to the attorney in confidence, fairness will require the privilege cease and be effectively waived at the time of the client's subsequent disclosure. *Edwards*, 235 Va. at 509. Similarly, where the "client communicates information to his attorney with the understanding that the information will be revealed to others, the disclosure to others effectively waives the privilege "'not only to the transmitted data but also as to the details underlying that information.'" *Id.* (citation omitted).

Additionally, attorney-client privilege "is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said." *Clagett v. Commonwealth*, 252 Va. 79, 92 (1996)

Waiver by Inadvertent Disclosure

"The inadvertent production of a privileged document is a specter that haunts every document intensive case." *FDIC v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 479–80 (E.D. Va. 1991). An attorney who discloses material protected by attorney-client privilege may be subject to liability for such disclosure. However, the disclosure must be "involuntary," *i.e.*, against the will of the client, and not merely inadvertent. *Walton*, 280 Va. at 125. "[I]nvoluntary means that another person accomplished the disclosure through criminal activity or bad faith, without the consent of the proponent of the privilege." *Id.* at 125–26 (citations omitted). When material is produced involuntarily, attorney-client privilege is not waived. *Id.*

"Inadvertent disclosure of a privileged document includes a failure to exercise proper precautions to safeguard the privileged document, and does not require that the disclosure be a result of criminal activity or bad faith." *Id.* at 126. Thus, a knowing but mistaken production of a document may constitute an inadvertent disclosure. *Id.* Likewise, unknowingly providing access to a document due to a failure to implement sufficient precautions to maintain its confidentiality may also constitute inadvertent disclosure. *Id.*

Once a court determines that there has been an inadvertent disclosure, it must next determine whether the attorney-client privilege has been waived as to the inadvertently produced materials. *Id.* This analysis requires a balancing of the concern for fairness and the fundamental importance of the attorney-client privilege against the care (or lack thereof) with which the privilege is guarded by the attorney. *Id.* at 127 (citation omitted). When conducting this analysis, factors the court should consider include:

> (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.

Id. No factor is singularly dispositive; and the court must apply the factors in light of the posture of the case. *Id.* The court's inquiry should be fact-intensive. *See, e.g., id.* at 128–131.

In 2010, the Virginia General Assembly adopted VA. CODE § 8.01–420.7, which implemented, *inter alia*, standards governing inadvertent waiver of attorney-client privilege.[1] The code section, in pertinent part, provides:

> A. When disclosure of a communication or information covered by the attorney-client privilege . . . made in a proceeding or to any public body [] operates as a

[1] Mostly, VA. CODE § 8.01–420.7 simply adopted the holding of the Virginia Supreme Court in *Walton*.

> waiver of the privilege . . . the waiver extends to an undisclosed communication or information only if:
>
> 1. The waiver is intentional;
> 2. The disclosed and undisclosed communications or information concern the same subject matter; and
> 3. The disclosed and undisclosed communications or information ought in fairness be considered together.
>
> B. Disclosure of a communication or information covered by the attorney-client privilege . . . made in a proceeding or to any public body [] does not operate as a waiver of the privilege or protection if:
>
> 1. The disclosure is inadvertent;
> 2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3. The holder promptly took reasonable steps to rectify the error, including, if applicable, complying with the provisions of subdivision (b)(6)(ii) of Rule 4:1 of the Rules of the Supreme Court.
>
> C. A court may order that the privilege . . . is not waived by the disclosure connected with the litigation pending before the court, in which case the disclosure does not operate as a waiver in any other proceeding.
>
> D. An agreement on the effect of the disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
>
> E. This section shall not limit any otherwise applicable waiver of attorney-client privilege or work product protection by an inmate who files an action challenging his conviction or sentence.

VA. CODE § 8.01–420.7.

Attorney-Client Privilege as It Relates to Representation of Business Entities

In addition to individuals, attorney-client privilege may attach to business entities. *See, e.g., CFTC v. Weintraub*, 471 U.S. 343, 348 (1985) (citing *Upjohn*, 449 U.S. 383). Furthermore, as *Upjohn* clarified, attorney-client privilege may also extend to protect communications made by any employee of a business entity to that entity's legal counsel. 449 U.S. at 397. As the Supreme Court explained in *Weintraub*,

> The administration of the attorney-client privilege in the case of corporations, however, presents special problems. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation.

471 U.S. at 348.

Attorney-client privilege does not attach merely because an employee made a communication to corporate counsel. *See, e.g., Va. Elec. & Power Co. v. Westmoreland–LG & E Partners*, 259 Va.

319, 325 (2000). The privilege will attach when the employee makes the communication for the business entity's purpose of obtaining legal advice. *Id.* (citing *Robertson v. Commonwealth*, 181 Va. 520, 539–40 (1943)). The privilege will further extend to communications between employees that are subsequently relayed to corporate counsel for the purpose of obtaining legal advice. *Va. Elec. & Power*, 259 Va. at 326 (citing *Owens–Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 141 (1992) (citing *Upjohn*, 449 U.S. 383)).

As it relates to written materials, the attorney-client privilege will cover a particular document, even if the document does not contain, or is not accompanied by a written request for legal advice. *Va. Elec. & Power*, 259 Va. at 326. However, under such circumstances, the privilege will attach only if the proponent claiming the privilege can demonstrate that the document was prepared with the intention of securing legal advice on its contents. *Id.* (citing *Robertson*, 181 Va. at 540).

The power to waive attorney-client privilege in the corporate setting rests with the business entity's management group. *Weintraub*, 471 U.S. at 348. This power is normally exercised by the entity's officers, directors, or managing partners. *Id.* Importantly, the entity's management is obligated to exercise the privilege in a manner consistent with management's fiduciary duty to act in the best interest of the business entity. *Id.* (citation omitted).

When a business entity changes management, attorney-client privilege passes on to the new management. *Id.* New management may waive attorney-client privilege with respect communications made by the former management. *Id.* Accordingly, former managers may not assert the privilege over the wishes of current managers, even as to the former manager's own statements.

Exceptions to Attorney-Client Privilege

As assertion of attorney-client privilege must serve public ends. *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). Thus, exceptions to attorney-client privilege may arise when there is an overriding public policy to that underlying the attorney-client privilege. *See, e.g.*, *Gunter*, 212 Va. at 287 ("If the communication between attorney and client relates to unlawful or fraudulent accomplishment, higher public policy, and the duty of an attorney to society as a whole, abrogates the privilege.").

The various exceptions include: the crime-fraud exception, *see, e.g.*, *id.* at 286–88; the fiduciary exception, *see Jicarilla Apache Nation*, 564 U.S. at 167–68; disclosure authorized by law, *see, e.g.*, VA. CODE § 8.01–420.7; disclosure by an attorney seeking legal ethics advice, *see* Va. Rules of Professional Conduct, R. 1.6, comment 5a; and disclosure by an attorney in self-defense against a claim by the client, *see, e.g.*, *Hunt*, 128 U.S. at 470–71.

The United States Supreme Court has held that the Federal Rules of Evidence do not bar the court from conducting an *in camera* review of allegedly privileged attorney-client communications to determine whether the communications fall within one of the exceptions to the privilege. *See United States v. Zolin*, 491 U.S. 554, 555–56 (1989) (permitting *in camera* review of privileged information to determine whether materials fell within crime-fraud

exception). Before the court can engage in an *in camera* review, the proponent of the exception to attorney-client privilege must present sufficient facts to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence tending to establish the claim that an exception to the privilege may apply. *Id.* Whether to conduct an *in camera* review rests in the sound discretion of the court.

Legal Malpractice Actions in Virginia

The concept of a legal malpractice claim within the law is unique. "A cause of action for legal malpractice requires the existence of an attorney-client relationship which [gives] rise to a duty, breach of that duty by the defendant attorney, and that the damages claimed by the plaintiff client must have been proximately caused by the defendant attorney's breach." *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313 (2002).

What make the claim of legal malpractice so unique is that the elements of a legal malpractice claim are markedly similar to those of a standard negligence claim. *See, e.g., Blue Ridge Serv. Corp. of Va. v. Saxon Shoes, Inc.*, 271 Va. 206, 218 (2006) ("The elements of an action in negligence are a legal duty on the part of the defendant, breach of that duty, and a showing that such breach was the proximate cause of injury, resulting in damage to the plaintiff.").[2] Yet, while a legal malpractice claim sounds in tort, it is in fact a breach of contract. *See, e.g., Cox v. Geary*, 271 Va. 141, 152 (2006) (citations omitted), *abrogated on other grounds by William H. Gordon Associates, Inc. v. Heritage Fellowship*, 291 Va. 122 (2016).

Historically, the claim was long perceived as a sort of hybrid claim, straddling the line between tort and contract. *See, e.g., MacLellan v. Throckmorton*, 235 Va. 341, 343 (1988); *Oleyar v. Kerr*, 217 Va. 88, 90 (1976). The Virginia Supreme Court frequently described the substantive legal principles applicable to legal malpractice claims utilizing tort terminology. *See, e.g., Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 432 (1995); *Campbell v. Bettius*, 244 Va. 347, 352 (1992); *Spence v. Norfolk & W. R. Co.*, 92 Va. 102, 113 (1895) (citations omitted).

In 2006, the *Cox* case clarified any confusion, putting the question as to whether a legal malpractice claim is a tort or contract claim to bed. In *Cox*, the Virginia Supreme Court held that a legal malpractice claim was a one of breach of contract. 271 Va. at 152. As the Virginia Supreme Court so aptly propounded, "It is the contract formed between an attorney and a client that gives rise to the attorney-client relationship; but for the contract, the attorney owes no duty to the client." *Id.* (citing *O'Connell v. Bean*, 263 Va. 176, 180 (2002)). Indeed, as Justice Kinser expounded, although an attorney-client contract implies general tort principles—*i.e.*, a duty of due care and a duty of fiduciary responsibility on the part of the attorney—the cause of action for legal malpractice is nevertheless one for breach of contract. *Id.*

Ultimately, legal malpractice claims are predicated upon a breach of the attorney's duty created by the attorney-client contract. *Smith v. McLaughlin*, 289 Va. 241, 257 (2015). Generally, only the client can bring a legal malpractice claim. *See Cox*, 271 Va. at 152. "To establish an attorney's breach of duty, 'a client must show that the attorney failed to exercise a reasonable degree of care, skill, and dispatch in rendering the services for which the attorney was

[2] Compare this with the standard elements of a breach of contract claim in Virginia: "[T]he elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *See, e.g., Navar, Inc. v. Fed. Bus. Council*, 291 Va. 338, 344 (2016) (citations omitted). Conceptually then, based on the definition of an action for negligence and an action for breach of contract alone, it is more logical to perceive a legal malpractice claim as sounding in tort; rather than arising out of a breach of contract.

employed.'" *Id.* at 253 (quoting *Ripper v. Bain*, 253 Va. 197, 202–03 (1997)); *see also Jones v. Dere*, 36 Va. Cir. 519 (Richmond 1995) (citations omitted) ("[T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment.").

