GEORGE MASON AMERICAN INN OF COURT

2019 ETHICS UPDATE

October 23, 2019

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Introduction

Ethics and select Proposed Changes and Adopted Changes to the Rules of Ethics:

- Overview of the Ethics Committee and the process to change the Ethics Rules and Legal Ethics Opinions
- Hypotheticals and explanations for Proposed Rule 1.18 Comment 6, regarding Prospective Clients
- Hypotheticals and explanations for the change to Amended LEO 1750, regarding Advertisements
- Hypotheticals and explanations for the change to Amended LEO 1872, regarding Advertisements and Solicitations
- Hypotheticals and explanations for Rule 4.4(b), regarding Respect for Rights of Third Persons and Disclosures
- Hypotheticals and explanations for Rule 3.8, regarding Additional Responsibilities of a Prosecutor
- Hypotheticals and explanations for LEO 1890, Communications with Represented Persons

Proposed | amendment to Rule 1.18, Duties to Prospective Client, in Comment 6. Pending submission to Bar Council.

View the Current Rule

The Standing Committee on Legal Ethics approved the proposed rule changes but voted to delay submission to Bar Council pending staff's decision to make changes as a result of required minor amendments that address typos or inconsistencies in the comments to these rules.

Pursuant to Part 6, § IV, ¶ 10-2(C) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics is seeking public comment on proposed amendments to Rule 1.18 of the Rules of Professional Conduct.

The proposed amendment to Rule 1.18 removes a phrase from Comment 6 to the Rule, "the lawyer believes that an effective screen could not be engaged to protect the client," which is inconsistent with the section of the rule the comment is interpreting. Paragraph (c) of the Rule, and the balance of Comment 6, provides that a lawyer is not disqualified by a contact with a prospective client so long as she has not received significantly harmful information from the prospective client, and there is no need for a screen to be used under the circumstances. The language that the Committee proposes to delete does not belong in that comment, because either the lawyer is not disqualified and there is no need to form a belief about the effectiveness of a screen, or the lawyer is disqualified under paragraph (c) and paragraph (d) of the Rule, and Comments 7 and 8, must be applied to the situation.

Inspection and Comment

The proposed rule amendments may be inspected below or at the office of the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0060, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday, or by contacting the Office of Ethics Counsel at 804-775-0557.

Any individual, business, or other entity may file or submit written comments in support of or in opposition to the proposed opinion with Karen A. Gould, executive director of the Virginia State Bar, not later than **May 24, 2019**. Comments may be submitted via email to publiccomment@vsb.org.

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RULE 1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and

(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. The principle of loyalty diminishes in importance if the sole reason for an individual lawyer's disqualification is the lawyer's initial consultation with a prospective new client with whom no client-lawyer relationship is formed, either because the lawyer detected a conflict of interest as a result of an initial consultation, or for some other reason (e.g., the prospective client decided not to retain the firm). Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The client may disclose such information as part of the process of determining whether the client wishes to form a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter ~~and the lawyer believes that an effective screen could not be engaged to protect the client~~.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client and the lawyer reasonably believes that an effective screen will protect the confidential information of the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Updated: September 13, 2019

Committee Opinion
March 20, 2001
Committee Revised Opinion
April 4, 2006
Committee Revised Opinion
December 18, 2008
Supreme Court Approved
April 20, 2018
Supreme Court Approved
October 2, 2019

LEGAL ETHICS OPINION 1750. LAWYER ADVERTISING AND SOLICITATION.

The Standing Committee on Lawyer Advertising and Solicitation reviewed all of its previous opinions, and issued a compendium opinion March 20, 2001, summarizing many of the existing advertising opinions and incorporating previously issued legal ethics opinions on the subject of lawyer advertising. The Committee updated this opinion in 2005 and 2008 to reflect rule amendments and lawyer advertising amendments that had been adopted since 2001. The Standing Committee on Legal Ethics is now further updating the opinion to incorporate the significant rule changes effective July 1, 2017.

Some of the issues addressed in this opinion include: use of actors; use of the phrase "no recovery, no fee;" laudatory statements by third parties; use of specific or cumulative case results; participation in a lawyer referral service; communications involving listing of inclusion in publications such as *The Best Lawyers in America*; and the use of the terms "Specialist" or "Specializing In." The prohibition in Rule 7.1 concerning advertising which is false or misleading applies to all public communications and includes communications over the internet.

In order to provide all members of the Bar with better access to the advertising opinions, this compendium opinion, issued by the Standing Committee on Lawyer Advertising and Solicitation, will be published as a Legal Ethics Opinion. *See* Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 10; Virginia State Bar Bylaws, Article VII, Section 5.

Opinion

The appropriate and controlling rules of professional conduct relevant to the questions raised are Rules 7.1 and 7.3(d):

RULE 7.1. Communications Concerning A Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Committee Opinion
March 20, 2001
Committee Revised Opinion
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RULE 7.3. Solicitation of Clients.

* * *

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

* * *

(2) pay the usual charges of a legal service plan or not-for-profit qualified lawyer referral service.

A. Use of Actors in Lawyer Advertising.

The Committee considered the issue of whether a television advertisement is misleading when an attorney or law firm uses an actor to portray an attorney associated with the law firm without disclosing that fact in the advertisement.

The Committee is of the opinion that failing to disclose that the actor is not truly an employee or member of the law firm, when the language used implies otherwise, is misleading. For example, some advertisements feature actors who use first person references to themselves as lawyers or as members of the law firm being advertised. When the advertisement implies that an actor is actually a lawyer or client of the law firm, a disclosure that the actor is not associated with the firm, or that the depiction is a dramatization, is necessary to prevent the advertisement from being misleading.[1]

B. Use of "No Recovery, No Fee."

The Committee considered whether the language "no recovery, no fee" or language of similar import contained in advertising or other public communication soliciting claims for cases in which contingent fees are permissible was false or misleading pursuant to Rule 7.1, as the

[1]There may also be legal requirements to disclose compensation given in exchange for endorsements or testimonials in advertising. These requirements are beyond the purview of the Committee. *See*, e.g., Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

client might still be responsible for advanced costs and expenses regardless of whether any recovery was obtained.

The Committee determined that use of the explicit phrase "no recovery, no fee" in the solicitation of contingent fee cases is misleading when the lawyer or law firm may or will require the client to remain responsible for costs and expenses of litigation. According to Rule 1.8(e), a lawyer is permitted, but not required to, make repayment of costs and expenses contingent on the outcome of litigation. Thus, an advertisement or other public communication may only use the phrase "no recovery, no fee" when the lawyer or law firm has already made the decision that the client's responsibility for advanced costs and expenses will be contingent on the outcome of the matter. If the lawyer or law firm intends that the client will be ultimately responsible for the costs and expenses of litigation, it is misleading to use the phrase "no recovery, no fee" with no additional explanation that litigation expenses and court costs would be payable regardless of outcome because the public generally may not distinguish the differences between the terms "fee" and "costs." *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-3 (1985) (finding that "[t]he State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed"). The statement "no recovery, no fee" is misleading if a client is or may be liable for costs even if there is no recovery. *See* Rule 1.8(e).

Also, the Committee considered the propriety of such phrases as "we guarantee to win, or you don't pay," "we are paid only if you collect," "no charge unless we win," or other language not making explicit reference to a legal "fee." Language of this type that does not make explicit reference to a "fee" may be false and misleading in violation of Rule 7.1 if the language includes the implication that the client will not be required to pay either expenses or attorney's fees if there is no recovery, but the lawyer does not intend to make the costs and expenses contingent on the outcome of the matter. *See also* Rule 1.8(e).

C. Firm Names and Offices.

The question arises whether and under what circumstances attorneys may advertise using a corporate, trade, or fictitious name which is not the name or names of the firm, the attorney, or the attorneys in the firm. Comments 5 and 6 to Rule 7.1 allow a firm to use a trade or fictitious name as long as it is not misleading. For example, a firm may use the name or names of lawyers associated with the firm or a predecessor of the firm, or the name of a member of the firm who is deceased or retired from the practice of law. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. The firm name also may only state or imply a partnership between lawyers when that is the fact. A firm may not call itself "Smith and Jones" unless Smith and Jones are actually associated as partners in the firm.

It is also misleading under Rule 7.1 for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. Use of a name which is not the name used in the practice is misleading as to the identity, responsibility, and status of those using such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign. Furthermore, the usage of such name shall comply with applicable laws, including Sections 13.l-542 *et seq.* or Sections 59.l-69 *et seq.* of the Code of Virginia.

It is also potentially misleading under Rule 7.1 for a lawyer to advertise the use of a non-exclusive office space, including an executive office rental, if that is not actually an office where the lawyer provides legal services. *See* LEO 1872, which cautions that:

> [A] lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case.

D. Advising That an Attorney Must Be Consulted.

The question arises whether it is permissible for an advertisement to state that an

individual injured in an automobile accident must consult an attorney before speaking to any representative of an insurance company. While it may make good sense for an individual involved in an accident with an injury to consult with an attorney before speaking with a representative from an insurance company, there is no legal requirement for this. Since the proposed advertisement makes an explicitly false statement, to wit, that an individual "will have to consult an attorney," the proposed advertisement would be in violation of Rule 7.1.

E. Participation in Lawyer Referral Services.

Attorneys may advertise participation in lawyer referral services and joint marketing arrangements so long as the advertising is not false or misleading. *See* Rule 7.1. Lawyers may pay the "usual charges" of a legal service plan or not-for-profit lawyer referral service. *See* Rule 7.3(d) and LEO 1751. The Committee is concerned that some advertising concerning lawyer referral services and joint marketing arrangements are misleading. As noted in LEO 910, statements which violate the Rules of Professional Conduct and which are used in advertisements by lawyer referral services would create automatic rules violations by the participating attorneys. The following practices of lawyer referral services are misleading:

1. Implying in advertising that a lawyer is selected for participation in a Lawyer Referral Service based on quality of services or some other process of independent endorsement when in fact no bona fide quality judgment has been objectively made;

2. Stating or implying that the Lawyer Referral Service contains all of the lawyers or law firms eligible to participate in the Service by the objective criteria of the Service when in fact the Service is closed to some lawyers or law firms who meet the objective criteria;

3. Stating or implying that there are a substantial number of attorneys or firms participating in the Service when in fact all calls in a geographic area will be directed to one or two attorneys or firms;

4. Using the name of a Lawyer Referral Service or joint marketing arrangement in a way which misleads the public as to the true identity of the advertiser; or

5. Advertising participation in a Lawyer Referral Service which is not a true, qualifying Lawyer Referral Service as defined in this opinion, based on the American Bar Association Model Supreme Court Rules Governing Lawyer Referral Services.[2]

In order to qualify as a lawyer referral service for purposes of these rules, the service must: be operated in the public interest for the purpose of providing information to assist the clients; be open to all licensed lawyers in the geographical area served who meet the requirements of the service; require members to maintain malpractice insurance or provide proof of financial responsibility; maintain procedures for the admission, suspension, or removal of a lawyer from any panel; and not make any fee-generating referral to any lawyer who has an ownership interest in the service, or to that lawyer's law firm. *See also* LEOs 910, 1014, and 1175.

F. Advertising Specific or Cumulative Case Results/Jury Verdicts/Comparative Statements.

The Committee considered the question of whether it is misleading to the public for an attorney to advertise results obtained in a specific case or to advertise cumulative results obtained in more than one specific case, e.g., "We've collected millions for thousands," or "We've collected $30 million in 1996."

The Committee determined that it can be misleading to the public for an attorney to advertise specific case results, whether individually or cumulatively, for two reasons:

1. The results obtained in specific cases depend on a variety of factors, and any advertisement of the results obtained in a specific case or cases that does not include all factors can be misleading. This is true, in part, because it is generally impossible to know all factors that have influenced a specific result or an accumulation of specific results.

2. Each legal matter consists of circumstances that are peculiar or unique to the specific case, and the result obtained under one set of circumstances may not provide useful information to the public as a predictor of the result likely to be obtained in a case that necessarily involves different circumstances.

[2]Available at www.americanbar.org/groups/lawyer_referral/policy.html

An example will illustrate why information describing a specific case result or a blanket statement of cumulative results may be entirely accurate, but nonetheless misleading. An attorney could accurately cite in advertising a verdict of one million dollars, yet the public would be misled if the verdict were obtained under circumstances in which the offer prior to trial had been two million dollars. The same advertisement would be similarly misleading if the one million dollar verdict were obtained against an uncollectible defendant, under circumstances in which the case was lost as to a collectible co-defendant who had made a substantial offer prior to trial. More importantly, since no member of the public is likely to have a case in which the circumstances precisely duplicate the advertised verdict, the report of a specific case result may mislead the consumer "if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." Rule 7.1, Comment 2.

The 2017 amendments to Rule 7.1 shifted the focus from a mandatory disclaimer with a number of technical requirements for language and placement to an assessment of whether a particular statement is misleading, and if so, whether there is a disclaimer or additional information that would put the statement in the proper context and avoid any misleading implications. Rule 7.1 no longer requires a specific disclaimer to precede any statement of case results, although Comment 2 does clarify that the inclusion of "an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public."

For example, the above statement of a "one million dollar verdict" obtained after a two million dollar settlement offer was refused would need to include the full context in order not to be misleading. Nor would the boilerplate disclaimer language previously required by Rule 7.1 be sufficient to avoid the misleading implication – the communication would have to state the fact that a two million dollar settlement offer was made prior to the trial in which the one million dollar verdict was obtained. Another example of a misleading statement of case results would be a

statement that a lawyer obtained an $8 million jury verdict in a medical malpractice case, when the court reduced the award to the statutory cap of $2.25 million. A lawyer advertising such a result must include the fact that the award was reduced by the court.

On the other hand, a lawyer who advertises that she has obtained pre-trial dismissal of criminal charges after prevailing on a motion to suppress evidence, when that is a complete and true statement of what happened in the case, may do so without including any disclaimer or limiting language. Similarly, a lawyer may truthfully advertise that he obtained a $5 million settlement following a three-day mediation.

The Committee has repeatedly opined that the use of claims such as "the best lawyers," "the biggest earnings," and "the most experienced" are self-laudatory and amount to comparative statements that cannot be factually substantiated, in violation of Rule 7.1. *See also* Comment 2 to Rule 7.1. This Committee continues to adhere to the belief expressed in Comment 2 that statements that use extravagant or self-laudatory words that cannot be factually substantiated are designed to and in fact mislead laypersons to whom they are directed and, as such, undermine public confidence in our legal system. *See also* LEOs 1229 and 1443.

G. Statements by Third Parties.

The Committee addressed whether a lawyer can circumvent the prohibition against comparative statements with the use of client testimonials. For example, a lawyer's television advertisement shows a former client making statements about the client's satisfaction and about the quality of the lawyer's services, using statements to the effect that the lawyer is "the best" and will get you "quick results."

Rule 7.1 prohibits statements comparing attorneys' services, unless the comparison can be factually substantiated. *See* Comment 2 to Rule 7.1. The Committee has previously opined that a lawyer's advertising of specific case results may be misleading, if the communication does not include an appropriate disclaimer or other context for the case results. Thus, an attorney has clear guidance as to the impropriety of making certain statements in his advertising. Rule 8.4(a) states

that an attorney shall not violate a disciplinary rule through the actions of another. Moreover, the language of the restriction in Rule 7.1 makes no qualification as to the maker of the regulated statements. To the contrary, the rule's requirements are directed at any statements contained in the communication. Thus, there is no support in Virginia's Rules of Professional Conduct for affording greater leeway to advertising statements made by clients than to those made by attorneys. The standard is the same in both instances. Applying that standard to this hypothetical, the client's statements make a comparison ("the best") that cannot be factually substantiated. If such improper statements are contained in the lawyer's advertisement, the lawyer would be in violation of Rule 7.1.

In further clarification, even statements of opinion by clients that contain comparative statements are not appropriate. This Committee adopts the mixed approach of Philadelphia Ethics Opinion 91-17; while prohibiting testimonials regarding results and/or comparisons, it does allow "soft endorsements." Examples of "soft endorsements" from the Philadelphia opinion include statements such as "the lawyer always returned phone calls" and "the attorney always appeared concerned."

In sum, the requirements for lawyer advertising are all intended for the protection of the public. The restrictions on advertising content are carefully chosen to avoid misleading the public as they make the important choice of whom to select for legal representation. This Committee will not erode that protection where non-lawyers or their statements appear in the advertisements. Such a distinction would violate both the language of the pertinent rule and the spirit behind it.

H. Communications Involving Listing in Publications such as *The Best Lawyers in America.*

The Committee addressed this issue and stated that a lawyer may advertise the fact he/she is listed in a publication such as *The Best Lawyers in America*, or a similar publication, and include additional statements, claims or characterizations based upon the lawyer's inclusion in such a publication, provided such statements, claims or characterizations do not violate Rule 7.1. If, for some reason, the lawyer is delisted by a publication, the statement in the advertisement

must accurately state the year(s) or edition(s) in which the lawyer was listed.

Further, the lawyer may not ethically communicate to the public credentials that are not legitimate, such as one that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee. Such a communication is misleading to the public and therefore prohibited.

Similarly, statements that explain, and do not exaggerate the meaning or significance of professional credentials, in laymen's terms are permissible. For example, if the lawyer is communicating his "A.V." rating by Martindale-Hubbell, the lawyer may properly include a description that states that "A.V." represents "the highest rating" that particular service assigns. Also, if the lawyer is recognized and listed in the book *The Best Lawyers in America*, that lawyer may properly note he is among those lawyers "whom other lawyers have called the best." The lawyer should be mindful to exercise discretion when communicating this information, that it be objective and not misleading. For example, although the lawyer may properly characterize inclusion in the book *The Best Lawyers in America*, he cannot properly characterize that inclusion into statements such as "since I am included in the book, that means I am the best lawyer in America," nor can the lawyer impute any such endorsement to others in the law firm not so recognized.

The Committee's decision includes objective and factual statements and claims of such inclusions and warns that descriptive characterizations and other qualitative statements must meet the requirements of Rule 7.1. *See also* LAO-0114.

I. Use of "Specialist" or "Specializing In."

Rule 7.1 permits a lawyer to hold herself out as limiting or concentrating the lawyer's practice in a particular area or field of law as long as that is a true and accurate statement.

Comment 4 to Rule 7.1 (formerly comment 1 to Rule 7.4) provides that a lawyer can generally state that she is a "specialist," practices a "specialty," or "specializes in" particular fields, as long as the statement is not false or misleading in violation of Rule 7.1. The 2017

amendments to the Rules removed the longstanding requirement that a lawyer who claims to be certified as a specialist include a disclaimer stating that no certifying organization has been recognized by the Supreme Court of Virginia. Instead, the lawyer is required to identify the name of the organization that purportedly conferred the certification, so that a prospective client or other member of the public can verify the validity of the certification and the criteria for conferring the certification. Any claim of certification as a specialist is still subject to the requirement that it is not false or misleading – the certifying organization must undertake some bona fide evaluation of lawyers rather than just awarding the certification to anyone who pays a required fee or joins an organization.

J. Use of "Expert" and "Expertise."

Rule 7.1 prohibits a lawyer from using or participating in the use of any form of public communication which contains a false or misleading statement or claim. The Committee opines that a lawyer's use of the words "expert" or "expertise" in public communications, if the claim cannot be factually substantiated, amounts to a misleading comparative statement and is therefore prohibited. *See* Comment 2 to Rule 7.1. *See also* LEOs 1292, 1406 and 1425.