Typically, whether an attorney breached his or her duty to the client is a question of fact. *Smith*, 289 Va. at 253; *cf. Heyward & Lee Constr. Co. v. Sands, Anderson, Marks & Miller*, 249 Va. 54, 57 (1995) (citing *Ortiz v. Barrett*, 222 Va. 118, 130 (1981)) ("However, when these questions are purely matters of law, they are reserved for determination by a court and cannot be the subject of expert testimony."). As the legal practice is regarded as a "highly technical profession," a client generally must employ expert testimony to establish the lawyer's standard of care. *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 434 (1995) (citations omitted).

An attorney does not breach a duty to his or her client when following "well-established law;" even when that law is reversed by an appellate court subsequent to the attorney's actions. *Heyward & Lee Constr.*, 249 Va. at 59–60. Likewise, where an attorney exercises "reasonable degree of care, skill, and dispatch" while acting in an unsettled area of the law—evaluated in the context of "the state of the law at the time" of the alleged negligence—the attorney generally will not be found to have breached a duty to the client. *Ripper*, 253 Va. at 202–03; *see also Heyward & Lee Constr.*, 249 Va. at 57.

Turning to the element of proximate cause, the client bears the burden of demonstrating that the damages claimed were proximately caused by the attorney's negligence. *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494, 497 (1992) (citing *Allied Prods. v. Duesterdick*, 217 Va. 763, 764–65 (1977), *overruled on other grounds, Shipman v. Kruck*, 267 Va. 495 (2004)). Courts will not presume the attorney's negligence. *Siddiqui*, 243 Va. at 497. An absolute requisite to the element of proximate cause is an allegation (and subsequent showing) that the client would have prevailed in the underlying action but for the negligence of the attorney. *Hendrix v. Daughterty*, 249 Va. 540, 544 (1995).

Damages are calculated on the basis of the value of what is lost by the client. *Downey*, 243 Va. at 497. The mere fact of the attorney's negligence, standing alone, is insufficient to support a recovery of damages by the client. *Campbell*, 244 Va. at 352. How to actually measure the damages is determined on a case-by-case basis. *Downey*, 243 Va. at 498 (citations omitted). The attorney will only be liable for injuries actually suffered by the client.[3] *Id.* at 497. The client need not prove the exact amount of damages incurred, but must present sufficient facts and circumstances from which the factfinder can make a reasonably certain estimate of those damages. *Id.* (citing *Goldstein v. Kaestner*, 243 Va. 169, 173 (1992)).

[3] "The 'rule,' them is clear: 'tort damages—including non-pecuniary damages such as mental anguish, emotional distress, and humiliation—'are not recoverable for breach of contract.' . . . [T]his principle holds true for all non-pecuniary, non-economic injury caused by the attorney's malpractice, such loss is not recoverable as damages in a legal malpractice claim. A legal malpractice plaintiff may recover only pecuniary damages proximately caused by an attorney's breach of the contractually implied duties." *Smith*, 289 Va. at 265-66 (quoting *Isle of Wight Cty v. Nogiec*, 281 Va. 140, 149 (2011) (citing *Sea–Land Serv., Inc. v. O'Neal*, 224 Va. 343, 353-54 (1982)) (footnote omitted).

In the context of a legal malpractice action arising out of representation in a criminal matter, the client must meet additional pleading requirements. A post-conviction ruling adverse to a defendant-client is an absolute bar on any recovery for legal malpractice. *See, e.g., Adkins v. Dixon*, 253 Va. 275, 281–82, *cert. denied*, 522 U.S. 937 (1997). A criminal client must generally plead actual innocence and demonstrate that he or she has obtained post-conviction relief. *Id.* at 282. Alternatively, a client can bring a successful legal malpractice claim by demonstrating that he was incarcerated upon conviction of acts that did not constitute a crime; *i.e.*, that, despite his or her conviction, no illegal act was committed. *See Taylor v. Davis*, 265 Va. 187 (2003).

Being an action deriving from contract, legal malpractice claims are governed by either the five-year statute of limitations for written contracts or the three-year statute of limitations for oral contracts. *See* VA. CODE § 8.01–246; *see also Shipman*, 267 Va. 495 (applying three-year statute of limitations); *Keller v. Denny*, 232 Va. 512 (1987) (applying five-year statute of limitations). The general rule is that "the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney's work on other undertakings or transactions for the same client." *Keller*, 232 Va. at 518.

A third-party beneficiary may bring a legal malpractice claim under certain narrow circumstances. *See Copenhaver v. Rogers*, 238 Va. 361 (1989); *Thorsen v. Richmond Soc'y for Prevention of Cruelty to Animals*, 292 Va. 257 (2016). As a general matter, "[i]n order to proceed on the third-party beneficiary contract theory, the party claiming the benefit must show that the parties to a contract 'clearly and definitely intended' to confer a benefit upon him." *Copenhaver*, 238 Va. at 367 (citation omitted). For example, a third-party beneficiary to a will, drafted by an attorney (who had an attorney-client relationship with the testator) could potentially bring a legal malpractice suit against the attorney if the purpose of the contract between the attorney and the client was to create a will devised to benefit that third-party beneficiary. *Thorsen*, 292 Va. at 280–81. Thus, merely being a beneficiary of the estate is insufficient to bring the claim; the contractual relationship between the attorney and client must be specifically directed towards benefiting that particular third-party. *Copenhaver*, 238 Va. at 368.

A couple of final notes about legal malpractice actions in Virginia. First, a legal malpractice claim cannot be assigned from a client to a third party. *See, e.g., MNC Credit Corp. v. Sickels*, 255 Va. 314, 318 (1998). This rule derives from the common law of the Commonwealth. *Id.* The fiduciary duties inherent in an attorney-client relationship provide the basis by which Virginia courts have held that contracts for legal services are not assignable. *See McGuire v. Brown*, 114 Va. 235, 242 (1912); *Epperson v. Epperson*, 108 Va. 471, 476 (1908).

Second, although legal malpractice claims are claims of breach of contract, contributory negligence is available as a defense in a legal malpractice action. *Lyle, Siegel, Croshaw & Beale*, 249 Va. at 432. Finally, while violating the Rules of Professional Conduct does not necessarily constitute legal malpractice, it nevertheless may be used to demonstrate a breach of the attorney's duty. *See, e.g., Weatherbee v. Va. State Bar*, 279 Va. 303 (2010). For example, an attorney may be held liable for legal malpractice for filing a frivolous lawsuit. *Id.* at 308–09.

Notable Virginia and Fourth Circuit Cases Involving Attorney-Client Privilege and Waiver (Past 3 years)

Fourth Circuit

Courtade v. United States, 243 F. Supp. 3d 699 (E.D. Va. 2017)

In *Courtade*, a criminal defendant ("Courtade"), pleaded guilty to possession of child pornography. 243 F. Supp. 3d at 701. After sentencing, Courtade filed a § 2255 Motion[4] to vacate his conviction on the basis of ineffective assistance of counsel. *Id.* Specifically, Courtade alleged his trial attorneys failed to inform him that his conduct was not criminal under the relevant statute and that they failed to properly appraise him of his right to appeal. *Id.*

In response, the Government filed a motion to compel, seeking information from Courtade's trial attorneys to defend against Courtade's claims. *Id.* at 701–02. By motion, Courtade requested that any discovery of privileged attorney-client communications be governed by a protective order prohibiting the use of such communications during any future proceeding. *Id.* at 702.

As an initial matter, Judge Rebecca Smith noted that "[a] petitioner who claims ineffective assistance of counsel in a habeas petition waives the protection of attorney-client privilege over information that is relevant to those claims." *Id.* (citations omitted) (quoting *LaBorde v. Virginia*, No. 1:10cv493, 2011 WL 2358510, at *2 (E.D. Va. June 9, 2011). Judge Smith explained that Courtade therefore had the choice between maintaining his ineffective assistance of counsel claim and waiving attorney-client privilege, or retaining the privilege and relinquishing his ineffective assistance claim. *Courtade*, 243 F. Supp. 3d at 702 (quoting *United States v. Nicholson*, 611 F.3d 191, 217 (4th Cir. 2010) (citation omitted)).

Since Courtade was intent to continue to pursue his ineffective-assistance-of-counsel claim, Judge Smith explained that Federal Rule of Evidence 502 was "enacted specifically to deal with the effect and extent of a waiver of the attorney-client privilege in a [f]ederal proceeding." *Courtade*, 243 F. Supp. 3d at 703 (citation omitted). Rule 502 provides that, when a disclosure is made in a federal proceeding, a waiver of attorney-client privilege extends to a particular undisclosed communication only if the waiver is intentional; the disclosed and undisclosed communications concern the same subject matter; and the two communications ought to, in fairness, be considered together. Fed. R. Evid. 502(a).

Citing to the Virginia Rules of Professional Conduct, Judge Smith asserted that a court must also take into account a lawyer's professional and ethical responsibilities when determining the extent and effect of a waiver. *Courtade*, 243 F. Supp. 3d at 703 (citations omitted). Judge Smith noted that Virginia Rules of Professional Conduct, Rule 1.6(b) permits an attorney to disclose privileged information "[t]o the extent [the] lawyer reasonably believes necessary . . . to comply with . . . a court order" or "to respond to allegations in any proceeding concerning the lawyer's representation of the client." *Courtade*, 243 F. Supp. 3d at 703.

[4] *See* 28 U.S.C. § 2255.

Turning to the case *sub judice*, Judge Smith held that by putting the conduct and communications of his former lawyers into issue by his § 2255 Motion, and by filing an affidavit disclosing some of those communications, Courtade intentionally waived attorney-client privilege with respect to all of those communications. *Id.* at 704 (citations omitted) (citing Fed. R. Evid. 502(a)).