LEGAL ETHICS OPINION 1890—COMMUNICATIONS WITH REPRESENTED PERSONS (COMPENDIUM OPINION)

In this compendium opinion, the Committee addresses numerous issues that have been raised in past legal ethics opinions regarding the application of Rule 4.2 of the Virginia Rules of Professional Conduct, formerly DR 7-103(A)(1) of the Virginia Code of Professional Responsibility. Although the rule on its face seems simple and straightforward, many issues arise in its application.

Rule 4.2 of the Virginia Rules of Professional Conduct states that:

> [i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Prior to January 1, 2000, the "no contact rule" was embodied in DR 7-103(A)(1) of the former Virginia Code of Professional Responsibility which stated:

> During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The commentary to Rule 4.2 provides guidance for interpreting the scope and meaning of the Rule. *Zaug v. Virginia State Bar,* 285 Va. 457, 462, 737 S.E.2d 914 (2013). In various places throughout this opinion, the rule is described as the "no contact rule" or simply "the rule." Throughout this opinion "communicate directly" means to communicate *ex parte* with a represented person, that is, without the knowledge or consent of the lawyer representing that person. The term "represented person" means a person represented by counsel. LEO means "legal ethics opinion." The Committee addresses these points in the opinion:

1. The rule applies even if the represented person initiates or consents to an *ex parte* communication.

2. The rule applies only if the communication is about the subject of the representation.

3. The rule applies only if the lawyer actually knows that the person is represented by counsel.

4. The rule applies even if the communicating lawyer is self-represented.

5. Represented persons may communicate directly with each other regarding the subject of the representation, but the lawyer may not use the client to circumvent Rule 4.2.

6. A lawyer may not use an investigator or third party to communicate directly with a represented person.

7. Government lawyers involved in criminal and certain civil investigations may be "authorized by law" to have *ex parte* investigative contacts with represented persons.

8. *Ex parte* communications are permitted with employees of a represented organization unless the employee is in the "control group" or is the "alter ego" of the represented organization.

9. The rule does not apply to communications with former employees of a represented organization.

10. The fact that an organization has in house or general counsel does not prohibit another lawyer from communicating directly with constituents of the organization, and the fact that an organization has outside counsel in a particular matter does not prohibit another lawyer from communicating directly with in house counsel for the organization.

11. Plaintiff's counsel generally may communicate directly with an insurance company's employee/adjuster after the insurance company has assigned the case to defense counsel.

12. A lawyer may communicate directly with a represented person if that person is seeking a "second opinion" or replacement counsel.

13. The rule permits communications that are "authorized by law."

14. The rule allows certain *ex parte* communications with represented government officials concerning the subject of the representation in a controversy between the lawyer's client and the government.

15. A lawyer's inability to communicate with an uncooperative opposing counsel or reasonable belief that opposing counsel has withheld or failed to communicate settlement offers is not a basis for direct communication with a represented adversary.

The purpose of the no-contact rule is to protect a represented person from "the danger of being 'tricked' into giving his case away by opposing counsel's artfully crafted questions," *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983), and to help prevent opposing counsel from "driving a wedge between the opposing attorney and that attorney's client." *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990). The presence of a person's lawyer "theoretically neutralizes" any undue influence or encroachment by opposing counsel. *Univ. Patents, Inc. v. Kligman*, 737 F. Supp. 325, 327 (E.D. Pa. 1990).

Authorities recognize that the no-contact rule contributes to the proper functioning of the legal system by (1) preserving the integrity of the attorney-client relationship; (2) protecting the client from the uncounseled disclosure of privileged or other damaging information relating to the representation; (3) facilitating the settlement of disputes by channeling them through

dispassionate experts; (4) maintaining a lawyer's ability to monitor the case and effectively represent the client; and (5) providing parties with the rule that most would choose to follow anyway. *Simels*, 48 F.3d at 647; *Richards v. Holsum Bakery, Inc.*, 2009 BL 240348 (D. Ariz. Nov. 5, 2009); *Am. Plastic Equip., Inc. v. Toytrackerz, LLC*, 2009 BL 66761 (D. Kan. Mar. 31, 2009); *Lobato v. Ford*, 2007 BL 295553, No. 1:05-cv-01437-LTB-CBS (D. Colo. Nov. 9, 2007); ABA Formal Ethics Op. 95-396, at 4; Model Rules R. 4.2 cmt. 1. See also Comments 8 and 9 to Va. Rule 4.2 ("concerns regarding the need to protect uncounseled persons against the wiles of opposing counsel and preserving the attorney-client relationship").

Rule 4.2 is a "bright line" rule. As the Supreme Court of Virginia noted in *Zaug v. Virginia State Bar,* 285 Va. 457, 737 S.E.2d 914 (2013):

> We agree with the State Bar that attorneys must understand that they are ethically prohibited from communicating about the subject of representation with a person represented by another attorney unless they have that attorney's consent or are authorized by law to do so. The Rule categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications when they are initiated by others.

Zaug, supra, 285 Va. at 465. For the Rule to apply, three elements must be established:

> (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. While the first two facts may occur in any order, both must occur before an attorney violates the Rule.

Zaug, supra, 285 at 463.

1. *The Rule Applies Even if the Represented Person Initiates or Consents to an Ex Parte Communication.*

Comment 3 to Rule 4.2 states:

> The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

As the Supreme Court of Virginia explained in *Zaug*, "immediately" does not mean "instantaneously." If a represented person contacts opposing counsel by telephone, for example, counsel must have an opportunity to ascertain the identity of the caller and to disengage politely from the communication, advise the represented person that the lawyer cannot speak with him directly about his case and should advise the represented person that he should speak with his lawyer.

2. *The Rule Applies Only if the Communication is About the Subject of the Representation*.

To trigger Rule 4.2 the communication must be about the subject of the representation—i.e., the lawyer's representation of his or her client. *Zaug, supra*, 285 Va. at 463; ABA Formal Op. 95-396 at 12.

Comment 4 to Rule 4.2 explains:

> This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.

For example, the Standing Committee on Legal Ethics opined in Legal Ethics Opinion 1527 (1993) that a lawyer/shareholder cannot communicate with officers or directors of a represented corporation regarding sale of lawyer's stock in the corporation if the stock sale is the subject of the lawsuit lawyer filed pro se against the corporation.

The Rule applies to *ex parte* communications with represented persons even if the subject matter of the representation is transactional or not the subject of litigation. LEO 1390 (1989). Comment 8 to Rule 4.2 states:

> This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.

3. *The Rule Applies Only if the Lawyer Actually Knows that the Person is Represented by Counsel.*

As the Supreme Court of Virginia explained in *Zaug v. Virginia State Bar*, a lawyer must *know* that she is speaking with a represented person. As used in Rule 4.2, the term "knows" denotes actual knowledge of the fact in question. Part 6, §II ("Terminology"). However, "[a] person's knowledge may be inferred from circumstances." For example, if a case concludes with a final order, may a lawyer thereafter communicate directly with a person previously represented by counsel during trial, during the time within which an appeal could be taken? In LEO 1389, the Committee concluded that a lawyer cannot presume that a final decree of divorce terminated the opposing party's relationship with his attorney since matters involving support, custody and visitation are often revisited by the courts:

> The Committee believes it would not be improper for an attorney to make direct contact with a previously represented party, following a final Order in that prior litigation, (1) where the attorney knows that the representation has ended through

> discharge by the client or withdrawal by the attorney, or (2) where, as permitted by DR:7 -103(A)(1), the attorney is authorized by law to do so. It is the Committee's opinion that, absent such knowledge or leave of court, it would be improper for an attorney to communicate on the subject of the prior litigation with the previously represented party, irrespective of the substance of the litigation.

The Committee also stated that if the lawyer is without knowledge or uncertain as to whether the adverse party is represented, it would not be improper to communicate directly with that person for the sole purpose of securing information as to their current representation.

The Committee has opined that it is improper for an attorney to send a letter to the opposing party concerning judgment matters during the appeal period following entry of a general district court judgment when the opposing party had been represented by counsel at trial, even though no appeal had yet been filed nor had the opposing party's attorney indicated that any appeal would be filed. Legal Ethics Opinion 963 (1987).

4. *The Rule Applies Even if the Communicating Lawyer is Self-represented.*

Rule 4.2 prohibits a self-represented lawyer from directly contacting a represented person. *See* LEO 1527 (1993) ("Additionally, the committee is of the opinion that neither the fact that the attorney/shareholder is representing himself nor the claim that the corporation's directors are not receiving accurate information about the nature of the attorney/shareholder's claim would constitute an exception to DR:7-103(A)(1)."). Further, the Supreme Court of Virginia has held that a lawyer cannot avoid the duties and obligations under the Rules of Professional Conduct on the basis that the lawyer is representing himself rather than another. In *Barrett v. Virginia State Bar*, 272 Va. 260, 634 S.E.2d 341 (2006) the Court ruled:

> Rules of statutory construction provide that language should not be given a literal interpretation if doing so would result in a manifest absurdity. *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005). Applying these Rules in the manner Barrett suggests would result in such an absurdity. The Rules of Professional Conduct are designed to insure the integrity and fairness of the legal process. It would be a manifest absurdity and a distortion of these Rules if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing himself. [Citations omitted.]
>
> Furthermore, an attorney who represents himself in a proceeding acts as both lawyer and client. He takes some actions as an attorney, such as filing pleadings, making motions, and examining witnesses, and undertakes others as a client, such as providing testimonial or documentary evidence. *See In re Glass*, 309 Or. 218, 784 P.2d 1094, 1097 (1990) (lawyer appearing in proceeding pro se is own client); *In re Morton Allan Segall*, 117 Ill.2d 1, 109 Ill.Dec. 149, 509 N.E.2d 988, 990 (1987) ("attorney who is himself a party to the litigation represents himself when he contacts an opposing party"); *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075, 1079 (1990) (restriction on attorneys contacting

represented parties limited to instances where attorney is representing client, not where attorney represents himself).