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In re Grand Jury Subpoena, 642 Fed. Appx. 223 (4th Cir. 2016)

In re Grand Jury Subpoena pertained to a white-collar criminal investigation of two commodities traders allegedly engaged in misconduct (misusing material information about impending trades for personal gain). 642 Fed. Appx. at 224–25. The traders, employees of an unnamed bank, were initially investigated by an unnamed private regulatory body. *Id.* at 225. The bank engaged a lawyer to represent both the traders and the bank before the private regulatory body. *Id.* The lawyer interviewed the traders individually and collectively. *Id.* The lawyer also submitted a written document to the private regulatory body in which the lawyer asserted that the traders flatly denied the misconduct and provide credible rationale as to why the misconduct alleged was not feasible. *Id.*

Sometime later, the government began investigating the traders and a grand jury issued a subpoena to the lawyer seeking documents related to his representation of the traders; particularly, the interviews and the written submission to the private regulatory body. *Id.* The traders refused to waive their attorney-client privilege; intervened; and together with the lawyer, sought to quash the grand jury subpoena. *Id.* After some procedural back-and-forth, the District Court for the Western District of North Carolina denied the motion to quash, holding that the crime-fraud exception was applicable because the traders' communications to the lawyer were made "precisely to further the Traders' criminal scheme." *Id.*

Applying an abuse of discretion standard of review, the Fourth Circuit first set forth the following standard regarding the crime-fraud exception:

> To overcome the attorney-client privilege and 'secure [sought] evidence,' the government must convince the court: (1) that 'the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel,' and (2) that the attorney's assistance was obtained in furtherance of the crime or fraud or was closely related to it.

Id. at 226 (first quoting *Union Camp Corp. v. Lewis*, 385 F.2d 143, 145 (4th Cir. 1967); then quoting *In re Grand Jury Proceedings*, 401 F.3d 247, 251 (4th Cir. 2005)). The Fourth Circuit explained that while the government need not demonstrate a crime or fraud by a preponderance of the evidence, "the proof 'must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted.'" *In re Grand Jury Subpoena*, 642 Fed. Appx. at 226 (quoting *In re Grand Jury Proceedings*, 401 F.3d at 251 (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976))).

The Fourth Circuit concluded that the district court did not abuse its discretion in determining that the Government made a prima facie showing that the traders engaged in criminal or fraudulent conduct. *Id.* at 227. The court found that the record showed that the traders intended

to avoid detection and continue their criminal or fraudulent scheme via their communications with the lawyer. *Id.* at 227–28. Accordingly, the materials requested were not protected by attorney-client privilege. *Id.*

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Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323 (E.D. Va. 2015)

Bethune Hill involved a challenge of twelve Virginia House of Delegates districts as unlawful gerrymanders in violation of the Equal Protection Clause of the U.S. Constitution. 114 F. Supp. 3d at 329. The suit was brought against the Virginia State Board of Elections, but the Virginia House of Delegates and Speaker William Howell intervened ("Intervenors"). *Id.* Importantly, however, the Intervenors made clear that the only individual delegate they represented was Speaker Howell, and that they did not speak on behalf of any other individual legislator. *Id.*

Judge Robert Payne issued a memorandum opinion in the case, granting-in-part and denying-in-part the plaintiff's motion to compel production of documents. *Id.* Through the motion to compel, the plaintiffs sought all communications relating to the 2011 redistricting process between the various delegates, between any delegates and outside entities, and between any delegates and Republican political groups (*e.g.*, the Republication National Committee). *Id.* at 329–30. The Intervenors withheld documents from production on the basis of, *inter alia*, attorney-client privilege.

Quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982), Judge Payne set forth the "classic test" for determining the existence of the attorney client privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

114 F. Supp. 3d at 346. Judge Payne drew special attention to the fact that the privilege must be asserted and established by the privilege holder. *Id.*

Consequently, Judge Payne first concluded that the Intervenors could not assert the attorney-client privilege on behalf of third parties, including the other individual delegates not presently represented, campaign committees, or political parties. *Id.* Judge Payne explained, if the House was in possession of communications reflecting an individual delegate's request for outside legal counsel, "the proper course of action is for the House to advise the delegate so that the delegate can properly claim and establish the privilege." *Id.* That said, the court clarified that the House's mere possession of certain communications—*e.g.*, as between a delegate and outside counsel—did not necessarily waive the privilege so long as the delegate can demonstrate that there was a reasonable expectation of privacy in the emails sent using the House email system. *Id.* at 346–47 (citing *United States v. Hamilton*, 701 F.3d 404, 409 (4th Cir. 2012)).

Next, Judge Payne rejected the Intervenors' contention that attorney-client privilege applied to all of the individual delegates because of the operation of the common interest doctrine and the common interest shared between the delegates and the House at large. *Id.* at 347; *see also Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004) ("[T]he common interest doctrine applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest."). The court found unavailing the Intervenors' argument that a generalized interest in passing legislation justified invocation of the common interest doctrine. *Id.* The court also made note of the fact that the Intervenors made no showing that any of the individual delegates actually concurred in the Intervenors' position that the House at large and the individual delegates shared a common interest. *Id.*

Nevertheless, Judge Payne withheld ruling on the plaintiff's motion with respect to the claims of attorney-client privilege to provide the Intervenors the opportunity to pass notice on to any non-parties potentially affected by the opinion, so that those third parties may claim attorney-client privilege as necessary. *Id.* at 347–48.

Notable Virginia and Fourth Circuit Cases Involving Legal Malpractice Actions (Past 3 years)

Virginia

Moonlight Enters., LLC v. Mroz, 293 Va. 224 (2017)

Moonlight Enterprises involved three lawsuits arising out of a condominium purchase transaction by Moonlight Enterprises, represented by Mroz, in 2008. 293 Va. at 227–29. The first lawsuit was filed in 2010 by Mroz, as the lawyer for Moonlight, against the condominium association seeking a declaratory judgment that Moonlight was not responsible for parking and trash removal fees. *Id.* at 227–28. At some point in that litigation, another member of Mroz's firm, Zachary, took over primary responsibility for the litigation. *Id.* at 228. Ultimately, the court ruled against Moonlight on all issues. *Id.*

Zachary submitted a proposed final order to the court for the 2010 litigation on January 10, 2012. *Id.* Zachary emailed Moonlight on January 19, 2012, to confirm Moonlight had hired new counsel to handle the appeal and stated in the email: "our attorney client relationship in this matter is now at an end." *Id.* Shortly thereafter, Zachary learned the court has misplaced the proposed final order. *Id.* So, on January 26, 2012, Zachary prepared a new proposed final order, which was submitted to the court and entered by the court on February 10, 2012. *Id.* Zachary also notified Moonlight's appellate counsel that he had prepared the second order on January 26, 2012. *Id.*

In 2013, Moonlight filed a legal malpractice suit against Mroz and Zachary. *Id.* at 229. Moonlight alleged malpractice by Mroz in his handling of the 2008 purchase of the condo because Mroz failed to obtain or review a resale disclosure package as required by the Virginia Code. *Id.* Moonlight alleged Zachary committed malpractice during the 2010 litigation which caused Moonlight to lose on the merits. *Id.* The court dismissed the malpractice claim against Mroz; Moonlight nonsuited the malpractice claim against Zachary. *Id.*

Three years to the day after the entry of the final order in the 2010 litigation—on February 10, 2015—Moonlight filed a second malpractice suit against Mroz and Zachary, alleging six counts of malpractice associated with the handling of the 2010 litigation. *Id.* The circuit court granted Mroz and Zachary's pleas in bar asserting the three-year statute of limitations on oral contracts barred the 2015 malpractice suit. *Id.* Moonlight appealed. *Id.*

First, the Virginia Supreme Court explained that as a general rule, "a showing of an attorney's breach of duty and the existence of 'even slight damage sustains a cause of action' for legal malpractice." *Id.* at 230 (quoting *Shipman v. Kruck*, 267 Va. 495, 501, 507 (2004)). However, the court also recognized the continuous-representation rule, a tolling principle:

> [W]hen malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, . . . the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the

> continuation of a general attorney-client relationship, and irrespective of the attorney's work on other undertakings or transactions for the same client.

Moonlight Enters., 293 Va. at 230 (quoting *Keller v. Denny*, 232 Va. 512, 518 (1987)). The court explained that the crux of the inquiry into whether the continuous-representation rule is applicable is a determination of "when the attorney's work on the particular undertaking at issue has ceased." *Moonlight Enters.*, 293 Va. at 230-31 (citations omitted) (quoting *Shipman*, 267 Va. at 505). The court explained that the limitation period begins on the date the attorney renders his last professional services related to a particular undertaking. *Moonlight Enters.*, 293 Va. at 231 (footnote omitted) (quoting *Keller*, 232 Va. at 519).

The Virginia Supreme Court held that Zachary's work on the 2010 litigation ceased, at the earliest on February 10, 2012, when he prepared the second proposed final order. *Moonlight Enters.*, 293 Va. at 232–33. The court rationalized that as of February 10, 2012, Zachary continued to perform legal work for Moonlight in an effort to bring the 2010 litigation to a close. *Id.* at 233.

The court reached a different conclusion for Mroz. The court pointed out that the focus is not on "whether a general attorney-client relationship has ended, but instead, when the attorney's work on the particular undertaking at issue has ceased." *Id.* (quoting *Shipman*, 267 Va. at 505 (emphasis added)). Accordingly, the court concluded, "[a]n attorney who has truly ceased working on a case and has turned the matter over to others in his firm may, of course, be sued for malpractice within the limitation period applicable to him." *Moonlight Enters.*, 293 Va. at 234. In other words, the court explained, the continuous-representation rule does not extend indefinitely the tolling period for all members of a litigation team in Virginia. *Id.* Therefore, the court ruled that the circuit court correctly held that the three-year limitation period barred Moonlight's legal malpractice claims against Mroz because his work on the 2010 litigation had ceased more than three years prior to the institution of the 2015 malpractice suit. *Id.* at 236–37 (quoting *Shipman*, 267 Va. at 505).

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Thorsen v. Richmond Soc. for Preservation of Cruelty to Animals, 292 Va. 257 (2016)

In *Thorsen*, a woman met with Thorsen, an attorney, to prepare her last will and testament. 292 Va. at 262–63. The woman advised Thorsen that she wanted a will that would convey all of her property to her mother; or, if her mother predeceased her, to the Richmond Society for the Prevention of Cruelty to Animals ("RSPCA"). *Id.* at 263. Thorsen prepared the will and the woman executed it. *Id.*

The woman died with her mother predeceasing her. *Id.* Thorsen notified RSPCA that it was the sole beneficiary of the woman's estate. *Id.* However, a title insurance company notified Thorsen that the will left only the tangible estate, and not the real estate, to RSPCA. *Id.* Thorsen then brought suit to correct this result, alleging it was a "scrivener's error" based on the woman's clear original intent. *Id.* The circuit court rejected this contention and found that the will

unambiguously limited the bequest to RSPCA to the woman's tangible property; and the real estate passed intestate to the woman's heirs at law. *Id.*

Subsequently, the RSPCA brought suit against Thorsen for breach of contract, premised on legal malpractice. *Id.* Thorsen demurred, contending that the RSPCA was not an intended third-party beneficiary of the contract and therefore Thorsen undertook no obligation on RSPCA's behalf. *Id.* The trial court overruled Thorsen's demurrer. After the trial court found for the RSPCA, Thorsen appealed, claiming, *inter alia*, the circuit court erred in holding that the RSPCA had standing to sue for breach of contract while not party to the attorney-client relationship. *Id.* at 263–64.

As the Virginia Supreme Court iterated, "[i]n order to proceed on the third-party beneficiary contract theory, the party claiming the benefit must show that the parties to a contract 'clearly and definitely intended' to confer a benefit upon him." *Id.* at 269 (quoting *Copenhaver v. Rogers*, 238 Va. 361, 367 (1989) (citing *Allen v. Lindstrom*, 237 Va. 489, 500 (1989))). Accordingly, the court rationalized, "[w]hile party may reap a benefit from an estate, such party may not proceed in Virginia against one who negligently drafted testamentary documents without showing that the party was a 'clearly and definitely intended' beneficiary of the contract to draft the testamentary documents." *Thorsen*, 292 Va. at 269–70 (quoting *Copenhaver*, 238 Va. at 368–69).

Nevertheless, the court found that "'where the intent to benefit the plaintiff is clear and the promisee (testator) is unable to enforce the contract,' [Virginia] recognizes a cause of action among the narrow class of third-party beneficiaries to enforce claims which would otherwise have no recourse for failed legacies resulting from attorney malpractice." *Thorsen*, 292 Va. at 271 (citations omitted). The rationale underlying the principle, according to the court, was that "[i]mposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the client's intent, and the third party is in privity with the attorney." *Id.* at 272 (citation omitted).

Applying this rationale and the general doctrine of third-party beneficiary standing, the Virginia Supreme Court held that RSPCA's pleading sufficiently alleged a cause of action for breach of contract premised on legal malpractice on behalf of a third-party beneficiary of the contract between the woman and Thorsen. *Id.* at 274. In short, the court found that the RSPCA had standing. *Id.*

The court asserted that the pleadings made it clear that the woman sought to confer a benefit to RSPCA upon her death. *Id.* The woman and Thorsen contracted (*i.e.*, entered an attorney-client relationship) to confer that benefit. *Id.* When Thorsen accepted that obligation (*i.e.*, to prepare the woman's will), "the RSPCA became not only the intended beneficiary of Dumville's will but also the intended beneficiary of her contract of employment with Thorsen." *Id.* (citing *Copenhaver*, 238 Va. at 368–69).

Desetti v. Chester, 290 Va. 50 (2015)

In *Desetti*, the wife (Judy), husband (Joel), and son (Ryan) of the Desetti family were charged with various crimes arising out of a criminal incident at the Desetti home.[5] 290 Va. at 53. Chester, a lawyer, was retained to represent all three Desetti family members in each's respective criminal proceeding. *Id.* Joel and Ryan's trial occurred first, and they were found guilty. *Id.* at 53–54.

Prior to Judy's trial, the Commonwealth conveyed a plea offer to Chester on Judy's charges, but Chester never relayed the plea to Judy.[6] *Id.* Instead, Chester advised Judy to plead "not guilty" and go to trial. *Id.* Chester advised Judy "she had a 'slam dunk' case." *Id.* Chester neglected to advise Judy of the mandatory minimum sentence should she be convicted (six months). *Id.* Judy pleaded not guilty, requested a jury trial, and was subsequently found guilty by the jury and sentenced to the mandatory minimum. *Id.*

While serving her sentence, Judy filed a petition for a writ of habeas corpus alleging Chester's representation constituted ineffective assistance of counsel in violation of the Constitution on three grounds. *Id.* The petition alleged deficient counsel because of: "(1) Chester's concurrent representation of Judy, Joel, and Ryan, (2) Chester's failure to convey and explain the Commonwealth's plea offer, and (3) Chester's failure to advise and consult with Judy regarding the inclusion of a lesser-included misdemeanor offense in the jury instructions." *Id.*

The habeas court vacated Judy's conviction. *Id.* The Commonwealth retried Judy, and she pleaded guilty to misdemeanor assault and battery. *Id.* at 54–55. Pursuant to the plea, Judy was only sentenced to ten days of incarceration, with all ten days suspended. *Id.* at 55.

Shortly thereafter, Judy filed a legal malpractice claim against Chester and his law firm. *Id.* The crux of Judy's claim was that in the absence of legal malpractice, her criminal conduct would merely have resulted in a misdemeanor conviction with a ten-day incarceration sentence. *Id.* at 57. The matter came before the Virginia Supreme Court to determine whether Judy sufficiently pled a claim for legal malpractice. *Id.* at 53.

The court first established the elements of a legal malpractice claim in general: "A cause of action for legal malpractice requires the existence of an attorney-client relationship which gave rise to a duty, breach of that duty by the defendant attorney, and that the [pecuniary] damages claimed by the plaintiff client must have been proximately caused by the defendant attorney's breach." *Id.* at 56 (quoting *Smith v. McLaughlin*, 289 Va. 241, 253 (2015)). However, as the court explained, a legal malpractice plaintiff alleging malpractice that occurred during the course of a criminal matter has additional burdens of pleading. *Desetti*, 290 Va. at 56.

Thus, according to the court, "actual guilt is a material consideration [because] courts will not permit a guilty party to profit from his own crime." *Id.* (quoting *Adkins v. Dixon*, 235 Va. 275,

[5] Judy was charged with felony assault and battery of a law enforcement officer and misdemeanor obstruction of justice; Joel and Ryan were charged with misdemeanor obstruction of justice. *Desetti*, 290 Va. at 53.
[6] The plea offer was to lower the felony assault and battery of a law enforcement officer in exchange for a guilty plea to misdemeanor assault and battery. *Id.* at 54.

282 (1997)). Consequently, a legal malpractice plaintiff who alleges that malpractice occurred during the course of a criminal matter must plead facts establishing this element of the cause of action: that the damages to be recovered were proximately caused by the attorney's negligence but were not proximately caused by the legal malpractice plaintiff's own criminal actions. *Desetti*, 290 Va. at 56 (quoting *W.S. Carnes, Inc. v. Bd. of Supervisors*, 252 Va. 377, 384 (1996)).

The Virginia Supreme Court held that Judy's pleadings failed to support her claim—*i.e.*, she failed to adequately plead that Chester's conduct, as opposed to her own commission of a criminal act, proximately caused the pecuniary damages alleged. *Desetti*, 290 Va. at 58.

First, the court addressed pecuniary damages resulting from her felony conviction. *Id.* at 58–59. The court noted that the only relevant pecuniary damage in Judy's complaint was that her nursing license was suspended as a direct result of her conviction. *Id.* at 58. The court concluded that this allegation failed to sufficiently plead damages flowing from her felony conviction because she failed to allege that but for the felony conviction, Judy would not have lost her nursing license. *Id.* at 59. The court further concluded that Judy failed to alternatively allege that she would not have lost her nursing license based upon only a conviction for misdemeanor assault and battery. *Id.*

Next, the court turned to Judy's claim that legal malpractice proximately caused a wrongful six-month duration of her sentence. *Id.* at 59–61. The court noted that although Judy adequately incorporated the habeas court's determination to demonstrate she would have been sentenced to less than six months of incarceration, Judy failed to "identify any pecuniary damages that were specifically caused by her six months of incarceration, and not a sentence imposed absent Chester's malpractice." *Id.* at 60. The court found that there were no facts pled from which it could be determined that absent the legal malpractice Judy would have received a sentence of less than six months.[7] *Id.* at 61. Accordingly, the Virginia Supreme Court affirmed the circuit court's judgment sustaining Chester's demurrer. *Id.*

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Fourth Circuit

Labgold v. Regenhardt, 573 B.R. 645 (E.D. Va. 2017)

In *Labgold*, the plaintiff, a patent attorney, after an unsuccessful venture as the chief executive officer of a biotechnology company, retained Regenhardt to represent him in filing for bankruptcy and the subsequent proceedings. 573 B.R. at 647. Regenhardt prepared a Chapter 7 bankruptcy petition and filed it in the U.S. Bankruptcy Court for the Eastern District of Virginia. *Id.* In the petition, Regenhardt understated the patent attorney's wife's income, did not fully list the assets of the patent attorney's law practice, and neglected to disclose the transfer of the patent attorney's home from the patent attorney to his wife. *Id.* These omissions cost the patent

[7] For example, by the time the second sentence was imposed, Judy had already served the complete six months. *Desetti*, 290 Va. at 61. Additionally, the Commonwealth's initial plea offer to Judy was not accompanied by any recommended sentence. *Id.*

attorney at least $180,000 and resulted in the bankruptcy court's denial of the patent attorney's discharge of his unsecured debts in excess of $600,000. *Id.* Subsequently, the patent attorney filed a legal malpractice suit against Regenhardt. *Id.* at 648. The matter was before the court to rule on the defendants' pending motion to dismiss for lack of subject matter jurisdiction, and plaintiff's motion for leave to file an amended complaint. *Id.* at 646.