The three Rules at issue here address acts Barrett took while functioning as an attorney and thus the three-judge panel correctly held that such acts are subject to disciplinary action.

Barrett, supra, 272 Va. at 345. *But see Barrett v. Virginia State Bar,* 269 Va. 583, 611 S.E.2d 375 (2005) (holding that Rule 4.3 (b)'s prohibition against giving legal advice does not apply to pro se lawyer in divorce proceedings against his unrepresented wife).

5. Represented Persons May Communicate Directly With Each Other Regarding the Subject of the Representation, but the Lawyer May Not Use the Client to Circumvent Rule 4.2.

Although their lawyer may advise against it, a represented party may communicate directly with a represented adversary. *See* Comment 4 to Rule 4.2. However, a lawyer may not use a client or a third party to circumvent Rule 4.2 by telling the client or third party what to say or "scripting" the communication with the represented adversary. Rule 8.4(a) (a lawyer may not violate a rule of conduct through the actions of another). *See also* Legal Ethics Opinion 1802 (2010) (It would be unethical for a lawyer in a civil matter to advise a client to use lawful undisclosed recording to communicate with a person the lawyer knows is represented by counsel.); Legal Ethics Opinion 1755 (2001) ("Thus, while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party."); Legal Ethics Opinion 233 (1974) (It is improper for an attorney to indirectly communicate with a party adverse to his client giving specific instructions to his client as to what communications to make, unless counsel for the adverse party agrees to such communication.).

6. A Lawyer May Not Use an Investigator or Another Third Party to Communicate Directly with a Represented Person.

In some situations, it may be necessary to determine if a nonlawyer or investigator's contact with a represented person can be imputed to a lawyer supervising or responsible for an investigation. There are two ethical considerations. First, a lawyer cannot violate or attempt to violate a rule of conduct through the agency of another. Rule 8.4 (a). Second, a lawyer having direct supervisory authority over a non-lawyer agent may be responsible for conduct committed by that agent, if the rules of conduct would have been violated had the lawyer engaged in the conduct; and, the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or, the lawyer knows or should have known of the conduct at a time when its consequences could be avoided or mitigated but fails to take remedial action. Rule 5.3.

In Legal Ethics Opinion 1755 (2001), the Committee noted that Rule 8.4(a) prohibits an attorney from violating Rule 4.2 through the acts of others. Consistent with this precept, ABA Formal Legal Ethics Op. 95-396 (1995), in its analysis of an attorney's use of investigators, states as follows:

Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do.

> [Footnote omitted.] Whether in a civil or a criminal matter, if the investigator acts as the lawyer's "alter-ego," the lawyer is ethically responsible for the investigator's conduct.

See also United States v. Smallwood, 365 F.Supp.2d 689, 696 (E.D. Va. 2005) ("[W]hat a lawyer may not ethically do, his investigators and other assistants may not ethically do in the lawyer's stead.")

7. Government Lawyers Involved in Criminal and Certain Civil Investigations May Be "Authorized By Law" to Have Ex Parte Investigative Contacts With Represented Persons.

Generally, prosecutors, government agents, and informants may communicate with represented criminal suspects in a non-custodial setting up until indictment, information or when the represented person's Sixth Amendment right to counsel would attach. See *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996) (agreeing with other federal circuits, except Second Circuit, that pre-indictment non-custodial interrogations are covered by "authorized by law" exception). The courts have long recognized the legitimacy of undercover operations, even when they involve the investigation of individuals who keep an attorney on retainer. *United States v. Lemonakis,* 158 U.S.App.D.C. 162, 485 F.2d 941 (1973), *cert. denied,* 415 U.S. 989 (1974); *United States v. Sutton,* 255 U.S.App.D.C. 307, 801 F.2d 1346 (1986); *United States v. Vasquez*, 675 F.2d 16 (2d Cir, 1982); *United States v. Jamil,* 707 F.2d 638 (2d Cir. 1984). Comment 5 to Rule 4.2 states:

> In circumstances where applicable judicial precedent has approved investigative contacts prior to attachment of the right to counsel, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

Since government lawyers often rely on investigators to contact persons in the course of an investigation, this excerpt from Comment 1 to Rule 5.3 is also relevant to the discussion:

> The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one's role in a law enforcement investigation or a housing discrimination "test".

8. Ex Parte Communications With Employees or Constituents of a Represented Organization are Permitted Unless the Employee is in the "Control Group" or is the "Alter Ego" of the Represented Organization.

If a corporation or other organization is represented by counsel with respect to a matter or controversy, Rule 4.2 prohibits *ex parte* communications with employees of the represented corporation or organization if the employee is in the entity's "control group" or is the "alter ego" of the entity. Comment 7 to Rule 4.2 states:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

The Committee acknowledged in Legal Ethics Opinion 1670 that its interpretation of Rule 4.2 narrows the scope of employees protected under the "no contact rule":

> The committee is mindful that some circuit courts and federal courts in Virginia have interpreted DR7-103(A)(1) differently. Some courts have applied a Model Rules approach and prohibited *ex parte* contacts not only where the control group or alter ego theory applies, but also where the activities or statements of an employee are part of the focus of litigation or would make the employer vicariously liable as a result of the employee's statements or activity. *Queensberry v. Norfolk & Western Ry*., 157 F.R.D. 21 (E.D. Va. 1993); *Nila Sue DuPont v. Winchester Medical Center, Inc*. — Winchester Circuit Court Law No. 92-171. The committee also recognizes that a different opinion might result if the facts of this hypothetical were analyzed under Rule 4.2 of the Model Rules which adopts a broader prohibition of *ex parte* contacts than DR7-103(A)(1). Nevertheless, the committee must apply the rules of conduct which Virginia has adopted to this hypothetical and leave specific legal rulings involving other rules of ethical conduct to the presiding trial judges of Virginia based upon the facts presented before them.

See also Pruett v. Virginia Health Servs., Inc., No. CL03-40, 2005 Va. Cir. LEXIS 151, at *12-13 (Va. Cir. Ct. Aug. 31, 2005) (permitting plaintiff's lawyer to initiate *ex parte* communications with a defendant nursing home's current employees, except for current "control group" employees and current non "control group" employees who provide resident care; permitting *ex parte* contacts even with those nursing home employees, as long as the communications "do not relate to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent"; also permitting *ex parte* contacts with former nursing home "control group" and non "control group" employees); LEO 1821 (2006) ("With an entity client, like this company, a lawyer should treat anyone within the entity's 'control group' as within the protection afforded by Rule 4.2.").

9. The Rule Does Not Apply to Communications With Former Employees of a Represented Organization.

Comment 7 to Rule 4.2 states: "[t]he prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's 'control group.'"

In LEO 1670, the Committee stated:

> [O]nce an employee who is also a member of the control group separates from the corporate employer by voluntary or involuntary termination, the restrictions upon direct contact cease to exist because the former employee no longer speaks for the corporation or binds it by his or her acts or admissions. In fact, this committee has previously held that it is ethically permissible for an attorney to communicate directly with the former officers, directors and employees of an adverse party unless the attorney is aware that the former employee is represented by counsel. (See LE Op. 533, LE Op. 905 and LE Op. 1589). Counsel for the corporation represents the corporate entity and not individual corporate employees. (See EC5-18). In the instance where it is necessary to contact unrepresented persons, a lawyer should not undertake to give advice to the person, except to advise them to obtain a lawyer. (See EC:7-15). See also LEOs 347. Counsel for represented employer cannot claim to represent a former employee if the former employee has not freely chosen counsel for employer. LEO 1589 (1994).

The *Restatement* is just as clear, and even provides an explanation:

> Contact with a former employee or agent ordinarily is permitted, even if the person had formerly been within a category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary's search for relevant facts without facilitating the employer's relationship with its counsel.

Restatement (Third) of the Law Governing Lawyers § 100 cmt. g (2000).

Although a lawyer may communicate with a former employee, the lawyer may not ask the former employee about any confidential communications the employee had with the organization's counsel while the employee was employed by the organization. Seeking information about confidential communications would impair the organization's confidential relationship with its lawyer and therefore violate Rule 4.4. LEO 1749. *See also Pruett v. Virginia Health Servs., Inc.,* No. CL03-40, 2005 Va. Cir. LEXIS 151 (Va. Cir. Ct. Aug. 31, 2005) (declining to prohibit a plaintiff's lawyer from *ex parte* contacts with any former employees of the defendant nursing home); *Bryant v. Yorktowne Cabinetry Inc*., 538 F.Supp.2d 948 (W. D. Va. 2008) (holding that Rule 4.2 generally does not prohibit an *ex parte* interview of a represented company's former employee who is not represented by counsel, unless the interviewing lawyer inquires into matters that involve privileged communications by and between the former employee and the company's counsel related to the subject of the representation).

10. The Fact that an Organization has In House or General Counsel Does not Prohibit Another Lawyer from Communicating Directly With Constituents of the Organization and the Fact that

an Organization has Outside Counsel in a Particular Matter Does not Prohibit Another Lawyer from Communicating Directly with In House Counsel for the Organization.

The fact that an organization has a general counsel does not itself prevent another lawyer from communicating directly with the organization's constituents. *SEC v. Lines*, 669 F.Supp. 2d 460 (S.D.N.Y 2009) (neither organization nor president deemed represented by counsel in a particular matter simply because corporation has general counsel); *Humco, Inc. v. Noble*, 31 S.W.3d 916 (2000) (knowledge that corporation has in house counsel is not actual notice that corporation is represented); Wis. Ethics Op. E-07-01 (2007) (fact that organization has in-house counsel does not make it "represented" in connection with any particular matter).