As an initial matter, Judge Anthony Trenga noted that the case presented a question of when the malpractice claim accrued. *Id.* at 649. If the claim accrued during the pendency of the bankruptcy proceeding, Judge Trenga explained, the claim was the property of the estate. *Id.* If it accrued post-petition, it is the property of the patent attorney and not the estate. *Id.* Judge Trenga held that the patent attorney's cause of action for malpractice accrued as of the commencement of the bankruptcy petition, and therefore, the cause of action became property of the estate. *Id.* (citing *Shipman v. Kruck*, 267 Va. 495 (2004)). Accordingly, Judge Trenga concluded that the patent attorney lacked standing to bring the legal malpractice claim and therefore the Eastern District of Virginia was without subject matter jurisdiction over the claim. *Id.*

Judge Trenga also addressed the patent attorney's amended complaint, which sought to abandon the original theory of causation and instead contend the malpractice claim was a separate and distinct cause of action based solely on Regenhardt's post-petition breaches. *Labgold*, 573 B.R. at 650. Judge Trenga found the amendments were frivolous, because regardless of whether the negligence occurred pre-petition or post-petition, the act of filing the petition created the legal injury constituting the basis for the cause of action. *Id.* at 650-651 (citing *Shipman*, 267 Va. 495). The cause of action encompassed the alleged post-petition breaches, Judge Trenga explained, because the breaches effectively amounted to a continuing failure to correct the original breach. *Id.*

Notable Cases from Other Jurisdictions

Federal Circuit Courts

In re Itron, Inc., --- F.3d ----, 2018 WL 1001545 (5th Cir. Feb. 21, 2018)

In re Tex. Brine Co., 879 F.3d 1224 (10th Cir. 2018)

EEOC v. BDO USA, L.L.P., 876 F.3d 690 (5th Cir. 2017)

United States v. Krug, 868 F.3d 82 (2d Cir. 2017)

Southern v. Bishoff, PC, 675 Fed. Appx. 239 (4th Cir. 2017)

In re Richard Roe, Inc., 168 F.3d 69 (2d Cir. 1999)

Federal District Courts

N.Y. Times Co. v. U.S. Dep't of Justice, --- F. Supp. 3d ----, 2017 WL 4772406 (D.D.C. Oct. 20, 2017)

Contravest Inc. v. Mt. Hawley Ins. Co., 273 F. Supp. 3d 607 (D.S.C. 2017)

Jordan v. U.S. Dep't of Labor, 273 F. Supp. 3d 214 (D.D.C. 2017)

El–Amin v. Downs, 272 F. Supp. 3d 147 (D.D.C. 2017)

Dist. Title v. Warren, 265 F. Supp. 3d 17 (D.D.C. 2017)

United States v. Straker, 258 F. Supp. 3d 151 (D.D.C. 2017)

Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64 (D.D.C. 2017)

State Farm Fire & Cas. Co. v. Admiral Ins. Co., 225 F. Supp. 3d 474 (D.S.C. 2016)

Wellin v. Wellin, 211 F. Supp. 3d 793 (D.S.C. 2016)

In re Grand Jury Subpoena, 201 F. Supp. 3d 767 (W.D.N.C. 2016)

Certusview Techs., LLC v. S&N Locating Servs., LLC, 198 F. Supp. 3d 568 (E.D. Va. 2016)

United States v. Braxton, 141 F. Supp. 3d 418 (D. Md. 2015)

Johnson v. Ford Motor Co., 309 F.R.D. 226 (S.D.W. Va. 2015)

Hanwha Azdel, Inc. v. C & D Zodiac, Inc., 617 Fed. Appx. 227 (4th Cir. 2015)

Chang-Williams v. United States, CIV. DKC 10–783, 2012 WL 253440, (D. Md. Jan. 25, 2012)

State Supreme Courts

Fenceroy v. Gelita USA, Inc., --- N.W.2d ----, 2018 WL 1021320 (Iowa Feb. 23, 2018)

Frederick v. Wallerich, --- N.W.2d ----, 2018 WL 735829 (Minn. Feb. 7, 2018)

In re 2015-2016 Jefferson Cty. Grand Jury, --- P.3d ----, 2018 WL 700098 (Colo. Feb. 5, 2018)

N. Kingstown Sch. Comm. v. Wagner, --- A.3d ----, 2018 WL 487245 (R.I. Jan. 19, 2018)

Story v. Bunstine, --- S.W.3d ----, 2017 WL 6276109 (Tenn. Dec. 11, 2017)

Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc., 805 S.E.2d 664 (N.C. 2017)

Sachs v. Downs Rachlin Martin PLLC, --- A.3d ----, 2017 WL 4700840 (Vt. Oct. 20, 2017)

Kay v. McGuirewoods, LLP, 807 S.E.2d 302 (W. Va. 2017)

In re Starwood Mgmt., LLC, 530 S.W.3d 673 (Tex. 2017)

Eagle Mountain City v. Parsons Kinghorn & Harris, P.C., 408 P.3d 322 (Utah 2017)

Rogers v. Zanetti, 518 S.W.3d 394 (Tex. 2017)

Stender v. Blessum, 897 N.W.2d 491 (Iowa 2017)

Worley v. Cent. Fla. Young Men's Christian Ass'n, 228 So.3d 18 (Fla. 2017)

Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court, 399 P.3d 334 (Nev. 2017)

Virginia Code Sections

VA. CODE § 8.01–420.7

A. When disclosure of a communication or information covered by the attorney-client privilege . . . made in a proceeding or to any public body [] operates as a waiver of the privilege . . . the waiver extends to an undisclosed communication or information only if:

1. The waiver is intentional;
2. The disclosed and undisclosed communications or information concern the same subject matter; and
3. The disclosed and undisclosed communications or information ought in fairness be considered together.

B. Disclosure of a communication or information covered by the attorney-client privilege . . . made in a proceeding or to any public body [] does not operate as a waiver of the privilege or protection if:

1. The disclosure is inadvertent;
2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. The holder promptly took reasonable steps to rectify the error, including, if applicable, complying with the provisions of subdivision (b)(6)(ii) of Rule 4:1 of the Rules of the Supreme Court.

C. A court may order that the privilege . . . is not waived by the disclosure connected with the litigation pending before the court, in which case the disclosure does not operate as a waiver in any other proceeding.

D. An agreement on the effect of the disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

E. This section shall not limit any otherwise applicable waiver of attorney-client privilege or work product protection by an inmate who files an action challenging his conviction or sentence.

Virginia Supreme Court Rules

RULE 2:501. PRIVILEGED COMMUNICATIONS

Except as otherwise required by the Constitutions of the United States or the Commonwealth of Virginia or provided by statute or these Rules, the privilege of a witness, person, government, State, or political subdivision thereof, shall be governed by the principles of common law as they may be interpreted by the courts of the Commonwealth in the light of reason and experience.

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RULE 2:502. ATTORNEY-CLIENT PRIVILEGE

Except as may be provided by statute, the existence and application of the attorney-client privilege in Virginia, and the exceptions thereto, shall be governed by the principles of common law as interpreted by the courts of the Commonwealth in the light of reason and experience.

Relevant Provisions of the Virginia Rules of Professional Conduct

Preamble: A Lawyer's Responsibilities

Scope

[T]hese Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has either a limited discretion or a limited obligation to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

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RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

RULE 1.3 Diligence

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

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RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
  (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  (3) the fee customarily charged in the locality for similar legal services;
  (4) the amount involved and the results obtained;
  (5) the time limitations imposed by the client or by the circumstances;
  (6) the nature and length of the professional relationship with the client;
  (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  (8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
  (1) the client is advised of and consents to the participation of all the lawyers involved;
  (2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
  (3) the total fee is reasonable; and
  (4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

(f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

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RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after

consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
  (1) such information to comply with law or a court order;
  (2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
  (4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
  (5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
  (6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(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;
  (2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud.

  For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or
  (3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and nondisclosure to the client.

Comments to Rule 1.6

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of

the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.
[3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.
[3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.
[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[5] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.
[5a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

Disclosure Adverse to Client

[6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.
[7] Several situations must be distinguished.
[7a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.
[7b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.
[7c] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph (c)(1), the lawyer is obligated to reveal such information. Some discretion is involved as it is very difficult for a lawyer to "know" when proposed criminal conduct will actually be carried out, for the client may have a change of mind.
[8] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client, the nature of the client's intended conduct, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Dispute Concerning a Lawyer's Conduct

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.
[10a] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a

charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[11] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[12] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct

[13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(3) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[14] Although paragraph (c)(3) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated.

RULE 1.7 Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  (1) the representation of one client will be directly adverse to another client; or
  (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
  (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  (2) the representation is not prohibited by law;
  (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  (4) the consent from the client is memorialized in writing.

Comments to Rule 1.7

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.
[4] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a clientlawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.
[6] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.

Consultation and Consent

[19] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the

lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.
[20] Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

Conflicts in Litigation

[23] Paragraph (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph(a)(2). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.
[23a] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.
[24] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Other Conflict Situations

[26] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[27] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.
[28] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. The lawyer should make clear his relationship to the parties involved.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.
[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.
[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(b).
[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.
[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

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RULE 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

Comments to Rule 1.10

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm as defined in the Terminology section can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other

RULE 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(g) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comments to Rule 1.11

Clarifying the Lawyer's Role

[10] When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

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RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk

of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comments to Rule 1.13

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Relation to Other Rules

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(c) can be applicable.

Government Agency

[9] The duty defined in this Rule applies to government organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Government lawyers, in many situations, are asked to represent diverse client interests. The government lawyer may be authorized by the organization to represent subordinate, internal clients in the interest of the organization subject to the other Rules relating to conflicts. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

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RULE 1.16 Declining Or Terminating Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the

lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by item basis during the course of the representation.

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RULE 5.1 Responsibilities Of Partners And Supervisory Lawyers

(a) 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.
(b) 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.
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
    (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
    (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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RULE 7.1 Communications Concerning A Lawyer's Services

(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
    (1) contains false or misleading information; or
    (2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or
    (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
    (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

(b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3.

Comments to Rule 7.1

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.
[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

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RULE 7.5 Firm Names And Letterheads

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Ethics Opinions

Va. Legal Ethics Opinion 1866, *"Of Counsel" Relationship*, (July 26, 2012)

In this hypothetical, a solo practitioner, the sole member of a professional limited liability company (PLC), who specializes in federal and state income taxes and complex business and real estate transactions wishes to formalize his relationship with a law firm that he works with frequently. Currently, the firm associates him as co-counsel in cases that require his expertise, and he associates with the firm or outright refers it cases that involve litigation or commercial real estate transactions.

The parties wish to modify and formalize their arrangement as follows:

> 1. The firm and the lawyer will jointly market themselves and refer to the lawyer as either "Of Counsel" or "Affiliated Attorney;"
> 2. In accordance with ABA Formal Opinion No. 330 (1972), the lawyer will be individually designated as "Of Counsel" or "Affiliated Attorney," rather than his PLC, and the lawyer will not enter into this arrangement with more than two firms at any time;
> 3. When the firm and the lawyer act as co-counsel on a matter, they will provide a joint bill to the client, accompanied by separate invoices of their individual fees and expenses;
> 4. When the involvement is an outright referral, the referring firm will receive a referral fee, which will comply with Rule 1.5(e); and
> 5. Other than these specific matters, neither the firm nor the lawyer will communicate or reveal confidences or secrets of any other clients or permit access to any documents or databases that would jeopardize other clients' confidences or secrets.

QUESTIONS PRESENTED

1. Other than matters on which the firms are co-counsel, are any other clients of the firm deemed to be clients of the solo practitioner for conflicts of interest and other purposes?

2. Other than matters on which the firms are co-counsel, is the referring firm responsible for ethical breaches that may arise in the receiving firm's representation, and are clients that are referred from the solo practitioner to the firm considered to be clients of the solo practitioner for conflicts of interest and other purposes?

3. If the fee arrangement complies with Rule 1.5(e) (including client disclosure), is joint marketing referring to the solo practitioner as either "Of Counsel" or "Affiliated Attorney" permissible?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.5(e)[], Rule 1.10(a)[], Rule 5.1(c)[] and Rule 7.5(d).[] Relevant legal ethics opinions are 1293, 1554, 1712, 1735 and 1850, along with ABA Formal Opinions 330 (1972) (withdrawn 1990) and 90-357 (1990).

ANALYSIS

In order to answer your specific inquiry, the Committee must first review and refine the principles applicable to the "of counsel" relationship. The Committee has consistently defined the "of counsel" relationship as a close, continuing, and personal relationship between a lawyer and a firm that is not the relationship of a partner, associate, or outside consultant. The relationship must involve some element of the practice of law, and cannot be limited to a pure business affiliation; the "of counsel" may not simply be a forwarder or receiver of legal business to or from the firm.

The "of counsel" designation is commonly used to describe several different types of relationships, including a retired partner of the firm who continues to be associated with the firm and available for consultations either with members of the firm or with clients directly, a parttime practitioner who has a different status than other members of the firm, such as a retired judge or former government official, or regular employees of the firm who occupy a status between partner and associate (typically lawyers who are too experienced to be considered associates, but who are not going to become partners for lifestyle or practice reasons). All of these uses of the term are permissible, since each arrangement involves a close, continuing relationship with the firm.

The term is also commonly used in a way that is not permissible: to describe the relationship between a lawyer or firm and a national law firm that solicits cases throughout the country and then makes geographically-based referrals to its designated lawyer or firm in each state. In this case, it is not appropriate for the lawyer to be designated as "of counsel" to the national law firm, because the relationship consists only of forwarding/receiving business and there is otherwise no relationship between the lawyer and the national firm.

Accordingly, a lawyer who is "of counsel" to a firm is associated with that firm for the purposes of the Rules of Professional Conduct, including the fee-sharing and conflict of interest rules. Rule 1.5(e) addressing fee-sharing between lawyers not in the same firm does not apply to the firm's relationship with a lawyer serving as "of counsel." When a lawyer becomes of counsel to a firm, all conflicts are imputed from the lawyer to the firm and vice versa. This imputation cannot be avoided by screening the lawyer from other cases in the firm or otherwise limiting the information available to him; Rule 1.10(a) provides for an absolute imputation of conflicts between lawyers who are currently associated in a firm.

Applying these general principles to the hypothetical situation presented, it is clear that the lawyer and firm may either have an occasional relationship in which conflicts are not imputed beyond specific cases and fee-sharing must be done in accordance with Rule 1.5(e), or the lawyer may become "of counsel" to the firm, which would impute all conflicts of the firm to the lawyer. Once the lawyer and the firm begin to hold the lawyer out as "of counsel" to the firm, conflicts will be imputed between the two regardless of whether the lawyer actually has any information about the clients of the firm or vice versa. However, the lawyer also cannot avoid the imputation of conflicts merely by refusing the title "of counsel;" if the lawyer holds himself out to potential clients as being closely associated with the firm, or if he in fact is closely and regularly associated with the firm, then conflicts will be imputed to him regardless of the title he

uses. Likewise, Rule 7.5(d) permits the lawyer and firm to describe their relationship as an "of counsel" relationship if that is the case.

In order to avoid association with the firm for conflicts purposes, the firm may limit the lawyer's relationship to that of an independent contractor, sharing fees with the firm pursuant to Rule 1.5(e), and working on specific matters in which the firm's clients require his specialized skills with each client's consent to the lawyer's participation at the outset of the representation. This relationship must remain limited though, in order to avoid imputation of conflicts. If the relationship between the lawyer and the firm is limited in this way, then the lawyer and firm would apply the analysis of LEOs 1712, 1735, and 1850, governing lawyer temps and other forms of "outsourcing" of legal services, in determining whether and to what extent the lawyer would be considered to be associated with the firm for conflicts purposes. For example, if the lawyer's access to information is restricted solely to those matters on which he or she is working on a temporary or occasional basis, the lawyer would not be considered associated with the firm for conflicts purposes.

Although conflicts would be imputed between the firm and any lawyer who is "of counsel" to that firm, the lawyer and firm would not generally be liable for one another's ethical misconduct on cases that they were not handling together. Rule 5.1(c) limits a lawyer's responsibility for another lawyer's ethical misconduct to circumstances where the lawyer knew about the other lawyer's conduct and either ordered or ratified it, or was in a supervisory position over the other lawyer and failed to take remedial actions. When the "of counsel" lawyer and the firm are not working together on cases, neither the lawyer nor the firm is supervising or directing the other's behavior, and generally will not be aware of one another's actions. There would therefore be no basis for holding the lawyer or the firm responsible for one another's actions when they are not associated on a particular case.

This opinion is advisory only and is not binding on any court or tribunal.

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Va. Legal Ethics Opinion 1831, *Compensation of Guardian* Ad Litem *by Insurer*, (Sept. 6, 2006)

You have presented a hypothetical in which an attorney was appointed to serve as guardian *ad litem* for a minor plaintiff in a personal injury case. The insurer petitions the court for approval of the settlement of the minor's claim. The insurer is willing to pay the fee of the guardian *ad litem* for her services as a cost to the insurer of obtaining that settlement. With regard to that hypothetical situation, you have asked the Committee to opine with regard to the following questions:
1) From whom may a guardian *ad litem* ethically accept fee payment when appointed by a court to represent a minor in a hearing in which a petitioning insurance company seeks court approval of the settlement of the minor's personal injury claim?
2) May the minor's parent give informed consent to the third party payment, in resolution of the potential conflict? The purview of this Committee is exclusively to interpret the Rules of Professional Conduct. *See* Rules of the Virginia Supreme Court, Pt. 6, § IV, Para. 10. Determination of who should properly pay the fee of a guardian *ad litem* in a particular matter is a legal question. The Committee notes that Va. Code Section 8.01-424 grants the court the power to approve the settlement of the minor's claim and the distribution of the settlement proceeds. Consequently, the particulars regarding the payment of the guardian *ad litem's* fee are subject to the court's approval.

Assuming the child is the "client" of the guardian *ad litem* for purposes of your inquiry,[8] you ask whether Rule 1.8(f) is applicable to the circumstances presented. Specifically, Rule 1.8(f) allows for payment of legal fees by third parties with the following requirements:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> > (1) the client consents after consultation;
> >
> > (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Thus, if the attorney can comply with those requirements, including the requirement of consent, then the attorney may ethically accept payment of her fee by a third party.

Your request asks just who can provide the consent called for in this situation, as the client is a minor. Of course, a minor cannot provide that consent[9], and the guardian cannot consent as it is the guardian's receipt of third party money that is at issue. In LEO 1725, an attorney in several

[8] [FN 1] The Committee does not hold that the child is the "client" of the guardian *ad litem*. That is a legal issue outside the purview of the Committee. Nevertheless, the Committee has opined that the Rules of Professional Conduct may apply to a guardian *ad litem* representing a child if the rules of conduct are not inconsistent with the lawyer's duties as guardian. *See* LEO 1729.
[9] [FN 2] *See* LEO 1762 (noting that while a minor may never provide any consent required by the Rules, whether any individual such as a parent, guardian, or next friend can provide valid consent for a minor is a legal question outside the purview of the Committee).

matters represented the Department of Social Services (DSS) while simultaneously serving as guardian *ad litem* in other matters where DSS is a party. The opinion directs the attorney to disclose to the court appointing him as guardian that DSS is a client, and the court can decide whether to permit service as guardian. LEO 1725 explains:

> It is the duty of the court to see that the GAL faithfully represents and protects the child's interests. To do so, the court must appoint a person…who is discreet and competent and who has no interest adverse to the child's interest…. The court is a gatekeeper. If a lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest…then the attorney…must make the same full disclosure to the court that he or she would make to a sui juris client for an informed consent to the representation.

The Committee reiterates that advice for any attorney who will serve or is serving as a guardian *ad litem* with a potential conflict of interest, including the attorney in the present scenario if concerned about payment of her fee by the insurer in this instance.

The Committee takes guidance from LEO 1725. The Committee notes the court has appointed the GAL and the court will also approve the compromise or settlement of the minor's claim. Therefore, the issue of the payment of the GAL's fee is also a matter that should be disclosed to and approved by the court. The court's approval of the GAL's fee should address any concern about the "consent" required under Rule 1.8 (f).

The Committee further cautions that any attorney being paid by a third party (such as the guardian in the present scenario) should be mindful of the need to maintain professional independence from that third party payor. Specifically, Rule 5.4(c) provides that the lawyer shall not permit the payor to "direct or regulate the lawyer's professional judgment in rendering such services." The lawyer should be especially sensitive of the need to maintain this independence in a situation involving a minor child. Additionally, when a third party is to pay an attorney's fee, the attorney should be mindful that Rule 1.6, outlining the duty of confidentiality, carves out no exception to that client protection for disclosures to third party payors.

This opinion is advisory only, and not binding on any court or tribunal.

Va. Legal Ethics Opinion 1664, *Agreement Between Attorney and University for Maintenance and Archiving of Closed Client Files Which Would Be Available on A Limited Basis for Research*, (Feb. 9, 1996)

You have presented a hypothetical situation in which an attorney has in storage many closed files which may have historical significance. The entity which employed the attorney to represent various clients during the time he handled these files has an agreement with a university to archive and maintain certain files. The attorney would like to have his files included with those maintained at the university. Under the agreement with the university, access to the attorney's files for research would be granted only after a written request is made and approved. Under the facts you have presented, you have asked the committee to opine as to the propriety of this arrangement.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:4-101. DR 4-101 governs a lawyer's duty of confidentiality to clients. DR:4-101(A) establishes two distinct categories of confidential information: 1) "confidences," which are information protected by the attorney-client evidentiary privilege; and 2) "secrets," which are other information gained in the professional relationship "that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

In the absence of a client's request to hold secrets inviolate, DR:4-101(A) entails a subjective analysis of whether disclosure would be embarrassing or likely detrimental to the client. In contrast, ABA Model Rule 1.6(a) prohibits disclosure of "information relating to or gained in the course of a representation of a client."