A lawyer is generally permitted to communicate with a corporate adversary's in house counsel about a case in which the corporation has hired outside counsel. The purpose of Rule 4.2 is to "protect uncounseled persons against being taken advantage of by opposing counsel" and to preserve the client-lawyer relationship; neither of those dangers is implicated when a lawyer communicates with an organization's in-house counsel. It is unlikely that an in-house lawyer would inadvertently reveal confidential information or be tricked or manipulated into making harmful disclosures or taking harmful action on behalf of the organization, and therefore the lawyer does not need to be protected or shielded from communication with an opposing lawyer. ABA Formal Op. 06-443 (2006); D.C. Ethics Op. 331 (2005).

11. Plaintiff's Counsel Generally May Communicate Directly with an Insurance Company's Employee/Adjuster After the Insurance Company Has Assigned the Defense of the Insured to Outside or Staff Counsel.

The question has arisen as to whether Rule 4.2 prohibits a personal injury lawyer from communicating or settling a claim with the insurance company's employee/adjuster once the insurance company has retained counsel to defend the insured. If the insurance adjuster or claims person has authority to offer and accept settlement proposals, that employee would fall within the scope of Comment 5's definition of an "employee of the organization who, because of their status or position, have the authority to bind the corporation." Does this mean that the adjuster may be contacted only with the consent of the lawyer hired by the insurance company to defend the insured?

The answer to this question turns upon factual and legal questions that are beyond the purview of the Committee. Virginia is not a direct action state and the insurance company generally is not a named party to a lawsuit against the insured based upon a liability claim.[1] The plaintiff's claim is against the insured, not the insurance company. Whether the defense lawyer

[1] Unauthorized Practice of Law Opinion 60, approved by the Supreme Court of Virginia in 1985, explains:

> Courts have recognized that a suit against an insurance carrier's insured may in some instances be tantamount to a suit directly against the carrier. In many suits against insured defendants, the carrier's obligation to fully satisfy any judgment is fixed by contract and is unquestioned by the insurer. Such cases, while brought against the insured, are sometimes said to be *de facto* suits against the insurance carrier. Some states permit the insurer to be sued directly by the injured party, and the carrier has been regarded as the "real party in interest." In federal courts interpreting the laws of those states. *Lumbermen's Casualty Company v. Elbert*, 348 U.S. 48, 51 (1954) (diversity of citizenship existed between Louisiana plaintiff and Illinois insurer, even though insured was also a Louisiana resident, since insurance carrier was "real party in interest.").

hired by the insurance company to defend the insured also represents the insurance company is a legal not an ethics issue. In other words, whether or not an attorney-client relationship exists between defense counsel and the insurer is a legal issue beyond the Committee's purview.

The Committee faced this inquiry in Legal Ethics Opinion 1863 (2012). In the hypothetical, a defendant/insured in a personal injury case is represented by a lawyer provided by his liability insurer. The plaintiff is also represented by a lawyer. The defendant/insured's lawyer has not indicated to the plaintiff's lawyer whether he represents the insurer or only the insured. The plaintiff's lawyer asks whether he may communicate directly with the insurance adjuster, an employee of the insurer, without consent from the defendant/insured's lawyer. The Committee's research indicates that the Supreme Court of Virginia has not had the occasion to address directly the question of whether the insurer is also a client of the defendant/insured's lawyer when that lawyer is provided to the defendant/insured pursuant to his contract of insurance with the insurer.[2] In Unauthorized Practice of Law Opinion 60 (1985) the Court approved this language, suggesting that the only "client" in these circumstances is the insured:

> This opinion is restricted to the unauthorized practice of law implications of the question presented and does not attempt to analyze any ethical considerations which might be raised by the inquiry. Staff counsel, in undertaking the representation of the insureds of his or her employer within the guidelines established herein, is clearly bound by the same ethical obligations and constraints imposed on attorneys in private practice. *This includes zealously guarding against any potential erosion, actual or perceived, of the duties of undivided loyalty to the client (the insured)*, independence and confidentiality, to mention on the most obvious areas of potential concern in their relationship.
>
> Finally insurance carriers, in selecting cases for handling by staff counsel which involve potential excess exposure to the insured, should be aware that the *employer-employee relationship between the insurer and the insured's counsel* carries with it certain risks. The opinions of staff counsel in regard to legal liability, potential verdict ranges, and settlement value and his or her decisions concerning trial preparations and trial strategy will be subjected to unusually close scrutiny and subsequent litigation following any excess verdict.

As stated above, the creation of an attorney-client relationship is a question of law and fact. Nevertheless, in prior opinions the Committee has addressed the question in order to resolve

[2] The Committee reviewed a number of decisions in which the question is addressed obliquely in dicta, i.e., the finding of an attorney-client relationship between defense counsel and insurer was not relevant or necessary to the holdings in those cases. *Norman v. Insurance Co. of North America*, 218 Va. 718, 727, 239 S.E.2d 902, 907 (1978) ("**And an insurer's attorney, employed to represent an insured**, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.") (emphasis added). A similar suggestion appears in *State Farm Mutual Automobile Insurance Co. v. Floyd*, 235 Va. 136, 366 S.E.2d 93 (1988) ("**During their representation of both insurer and insured**, attorneys have the duty to convey settlement offers to the insured "that may significantly affect settlement or resolution of the matter." Code of Professional Responsibility, Disciplinary Rule 6-101(D) [DR:6-101]; Ethical Consideration 7-7 [EC:7-7] (1986)") (emphasis added). *But see General Security Insurance Co. v. Jordan, Coyne & Savits, LLP,* 357 F. Supp. 2d 951, 957 (E.D. Va. 2005) ("the Supreme Court of Virginia has never suggested that an insurer, as well as the insured, may be a client of the law firm the insurer retains to defend an insured."). Again, none of the holdings in those opinions turned on whether the attorney and the insurer had an attorney-client relationship.

the ethics inquiry put to it. Legal Ethics Opinion 598 (approved by Supreme Court of Virginia, 1985) ("the client of an insurance carrier's employee attorney is the insured, not the insurance carrier"); *see also* Legal Ethics Opinion 1536 (1993) (stating that insurer is not a client of insurance defense counsel, and that counsel may therefore sue a party insured by the same insurer in later action without a conflict of interest).

In Legal Ethics Opinion 1863, the Committee stated:

> Although the question of whether an attorney-client relationship exists in a specific case is a question of law and fact, the Committee believes that, based on these authorities, it is not accurate to say that the defendant/insured's lawyer should be presumed to represent the insurer as well. On the other hand, in the absence of a particular conflict, it would be permissible for a single lawyer to represent both the insured and the insurer. If the lawyer is jointly representing both the insured and the insurer, then Rule 4.2 would apply to require the lawyer's consent to any communications between the plaintiff's lawyer and the insurer. Conversely, if the lawyer is not representing the insurer, then Rule 4.2 does not apply and the plaintiff's lawyer is free to communicate with the insurer without the defendant/insured's lawyer's consent/involvement.

Rule 4.2 requires that the plaintiff's counsel *actually know* that defense counsel represents both the insured and insurer. Thus, the Committee concluded in LEO 1863, "unless the plaintiff's lawyer is aware that the defendant/insured's lawyer also represents the insurer, the plaintiff's lawyer may communicate with the insurance adjuster or other employees of the insurer without consent from the defendant/insured's lawyer."

12. A Lawyer May Communicate Directly With a Represented Person if that Person is Seeking a "Second Opinion" or Replacement Counsel.

Comment 4 to Rule 4.2 allows a lawyer to communicate with a person seeking a second opinion or replacement counsel concerning the subject of the representation even if a lawyer currently represents that person:

> A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

In Legal Ethics Opinion 369 (1980) the committee stated that it is not improper for an attorney to give advice of a general nature or express an opinion on a matter to an individual already represented by an attorney on that same matter. The legal right of such individual to select or discharge counsel makes such general advice "authorized by law." However, it is improper for an attorney to accept employment on that same matter unless the other counsel approves, withdraws, or is discharged.

13. The Rule Permits Communications that are "Authorized by Law."

Unfortunately, in most jurisdictions, including Virginia, the precise reach and limits of the "authorized by law" language in Rule 4.2 is not clear. As a starting point, ABA Formal Ethics Op. 95-396 (1995) explains that the "authorized by law" exception in Model Rule 4.2 is

satisfied by "constitutional provision, statute or court rule, having the force and effect of law, that expressly allows particular communication to occur in the absence of counsel." ABA Formal Op. 95-396, at 20. Statutes, administrative regulations, and court rules grounded in procedural due process requirements are also a common place to find *ex parte* communications that are "authorized by law."

As Comment g to Section 99 of the Restatement (3d) of the Law Governing Lawyers explains:

> Direct communication may occur pursuant to a court order or under the supervision of a court. Thus, a lawyer is authorized by law to interrogate as a witness an opposing represented non-client during the course of a duly noticed deposition or at a trial or other hearing. It may also be appropriate for a tribunal to order transmittal of documents, such as settlement offers, directly to a represented client.
>
> Contractual notice provisions may explicitly provide for notice to be sent to a designated individual. A lawyer's dispatch of such notice directly to the designated non-client, even if represented in the matter, is authorized to comply with legal requirements of the contract.

See also Legal Ethics Opinion 1375 (1990) (opining that the provision of legal notices does not constitute the communication prohibited by DR:7-103.)

Therefore, a lawyer may arrange for service of a subpoena, or other process, directly on an opposing party represented by counsel because controlling law or court rule requires that process must be served directly. See, e.g., Va. Code § 8.01-314 ("... in any proceeding in which a final decree or order has been entered, service on an attorney shall not be sufficient to constitute personal jurisdiction over a party in any proceeding citing that party for contempt ... unless personal service is also made on the party.").