The committee has previously opined that the passage of time does not affect a lawyer's ongoing duty of confidentiality (LE Op. 812), and that the duty survives the client's death (LE Op. 1207). The Committee also has opined that it is not proper for a lawyer's files to be turned over to an institution following his death since the client's wishes remained the dominant consideration. LE Op. 928. See EC 4-6 [EC:4-6] (upon lawyer's death, disability or retirement, clients' instructions and wishes are dominant consideration in whether clients' personal papers are to be returned and lawyer's papers to be delivered to another lawyer or destroyed.) See also LE Op. 956.

In LE Op. 1307, the Committee was asked whether it was permissible for a deceased lawyer's daughter, who was a trained historian, to review his attorney-client files where she represented that information from those files would not be used to verify or amplify her historical work, but would be set aside from the materials being used. The Committee concluded that the daughter/historian properly could review the file jackets to categorize them, but that she could not review the contents of attorney-client files.

[I]t would not be proper . . . for a nonlawyer, or for a lawyer who is not affiliated with the same firm or practice as the lawyer to whom the client's information was originally entrusted, to review the contents of the legal, attorney-client files for any purpose regardless of any representation that the material will be set aside . . .
DR:4-101(B) is subject to rule of reason exceptions. Hence, a lawyer may disclose client confidences/secrets to employees or professionals whose service form part of the representation.

Even then, however, DR:4-101(E) requires a lawyer to exercise reasonable care to prevent those persons from disclosing or using client confidences/secrets. See LE Op. 1628.

Similarly, unless a client otherwise directs, a lawyer may give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing or other legitimate purposes. There, too, the lawyer must exercise due care in the selection of the agency and warn the agency that the information must be kept confidential. EC:4-3. See LE Op. 859 and LE Op. 1300.

In the hypothetical presented, scholars wishing access to the lawyer's case files would be required to represent that their work would not involve any use of former clients' names or other identifying data. On the facts presented, the Committee believes that LE Op. 1307 is controlling, and that scholar access to former client's case files is not permissible under DR:4-101(B) without client consent if the case files contain client confidences or secrets.

The Committee previously opined that once information has become a matter of public record, it is no longer confidential "unless the attorney should have known or it is obvious that such information may be construed to constitute a 'secret' under DR:4-101 and should remain confidential." LE Op. 1147. In LE Op. 1300 the Committee opined that identifying data about a client of a legal aid office was a secret since it might be an embarrassment to the client to have it revealed that he received legal aid services. ACLU legal assistance to the general public and prisoners likewise might be construed to constitute a client secret. The Committee observes, however, that if no attorney-client relationship resulted from a request for legal assistance, then DR:4-101(B) is not applicable; bearing in mind, however, that an implied (though not formal) attorney-client relationship can arise whenever a lawyer receives confidences or secrets from a person who had an expectation of confidentiality even if no representation resulted. See LE Op. 452; ABA Formal Op. 90-358. With respect to the retention/destruction of client files, the Committee directs your attention to LE Op. 1305.

In the facts you present, the committee believes that before turning over any former client's case file to the university, you must either obtain client consent to release the file to the university or ascertain whether the file contains information which constitutes client confidences or secrets. DR:4-101(A); DR:4-101(B)(1).

Va. Legal Ethics Opinion 1645, Obligation of Attorney to Provide Itemized Statement of Fees Due When Person Responsible for Payment Is Not the Attorney's Actual Client, (Sept. 8, 1995)

You have presented a hypothetical situation in which Borrower entered into a construction loan agreement with Bank for the construction of Borrower's home. Delays in completing the construction and the filing of a mechanic's lien constituted breaches of the construction loan agreement. The Bank referred certain aspects of this matter to its attorney. The loan documentation states that the Bank "shall be entitled to collect all expenses incurred in pursuing the remedies provided in the security instrument including, but not limited to, reasonable attorney's fees . . . ."

The Bank notified Borrower that $3,640 in attorney's fees had been charged against the loan. After several requests, the Bank provided to Borrower a bill from the law firm which provided little additional information. Borrower has attempted to obtain an itemized accounting of the attorney's fees, but the law firm has not provided this information to the Borrower. The Borrower feels that without an itemized accounting it cannot be determined whether the charges are proper and constitute "reasonable attorney's fees" as that term is used in the loan documents.

Under the facts you have presented, you have asked the committee to opine as to whether the person ultimately responsible for the payment of reasonable attorney's fees is entitled to an itemized accounting of how those fees were determined as if that person were a client.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2- 105(A) which states that a lawyer's fees shall be reasonable and adequately explained to the client; and DR:2-105(B) which states that the basis or rate of a lawyer's fee shall be furnished on request of the lawyer's client.

The committee believes that the cited rules require the existence of an attorney-client relationship. Prior opinions of the committee have interpreted certain disciplinary rules as applicable to the conduct of an attorney regardless of whether a professional relationship of attorney and client existed. LE Op. 1185 (lawyer must comply with the applicable rules at all times, whether or not acting in professional capacity).

However, the committee is of the view that the language of DR:2-105(A) and (B), cannot be construed as creating an ethical duty for an attorney to provide an itemized accounting of his or her fees to persons other than the client, even though such third party may be responsible for the payment of such legal fees, incident to a contract between the client and such third party.

The Rules of the Supreme Court of Virginia provide that the relation of attorney and client exists whenever one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill, or the preparation of legal instruments for a person other than his regular employer. Rules of Court, Pt. 6, § I(B) (definition of the practice of law).

If the relation of attorney and client exists between Bank's attorney and Borrower, then the refusal of Bank's attorney to provide an itemized breakdown of legal fees charged in the

construction loan dispute would violate DR:2-105(A) and (B). See, LE Op. 1571. In the absence of an attorney-client relationship, however, the committee is of the opinion that these rules do not apply and Bank's attorney is under no ethical duty to provide Borrower with an itemized breakdown of his legal fees. Whether or not an attorney-client relationship exists between Bank's attorney and Borrower is a legal question beyond the purview of the committee.

Am. Bar Ass'n, *Use of Designation "Of Counsel*," (May 10, 1990)

The use of the title "of counsel," or variants of that title, in identifying the relationship of a lawyer or law firm with another lawyer or firm is permissible as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading.

In this opinion the Committee revisits the general subject of use of the title "of counsel." The subject was last comprehensively addressed by the Committee in Formal Opinion 330 (1972), and one or another aspect of the subject has also been addressed by the Committee in a number of informal opinions, both before and after Formal Opinion 330.[10] The reasons for considering yet again this much-visited subject are several. One is that there has been a proliferation of variants of the term "of counsel," and of arrangements that one or another such variant term has been used to designate, not all of which are addressed by the Committee's prior opinions. Another reason is that the Committee's prior opinions may be unjustifiably restrictive with regard to some relationships that are commonly designated by the term "of counsel." Finally, it is desirable to consider whether the supersession of the ABA Model Code of Professional Responsibility (1969, amended 1980) by the ABA Model Rules of Professional Conduct (1983, amended 1989) warrants any modification of the Committee's previously announced views, all of which had reference solely to the Model Code or to its predecessor the Canons of Professional Ethics.

To address the last question first, it is the Committee's conclusion that there have been no changes involved in the transition from Model Code to Model Rules that have any substantive effect on the use of the term "of counsel." The Model Code included a specific reference to the title "of counsel" in DR 2- 102(A)(4), relating to letterheads, and the term does not appear in the Model Rules; but there is no substantive significance to this difference. Moreover, the textual basis in both the Model Rules and the Model Code for determining whether particular uses of the title are or are not ethically permissible is in substance the same--a prohibition against misleading representations--although the particular provisions embodying this prohibition are different in form. Model Rule 7.5(a) provides, in part, that "[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1"; and the latter Rule states in part that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Similarly, DR 2-101(A) of the Model Code provides that "[a] lawyer shall not ... use ... any form of public communication containing a false, fraudulent, misleading, deceptive ... or unfair statement or claim"; DR 2- 102(B) provides that "[a] lawyer in private practice shall not practice under a ... name that is misleading as to the identity of the lawyer or lawyers practicing under such name"; and EC 2-13 states that "[i]n order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status." The essence of the ethical requirement under both the Model Rules and Model Code is avoidance of misrepresentations as to the lawyer's status, and the relationship between lawyer and firm.

[10] [FN 1] Informal Opinion 678 (1963), Informal Opinion 710 (1964), Informal Opinion 1134 (1969), Informal Opinion 1173 (1971), Informal Opinion 1189 (1971), Informal Opinion 1246 (1972), Informal Opinion 1315 (1975) and Informal Opinion 84-1506 (1984). The present opinion supersedes both Formal Opinion 330 and the referenced informal opinions that preceded it, and those opinions are hereby withdrawn.

Of present concern are the representations implied by the use of the title "of counsel" on letterheads, law lists, professional cards, notices, office signs and the like: that is, its use in circumstances where there is a holding out to the world at large about some general and continuing relationship between the lawyers and law firms in question. A different use of the same term occurs when a lawyer (or firm) is designated as of counsel in filings in a particular case: in such circumstances, there is no general holding out as to a continuing relationship, or as to a relationship that applies to anything but the individual case.[11]

The issues that have been addressed in the Committee's previous opinions and that will be revisited here are, generally speaking, of two kinds, relating respectively to defining the relationship among lawyers and firms that the title "of counsel" is properly understood to evoke, and to identifying the resulting ethical implications of and limitations on its use.