See also LEO 1861 (2012) (Rule 4.2 does not bar a Chapter 13 trustee from communicating with a represented debtor to the extent that the communications are authorized or mandated by the statute requiring trustee to assist debtor in performance under the plan).

14. The Rule Allows Certain Ex Parte Communications with Government Officials Concerning the Subject of the Representation in a Controversy Between the Lawyer's Client and the Government.

In general, a government entity and its relevant constituents are protected by Rule 4.2 in the same way any private client is. However, that protection must in some respects yield to the First Amendment right to petition the government, as well as statutory rights such as the Freedom of Information Act which grant members of the public certain rights to access information, participate in public meetings, and communicate with government representatives. Communications that are authorized by such statutes are "authorized by law" for purposes of Rule 4.2, and a lawyer may communicate with otherwise represented government entities or persons when authorized by such a law. Further, as the Committee explained in LEO 1891, a lawyer may communicate with a represented government official when the communication is

made for the purpose of addressing a policy issue, and when the government official has the authority to take or recommend action on that policy issue. The lawyer may, but is not required to, give advanced notice of such a communication to the government lawyer.

15. A Lawyer's Inability to Communicate with Opposing Counsel or Reasonable Belief that Opposing Counsel has Withheld or Failed to Communicate Settlement Offers is not a Basis for Direct Communication With a Represented Adversary.

Sometimes lawyers ask if there are reasonable excuses or justification for bypassing a lawyer and communicating directly with a represented adversary. Generally, the answer is "no." For example, a lawyer's inability to contact opposing counsel and a client's emergency is not a basis for *ex parte* contacts with a represented adversary. LEO 1525 (1993).

In LEO 1323 (1990), the Committee indicated that a prosecutor's belief that defense counsel may not have communicated the plea agreement offer to the defendant does not constitute sufficient reason for an exception. In that opinion, the Committee concluded that the prosecutor violated the no contact rule by copying the defendant in a letter sent to defense counsel reiterating a plea offer and deadline for acceptance. See also Pennsylvania Ethics Op. 88-152 (1988) (concluding that a lawyer may not forward settlement offers to an opposing party even if the opposing counsel failed to notify the client about the offer); Ohio Ethics Op. 92-7, at *1 (1992) (finding it inappropriate for a lawyer to send copies of settlement offers directly to a government agency even if the original is served on the government's attorney).

In LEO 1752 (2001), the Committee said that even if plaintiff's counsel believes insurance defense counsel has failed to advise, or wrongfully withheld information regarding the underinsured client's right to hire personal counsel, plaintiff's counsel may not communicate that advice directly to defense counsel's client.

Positive
As of: October 11, 2019 2:35 AM Z

Pruett v. Va. Health Servs.

Circuit Court of Lancaster County, Virginia

August 31, 2005, Decided

Case No.: CL03-40

Reporter
69 Va. Cir. 80 *; 2005 Va. Cir. LEXIS 151 **

Shirley L. Pruett, Executor v. Virginia Health Services, Inc., et al

Core Terms

ex parte contact, employees, former employee, control group, nurses, nursing home, ethical, current employee, discovery, courts, bind, alter ego, communications, omissions, resident

Case Summary

Procedural Posture
Plaintiff executor sued defendant corporation, alleging medical malpractice in the treatment of the executor's decedent in a nursing home owned by the corporation. The corporation moved to prohibit the executor's counsel from having ex parte contact with certain current or former employees of the corporation.

Overview
The plaintiff proposed ex parte contact with former control group and non-control group employees of the corporation and currently employed nurses and care providers who were not control group employees of the corporation. The court found that cases had ruled that communications with persons having a managerial responsibility on behalf of the corporation, and with any other person whose act or omission in connection with that matter may have been imputed to the organization for purposes of liability or whose statement may have constituted an admission on the part of the organization were prohibited. Va. Sup. Ct. R. pt. 6, § II, R. 4.2 did not bar ex parte contact with any former or current employees of the corporation other than current "control group" employees or persons fitting the alter ego analysis. "Control group" employees were defined as any employee who, because of their status or position, had the authority to bind the corporation. "Alter ego" employees were those who acted on behalf of the corporation performing the work to which they were assigned. By contrast, former employees were not answerable to the corporation and thus were not under its control or authority.

Outcome
The motion was denied insofar as it sought to bar ex parte contact with former "control group" employees or former non control group employees no longer employed by the corporation. The motion was granted insofar as it sought to bar contact with current "control group" and non "control group" employees who provided resident care. However, the executor's counsel was permitted to have ex parte contact with those employees on certain matters.

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Legal Ethics > Professional Conduct > Opposing Counsel & Parties

HN1[] **Discovery, Protective Orders**

The prohibition against ex parte contact does not apply to former employees of a corporation, and an attorney may communicate ex parte with such former employee even if he or she was a member of the corporation's "control group."

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

HN2[] **Discovery, Protective Orders**

Courts have great flexibility in entering protective orders under Va. Sup. Ct. R. 4:1(c).

Headnotes/Summary

Headnotes

Courts have great flexibility in entering protective orders from discovery under Virginia Supreme Court Rule 4:1(c).

Counsel: [1]** William B. Pace, Esquire, Williams Mullen, Richmond, Virginia.

Roy D. Turner, Esquire, The Chandler Law Group, Harrisonburg, Virginia.

Judges: Harry T. Taliaferro, III.

Opinion by: Harry T Taliaferro , III

Opinion

[*80] The defendant Virginia Health Services, Inc. ("VHS") has filed a motion for a protective order to bar the plaintiff and/or plaintiff's attorney from having ex parte communications with former employees of VHS and current employees who are not a part of the defendant corporation's "control group". Upon consideration of the oral arguments of counsel and the briefs submitted by each side, the Court denies in part and grants in part defendant's motion.

FACTS

This is a medical malpractice case. VHS owns, operates and manages a nursing home in Lancaster County, Virginia. Plaintiff's decedent was a resident of defendant's nursing home from May 1, 2002 until her death on October 16, 2002. While in the nursing home, plaintiff's decedent's care was provided by nurses, CNAs and other attendants who were defendant's employees. Defendant alleges that VHS breached the standard of care for nursing homes by not properly training, managing and supervising its care staff and by failing to **[**2]** provide enough staff to sufficiently care for plaintiff's **[*81]** decedent. Plaintiff's motion for judgment seeks damages for pain, suffering and medical expenses caused by defendant's negligence and for wrongful death of plaintiff's decedent.

ANALYSIS

The issue before the Court is the extent of plaintiff's ability to have ex parte contact with persons having a former or present employment relationship with VHS and how such right may be affected by whether such persons are deemed to be within or without the corporate "control group" or may be regarded as the alter ego of the corporation. Such issue involves, on a case by case basis, analysis of the interplay between the rules of discovery and the ethical limitations governing ex parte contact with the opposing party and with persons represented by counsel. There is no controlling precedent in Virginia on this issue.

Defendant relies upon *DuPont v. Winchester Medical Center, 34 Va. Cir. 105 (1994)*, and *Armsey v. MedShares Management Services, Inc., 184 F.R.D. 569 (1998)*. These cases contain analysis of the Virginia Code of Professional Responsibility (particularly former D.R. 7-103(A)(1)), Virginia **[**3]** Legal Ethics Opinions (including LEO No. 1670), the ABA Model Rules of Professional Conduct and the comments therein [1] and Part Four of the Rules of the Supreme Court of Virginia (particularly Rule 4:1(c)).

DuPont was a medical malpractice suit alleging that a hospital and a treating physician negligently left surgical sponges inside plaintiff. Hospital nurses were charged with failure to remove the sponges. Plaintiff's counsel sought ex parte contact with the nurses who were current employees of the hospital. The hospital instructed its nurses not to speak with the plaintiff. The Winchester Circuit Court granted the hospital's protective order prohibiting the plaintiff from having ex parte contact with the nurses who attended the physician and who may have negligently placed the sponges.

There **[**4]** were specific facts cited by the Court in *DuPont* as reason for denying ex parte contact. The plaintiff made her motion in the "11th hour" after the cutoff of discovery arguing an imperative need to have ex parte contact. The nurses were caught in the middle. Citing their protection, the Court ruled out all ex parte contact with the nurses regarding any issue of liability relating to the **[*82]** sponges, while finding that ex

[1] A modified version of the ABA Model Rules and comments entitled "Virginia Rules of Professional Conduct" ("RPC") was adopted effective January 1, 2000, replacing the Virginia Code of Professional Responsibility.

parte communication was not improper if plaintiff's counsel limited inquiry with the nurses to subject matter not relating to the negligent acts alleged in the suit.

The *DuPont* court in considering conflicting lines of analysis regarding ex parte contact correctly noted that the rules of discovery and rules of ethics are not coterminous. It considered *UpJohn v. U.S., 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)* (any employee who might bind the corporation by their acts or admissions only to be contacted by the opposing side through formal discovery) and a string of non-binding LEOs (all but one of which were after *UpJohn*) all opining it permissible for an attorney to directly contact and communicate with employees of an adverse party **[**5]** provided that the employees were not members of the corporation's "control group" and were not able to commit the corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego.

DR 7-103(A)(1) in effect at the time *DuPont* was decided is substantially similar to Virginia's current RPC 4.2 adopted in 2000. [2] Citing this similarity, *DuPont* utilized an official comment to ABA Model Rule 4.2 to interpret DR7-103(A)(1). The comment, set out in *DuPont,* is as follows:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the corporation, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

[6]** *DuPont* considered the nurse employees who acted on behalf of the corporation as not functionally different from "control group" employees who have authority to make binding decisions on behalf of the corporation. *DuPont* approved reasoning from *Queensberry v. Norfolk & Western Ry. Co.,* Civil Action No. 3:93CV163 (E.D. Va. 1963) finding that corporate employees who are alleged to act negligently or who can make binding corporate decisions are all acting as the corporation and are in essence its alter ego. *DuPont's* conclusion was that since a corporation can only act through its "surrogates" it should not **[*83]** have less protection than a natural person, therefore, the better rule was the above cited comment to ABA Model Rule 4.2. [3]

While *DuPont* dealt exclusively with current corporate employees, *Armsey* involved only ex employees. Plaintiff's counsel desired ex parte contact with **[**7]** the defendant corporation's (1) former in-house counsel, (2) former vice president of managed care and (3) three former non-management employees.

The corporate defendant in *Armsey* sought to block ex parte contact with former management employees because they were part of the "control group" and with non-management employees because the plaintiff admittedly was seeking employee statements to offer at trial as corporate admissions. While it considered both DR 7-103(A)(1) and Model Rule 4.2, *Armsey* noted that federal courts would look to federal law to interpret and apply Virginia's rules of ethics. The opinion discussed the split of opinion among different courts regarding what constituted permissible ex parte contact with opposing party corporate personnel:

> [] Some courts hold ex parte contact with former employees to be permissible on the ground that former employees could no longer speak for the corporation [4] and, therefore, what they told opposing counsel could not be used as vicarious admissions of the corporation.
>
> [] Other courts hold that ex parte communication with former employees is prohibited because such employees present statements to opposing counsel **[**8]** of acts or omissions done in the course of their former employment could be imputed as corporation admissions.
>
> [] Still other courts used a position analysis to hold that former managerial ("control group") employees could not be contacted ex parte by opposing counsel.

Armsey addressed the ethical policy rationale behind

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[2] This similarity to the then ABA Model Rule 4.2 was noted in the *DuPont* case. The "Virginia Code Comparison" comment under Virginia's RPC 4.2 also notes the two rules are "substantially the same".

[3] When Virginia adopted its Rules of Professional Conduct in 2000, the comment cited in *DuPont* was not included.

[4] See Comment [4] of RPC 4.2 *HN1*[] "the prohibition [against *ex parte* contact] does not apply to former employees . . . of the [corporation], and an attorney may communicate ex parte with such former employee . . . even if he or she was a member of the [corporation's] "control group".

prohibited ex parte contact including the "retained . . . interest" of a represented corporate party from having opposing counsel obtain "uncounselled" or "unwise" statements **[*84]** from former employees which could affect the corporation's potential liability. The Court found that plaintiff's counsel desired ex parte contact with former employees in order to impute their knowledge, actions or statements **[**9]** to their former corporate employer.

Non-binding Virginia LEO 1670 (1996) opined that restrictions on ex parte contact cease to exist for an ex employee because former employees can no longer speak for or bind the corporation by their acts or omissions. [5] *Armsey* concurred that ex-employees cannot bind their former corporate employer by their current statements, but noted they could cause liability to be imputed to the employer based on statements, acts or omissions which occurred during the course of their employment. *Armsey* thus held plaintiff's counsel could not have ex parte contact with former employees concerning the subject matter of their actions which occurred during their employment at the time of the event allegedly giving rise to the plaintiff's claim of liability.

Under the particular facts in our case, we do not find plaintiff's counsel's action occurring in the 11th hour after **[**10]** the expiration of the deadline for discovery. The case is currently set for trial on March 28, 2006. The plaintiff proposes ex parte contact with former control group and non-control group employees (the group in *Armsey*), and currently employed nurses, CNAs and care providers (the group in *DuPont*) who are not control group employees. When Virginia adopted RPC 4.2 it excluded the Model Rule 4.2 comment relied upon in *DuPont.* RPC 4.2 contains no comment which would red flag an ethical bar to plaintiff's counsel's ex parte contact with any former or current employees of VHS other than current "control group" employees or persons fitting the alter ego analysis.

Concern exists about preserving the confidentiality of any attorney-client privilege particularly where the person who is contacted ex parte has retained personal counsel.

Comment 4 to RPC 4.2 suggests the adoption of the primary logic employed in LEO 1670. It would prohibit ex parte communications with persons in VHS's "control group" defined as "any employee of an organization who, because of their status or position, have the authority to bind the corporation". We find such persons to be managerial employees, not **[**11]** floor nurses, CNAs or other direct care providers

Comment 4 to RPC 4.2, however, also would prohibit ex parte contact with persons who may be regarded as the "alter ego" of the corporation. Such persons may be those who act on behalf of the corporation performing the work to which they are assigned. The rationale is that only through such "hands on" **[*85]** interaction with residents of the nursing home does the corporation carry out its purposes. Like in *DuPont,* VHS's current employees are in the middle. They are answerable within the scope of their employment to their employer. By contrast, former employees are not answerable to the corporation and thus are not under its control or authority.

Plaintiff's counsel stated to the Court he was a passionate about fighting neglect and abuse of residents by nursing homes charged with their care. As Mr. Turner put it, they are killing people and making a lot of money doing it. It is harmless to say this to the Court in a motion hearing because we disregard the comment in our considerations. If stated to a jury, a motion for a mistrial would be a virtual certainty. Such statement to a current employee is unnerving.

We do not diminish the role **[**12]** of civil litigation in correcting societal wrongs. This effect normally occurs, however, after a verdict not during the course of litigation. We shrink not one inch from a lawyer's ethical responsibility to zealously represent his client. Political causes have their place, but in Lancaster County Circuit Court we deal with one resident vs. one nursing home. As this Court sees it, plaintiff's counsel ex parte contact with currently employed nurses, CNAs and care giving employees creates significant potential for disrupting the current operation of the defendant's facility. With respect to current employees, we believe a more controlled process of discovery under the rules of court would better serve the administration of justice in this case.

CONCLUSION

HN2[↑] Courts have great flexibility in entering protective orders under Virginia Supreme Court Rule 4:1(c).

Subject to the conditions stated below, defendant's motion is denied insofar as it seeks to bar ex parte

[5] LEO 1670 noted, however, that different conclusions could be reached in different cases based on the facts.

contact with:

(1) Former "control group" employees. (No longer employed by VHS.)

(2) Former non control group employees. (No longer employed by VHS.)

Also, subject to the conditions stated below, defendant's **[**13]** motion is granted insofar as it seeks to bar ex parte contact with:

(3) Current "control group" employees of VHS. (Presently employed by VHS.)

(4) Current non "control group" employees who provide resident care. (Presently employed by VHS.)

Plaintiff's counsel may, however, have ex parte contact with those employees identified in (3) and (4) above on matters which do not relate to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent.

[*86] Plaintiff's counsel may not contact any current or former employee of defendant who has retained independent counsel with respect to the matters in issue in this suit without first obtaining such counsel's consent to speak with his or her client.

In contacting any former employee identified in paragraphs (1) and (2) above, plaintiff's counsel must first advise any such person that he represents a party suing VHS, determine whether such former employee is represented by independent counsel, and if so, obtain consent of such counsel before talking to the former employee, and advise such person that he or she is not his client. Plaintiff's counsel shall not give advice to such persons, except to advise **[**14]** that they may wish to obtain a lawyer.

Mr. Pace shall draft a protective order pursuant to Rule 4:1(c) in accordance with the ruling as expressed in this letter.

Harry T. Taliaferro, III

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As of: October 11, 2019 2:31 AM Z

United States v. Smallwood

United States District Court for the Eastern District of Virginia, Alexandria Division

April 14, 2005, Decided

Case No. 1:03cr245

Reporter
365 F. Supp. 2d 689 *; 2005 U.S. Dist. LEXIS 6684 **

UNITED STATES OF AMERICA, v. TYRONE SMALLWOOD, Defendant.

Prior History: *United States v. Smallwood, 311 F. Supp. 2d 535, 2004 U.S. Dist. LEXIS 5760 (E.D. Va., 2004)*

Core Terms

Investigators, Ethics, recorded, conversation, communicate, telephone conversation, ethical obligation, lawyers, parties, murder, represented party, tape, telephone, advice, nonlawyer, sentence, abide, introduce, binding, words

Case Summary

Procedural Posture
Investigators who were hired by court-appointed defense counsel sought $ 6,759 in payment for services that were rendered in the case.

Overview
The court noted that certain of the investigators' conduct in the course of the investigation raised a question as to whether their payment request should be denied in whole or in part. Specifically, the investigators recorded a telephone interview with a critical prosecution inmate-witness, without the knowledge or consent of that witness or his appointed counsel. At issue was whether an investigator hired by a lawyer had to must abide by an attorney's ethical obligations in Virginia not to (i) communicate with a person known to be represented by counsel regarding the subject of the representation, or (ii) electronically record a conversation with a third party without the full knowledge and consent of the other party. The court found that the lawyers did not engage in any improper conduct nor did they knowingly authorize the investigators to do so. At most, the lawyers could be faulted for failing to anticipate that events would occur that would require them to instruct the investigators regarding their ethical obligations. Arguably, these events were not reasonably foreseeable in the circumstances. The court granted the investigators' request for payment in its entirety.

Outcome
The court found that it was appropriate to grant the investigators' request for payment in its entirety.

LexisNexis® Headnotes

Evidence > Privileges > Attorney-Client Privilege > Waiver

Legal Ethics > Client Relations > Conflicts of Interest

HN1[] **Attorney-Client Privilege, Waiver**

A lawyer may not ethically contact or direct others to contact a known represented party about the subject of that representation without the knowledge or consent of that party's counsel. Va. R. Prof'l Conduct R. 4.2. Thus, Rule 4.2 states unambiguously that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Va. R. Prof'l Conduct R. 4.2. The Rule's underlying rationale is not limited to parties in a formal proceeding, but rather extends to communications with any represented individual when the communications involve the subject of the representation. As comment 5a to Rule 4.2 makes clear, concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be

involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation. Moreover, the same concerns arise where a third party witness furnishes testimony in an investigation or proceeding and although not a formal party, has decided to retain counsel to receive advice with respect thereto.