As to the meaning of the title, it is appropriate to note preliminarily that, although "of counsel" appears to be the most frequently used among the various titles employing the term "counsel," it is by no means the only use of that term to indicate a relationship between a lawyer and a law firm. Other such titles include the single word "counsel," and the terms "special counsel," "tax [or other specialty counsel," and "senior counsel."[12] It is the Committee's view that, whatever the connotative differences evoked by these variants of the title "counsel," they all share the central, and defining, characteristic of the relationship that is denoted by the term "of counsel," and so should all be understood to be covered by the present opinion. That core characteristic properly denoted by the title "counsel" is, as stated in Formal Opinion 330, a "close, regular, personal relationship"; but a relationship which is neither that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term; nor, on the other hand, the status ordinarily conveyed by the term "associate," which is to say a junior non- partner lawyer, regularly employed by the firm.[13]

This core characteristic of the title "counsel" is shared by several kinds of relationships that in other respects vary in significant ways. There appear to be four principal patterns of such relationships, all of which in the Committee's view are properly referred to by the title "of counsel" (or one of its variants). Perhaps the commonest of such relationships is that of a part-time practitioner, who practices law in association with a firm, but on a basis different from that of the mainstream lawyers in the firm. Such part-time practitioners are sometimes lawyers who have decided to change from a full-time practice, either with that firm or with another, to a part-time one, or sometimes lawyers who have changed careers entirely, as for example former judges or government officials. A second common use of the term is to designate a retired partner of the firm who, although not actively practicing law, nonetheless remains associated with the firm and

[11] [FN 2] The distinction between use of the term "counsel" on the filings in a particular case on the one hand, and in general announcements implying a continuing relationship on the other, is significant because, as discussed below, its use in the latter connection is improper when it rests on no more than collaboration in a single case. See note 7 below and accompanying text.

[12] [FN 3] This opinion does not endeavor to address other terms of similar import that do not include the word counsel, such as "consultant," "consulting attorney" and "corresponding attorney."

[13] [FN 4] Formal Opinion 330 relied in part on the one passage in the Model Code that comes close to providing a definition of the term, DR 2-102(A)(4), which provides in part that "A lawyer may be designated 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate."

available for occasional consultation. A third use of the term is to designate a lawyer who is, in effect, a probationary partner-to-be: usually a lawyer brought into the firm laterally with the expectation of becoming partner after a relatively short period of time. A fourth, relatively recent, use of the term is to designate a permanent status in between those of partner and associate--akin to the category just described, but having the quality of tenure, or something close to it, and lacking that of an expectation of likely promotion to full partner status.[14]

In the Committee's view, the "of counsel" designation, or one of its variants, are appropriately applied to any of the four kinds of relationships just described. Prior opinions of the Committee may, however, be read as finding the term inapplicable to one or more of these relationships. For example, Formal Opinion 330 states that the relationship implied by "of counsel" would not be that of an employee of the firm, yet both the third and the fourth of the relationships identified in the preceding paragraph involve, as a technical matter, the status of an employee. Insofar as Formal Opinion 330 may be read to conclude that either the probationary partner model or the permanent between-partner- and-associate model are not permissibly designated of counsel, that conclusion is disavowed. Additionally, Formal Opinion 330 may be read as limiting the permissible use of the term "of counsel" by retired partners of a firm, because of possible implications from language in that opinion that an of counsel lawyer must be compensated for such legal work as the lawyer does, but only for that legal work--which, if strictly read, would exclude both a retired partner whose sole income from the firm is the partner's pension or other retirement benefit and counsel who share in some degree in the firm's profits. See also Informal Opinion 710. It is the Committee's view that, the other conditions just described having been met, it is not relevant to the permissibility of use of "of counsel" what the compensation arrangements are.[15] Similarly, some retired partners might be deemed to be excluded by the suggestion in Formal Opinion 330 that an of counsel's relationship to the firm must be "so close that he is in regular and frequent, if not daily, contact with the office of the lawyer or firm" (citing Informal Opinion 1134). Again, insofar as Formal Opinion 330 carries any implication that the contact must be so frequent as to verge on daily, the Committee now disavows it.

Nonetheless, the Committee remains of the view, as stated in earlier opinions, that it is not ethically permissible to use the term "of counsel" to designate the following professional relationships: a relationship involving only an individual case, see Informal Opinion 678, Formal Opinion 330;[16] a relationship of forwarder or receiver of legal business, see Formal Opinion 330; a relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms, see id.; and the relationship of an outside consultant, *see id.*

The characteristic of continuing and frequent professional contact bears particular emphasis in the context of use of the variant of the term "of counsel" that indicates a field of concentration: "tax counsel," "antitrust counsel," and the like. Such terms, although in the Committee's view as permissible as other variants of the term "counsel," must like them be confined to relationships

[14] [FN 5] Other terms sometimes used to designate this status are "senior attorney" and "principal attorney."
[15] [FN 6] The Committee expresses no view, however, on whether an arrangement under which the of counsel lawyer shares in the profits of the firm may expose the lawyer to malpractice liability as a partner.
[16] [FN 7] The reference here is not to the appearance of a lawyer or firm on the court filings of a particular case, but rather to representation of an "of counsel" relationship on firm letterhead, professional cards and the like on the basis of collaboration on a single case. See text at note 2 above.

that in fact involve frequent and continuing contacts, and not merely an availability for occasional consultations.[17] There is, moreover, in the term designating a specialty, a clear representation that the of counsel lawyer in fact has a special expertise in the designated area; and, for the firm, that it also has, by reason of the of counsel relationship, that special expertise.[18] It bears emphasis also that the use of a title indicating a specialty counsel, like the other uses here discussed, involves mutual attribution of all disqualifications of both the lawyer and the firm--and not just attribution with respect to matters falling within the designated area of specialty.

The Committee's previous opinions have expressed the view that a lawyer cannot properly be of counsel simultaneously with multiple firms, because the necessary "close, regular, personal relationship" cannot exist on a plural basis. Thus, the Committee's initial view, expressed in Informal Opinion 1173, was that a lawyer could not be of counsel to more than a single firm; and this was modified in Formal Opinion 330 to set a limit of two firms. On further consideration, the Committee finds the conclusion it reached on this subject in Formal Opinion 330 to be a doubtful one. The proposition that it is not possible for a lawyer to have a "close, regular, personal relationship" with more than two lawyers or law firms is not a self-evident one. A lawyer can surely have a close, regular, personal relationship with more than two clients; and the Committee sees no reason why the same cannot be true with more than two law firms. There is, to be sure, some point at which the number of relationships would be too great for any of them to have the necessary qualities of closeness and regularity, and that number may not be much beyond two, but the controlling criterion is "close and regular" relationships, not a particular number. As a practical matter, nonetheless, there is a consideration that is likely to put a relatively low limit on the number of "of counsel" relationships that can be undertaken by a particular lawyer: this is the fact that, as more fully discussed below, the relationship clearly means that the lawyer is "associated" with each firm with which the lawyer is of counsel. In consequence there is attribution to the lawyer who is of counsel of all the disqualifications of each firm, and, correspondingly, attribution from the of counsel lawyer to each firm, of each of those disqualifications. See Model Rule 1.10(a). In consequence, the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.

The Committee has also previously held that a firm cannot be of counsel to another lawyer or law firm, see Informal Opinion 1173; Formal Opinion 330. The reasoning here was that the term connotes an individual rather than a firm. This may be still so as a matter of current usage,[19] but semantics aside, the Committee's prior opinions do not suggest, and the Committee does not now perceive, any reason of policy why a firm should not be of counsel to another firm. Moreover, the Committee held in Formal Opinion 84-351 (1984) that two law firms could ethically present themselves as "affiliated" or "associated" with each other, and in Informal Opinion 1315 (1975), the Committee gave its approval to arrangements whereby two firms effectively became "of counsel" to each other, by each designating a partner of the other firm as "of counsel" to itself.

[17] [FN 8] The use of such terms may also be subject to ethical provisions of a particular jurisdiction limiting the use of terms designating specialization. See Model Rule 7.4(c).
[18] [FN 9] As on other points mentioned in this opinion, the Committee expresses no view as to the malpractice liability implications of such a representation of special expertise.
[19] [FN 10] It may be noted that firms are quite conventionally identified as of counsel to other lawyers or firms on the signature page of court filings.

As with multiple of counsel relationships of a single lawyer, the relationships between firms addressed in Formal Opinion 84- 351 and Informal Opinion 1315 would of course entail complete reciprocal attribution of the disqualifications of all lawyers in each firm.

A final issue regarding permissible use of the title "of counsel" is presented by the question whether the name of a lawyer who is of counsel may also be included in the name of the firm to which the lawyer is of counsel. This question may arise in two different sorts of circumstance, which in the Committee's view lead to two different results. The first is where a name partner in a firm retires from active practice and, as is of course permissible, the firm retains the lawyer's name in the firm name, see Model Code DR 2-102(B), cf. Model Rule 7.5(a) and Comment; but the retired partner also assumes of counsel status of the sort that has been described above. The second is a situation where the affiliation is altogether new, and where although the lawyer lends his or her name to the firm, the lawyer is not undertaking the responsibilities of a partner or principal.

The issue raised by both of these circumstances is whether they entail implicit representations to the public that are misleading. The Committee believes that in the case of a new or recent firm affiliation there is no escaping an implication that a name in the new firm name implies that the lawyer is a partner in the firm, with fully shared responsibility for its work. On the other hand, the Committee also believes that there is not a similar misleading implication in the use of a retired partner's name in the firm name, while the same partner is of counsel, where the firm name is long- established and well-recognized.[20]

To turn from consideration of the circumstances where use of the titles under discussion is or is not proper and address the ethical implications of and limitations on their use, the most important implication has already been adverted to. There can be no doubt that an of counsel lawyer (or firm) is "associated in" and has an "association with" the firm (or firms) to which the lawyer is of counsel, for purposes of both the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules and the imputation of disqualifications resulting from former government service under Rules 1.11(a) and 1.12(c); and is a lawyer in the firm for purposes of Rule 3.7(b), regarding the circumstances in which, when a lawyer is to be a witness in a proceeding, the lawyer's colleague may nonetheless represent the client in that proceeding. Similarly, the of counsel lawyer is "affiliated" with the firm and its individual lawyers for purposes of the general attribution of disqualifications under DR 5-105(D) of the Model Code. See Formal Opinion 330; Formal Opinion 84-351.

An additional ethical consequence of the relationship implied by the term "of counsel" is that is any listing, on a letterhead, shingle, bar listing or professional card, which shows the of counsel lawyer's name, any pertinent jurisdictional limitations on the lawyer's entitlement to practice must be indicated. See Model Rule 7.5(d); Model Code DR 2-102(D).

[20] [FN 11] The Committee does not express a view as to whether, when the retired partner's name remains included in the firm name, the retired partner may on that account be exposed to malpractice liability as if he or she were still a general partner.