Legal Ethics > Client Relations > Conflicts of Interest

HN2[] **Client Relations, Conflicts of Interest**

A violation of Va. R. Prof'l Conduct R. 4.2 occurs even where the represented party consents to the communication. Because such consent is uncounseled, it cannot qualify as the knowing and intelligent consent required for the Rule. In sum, then, a lawyer may not communicate with a person known to be represented about a matter relevant to the representation without the consent of the person's lawyer.

Legal Ethics > Professional Conduct > Illegal Conduct

Legal Ethics > General Overview

Legal Ethics > Law Firms

Legal Ethics > Professional Conduct > Nonlawyers

HN3[] **Professional Conduct, Illegal Conduct**

A lawyer should not be able to avoid ethical strictures that bind lawyers by using an assistant to engage in the proscribed conduct. In other words, in general, what a lawyer may not ethically do, his investigators and other assistants may not ethically do in the lawyer's stead. Were this not so, a lawyer might easily circumvent many ethical obligations through the use of an assistant or investigator who, given only a hint, cunningly perceives that his employer's cause can be aided by engaging in conduct that might be ethically forbidden to the lawyer. Further, it would give unscrupulous lawyers an incentive to provide those in their charge with only limited ethical direction. For these reasons, the Virginia Rules of Professional Conduct plainly contemplate that a lawyer's investigators or assistants, when acting on the lawyer's behalf, must abide by the ethical obligations of the legal profession as the Rules establish an affirmative duty for a lawyer to make reasonable efforts to ensure that his nonlawyer assistants' conduct is compatible with the professional obligations of the lawyer. Va. R. Prof'l Conduct R. 5.3 (2000).

Legal Ethics > Professional Conduct > Nonlawyers

HN4[] **Professional Conduct, Nonlawyers**

A lawyer must, of necessity, often act through and with the help of assistants who are nonlawyers in order to accomplish the lawyer's work, and thus the prudential concerns and ethical bounds that constrain the legal profession are of equal importance whether a lawyer acts directly or through the efforts of assistants or investigators. In general, therefore, a lawyer's assistants or investigators must abide by the lawyer's ethical obligations when they act on behalf of the lawyer. Nor is there any reason to depart from this general rule in the case of Va. R. Prof'l Conduct R. 4.2. A represented party is equally susceptible to manipulation in the best interests of one's own client by a lawyer's assistant or investigator as by a lawyer. Thus, it is sensible to conclude that a lawyer's assistants and investigators, when acting on behalf of the lawyer, must comply with Rule 4.2's commands for communications with represented parties.

Legal Ethics > Professional Conduct > Illegal Conduct

Legal Ethics > Professional Conduct > General Overview

HN5[] **Professional Conduct, Illegal Conduct**

In Virginia it is not a criminal offense for a person to record a conversation where the person is a party to the communication or one of the parties to the communication has given prior consent to the recording. *Va. Code § 19.2-62(B)(2)*. In other words, in Virginia, there is no criminal prohibition against recording a telephone conversation provided one of the parties to the conversation has consented to the recording. Yet, this does not end the analysis here, for as the Supreme Court of Virginia has noted, conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful. And while a lawyer's recording of a telephone

conversation with the knowledge and consent of one, but not all, parties to the conversation is not a crime in Virginia, the Supreme Court of Virginia nonetheless considers this to be conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Va. R. Prof'l Conduct R. 8.4. There is no reason to depart from the general rule that a lawyer's assistants and investigators are required to abide by the lawyer's ethical obligations when acting on the lawyer's behalf.

Legal Ethics > Professional Conduct > Nonlawyers

HN6[] **Professional Conduct, Nonlawyers**

Just as a lawyer may not communicate with a represented party about the subject of the representation without the consent of that person's lawyer, neither may a lawyer's investigator or other assistant do so.

Legal Ethics > Professional Conduct > Nonlawyers

HN7[] **Professional Conduct, Nonlawyers**

A lawyer's investigator or other assistant, like a lawyer, may not tape record conversations with the knowledge or consent of only one party to the conversation but without the knowledge and consent of other parties.

Legal Ethics > Law Firms

Legal Ethics > Professional Conduct > Nonlawyers

HN8[] **Legal Ethics, Law Firms**

An investigator or other assistant has an affirmative duty to learn and abide by a lawyer's ethical obligations; he may not simply claim ignorance of these duties and proceed to act with impunity; instead, investigators or other assistants should seek direction from their lawyer-employers when presented with areas of ethical ambiguity or uncertainty.

Counsel: **[**1]** For TYRONE SMALLWOOD (2), defendant: Lana Marie Manitta, Martin & Arif, Springfield, VA; Frank Salvato, Alexandria, VA.

U. S. Attorneys: Brian D. Miller, United States Attorney's Office, Alexandria, VA.

Judges: T. S. Ellis, III, United States District Judge.

Opinion by: T. S. Ellis, III

Opinion

[*691] **MEMORANDUM OPINION**

Investigators hired by court-appointed defense counsel seek $ 6,759 in payment for services rendered in this case, but certain of the investigators' conduct in the course of the investigation raises a question as to whether the payment request should be denied in whole or in part. Specifically, the investigators recorded a telephone interview with a critical prosecution inmate-witness, without the knowledge or consent of that witness or his appointed counsel. At issue, therefore, is whether an investigator hired by a lawyer must abide by an attorney's ethical obligations in Virginia not to (i) communicate with a person known to be represented by counsel regarding the subject of the representation, or (ii) electronically record a conversation with a third party without the full knowledge and consent of the other party.

I. [1]

[2]** Tyrone Smallwood and Thomas Edward Smith, Jr., members of a drug trafficking conspiracy, were tried for various crimes, including murder while engaged in drug trafficking. [2] Before the trial began, a co-conspirator, Anthony Brown, pled guilty to aiding and abetting that murder and became **[*692]** a cooperating witness for the government. [3] Importantly, Brown was

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[1] The facts recited here are derived from the parties' submissions and a hearing held on February 21, 2005. See *Smallwood v. Clairol, Inc., 2005 U.S. Dist. LEXIS 2726, Case No. 1:03cr245 (E.D. Va. Feb. 21, 2005)* (Hearing Transcript).

[2] For a detailed statement of the facts underlying the subject drug conspiracy and murder, *see United States v. Smallwood, 293 F. Supp. 2d 631 (E.D. Va. 2003)* (denying defendants' motion to transfer venue and to dismiss firearms charge and deferring ruling on defendants' motion to suppress statements), and *United States v. Smallwood, 299 F. Supp. 2d 578 (E.D. Va. 2004)* (granting in part and denying in part government's motion in limine to admit statements of decedent on day of murder).

[3] *See United States v. Brown,* Criminal No. 03-612-A (E.D. Va.

prepared to testify at trial that he drove with defendants to an alley entrance, and then observed from the parked car at the alley entrance as the defendants led the victim down the alley and murdered him.

[3]** To prepare for trial, defense counsel for Smallwood, Frank Salvato and Lana Manitta, [4] **[**4]** appropriately obtained authorization, *ex parte,* to retain private investigators to conduct a pre-trial investigation. [5] Pursuant to that authorization, they retained the investigative services of Hickey, Miller & Bailey, Inc. (hereinafter "Investigators" or "Investigator," as appropriate). Shortly before trial, Manitta learned that Christopher Dyer, her client in an unrelated case who was then an inmate at the Northern Neck Regional Jail, knew Brown, who was also incarcerated at Northern Neck at the time. Dyer told Manitta that Brown had approached him with offers to sell information that Dyer might use to testify as a government witness, and thus receive a reduced sentence. Concerned that Brown might attempt to offer false testimony against Smallwood, Salvato and Manitta made the decision to send the Investigators to speak with Dyer. Because Manitta represented Dyer at the time, this direction to the Investigators was not improper.

Acting on this direction from Salvato and Manitta, the Investigators traveled to the Northern Neck Regional Jail where they met with Dyer. From Dyer the Investigators learned that Brown had repeatedly tried to sell to other inmates information concerning a variety of criminal activity that might be used to win government assistance in obtaining a sentence reduction. [6] Indeed, according to Dyer, Brown had repeatedly urged Dyer to purchase such information for this purpose. Before the Investigators left, Dyer inquired what he should tell Brown in the event Brown were to continue to urge Dyer to purchase such information. Because the Investigators wanted to "keep things open," as they put it, they told Dyer to delay. Specifically, they suggested that Dyer tell Brown that he needed to talk with his "uncle" who might provide **[**5]** Dyer with money to pay for the information. The Investigators also gave Dyer a phone number so Dyer could contact them, if necessary.

In view of this conversation with Dyer, the Investigators decided to contact Salvato and Manitta as soon as possible to discuss an appropriate course of action. Yet, before they could do so, at approximately **[*693]** 8:15 p.m. that evening, Dyer called one of the Investigators in his office. The Investigator claims he did not expect the call, but that as soon as he learned that Dyer was the caller, he activated an electronic device to record the conversation. [7] **[**7]** The Investigator did not notify Dyer that the call was being recorded. [8] Near the beginning of the call, Dyer explained that Brown was present with him and wished to speak directly with the Investigator, apparently under the mistaken impression that the Investigator was Dyer's "uncle." Significantly, the Investigator did not disclose his **[**6]** true identity as an investigator working for Smallwood, nor did he say anything to correct Brown's mistaken impression that the person on the line, *i.e.* the Investigator, was Dyer's uncle. In the course of the recorded conversation, Brown explained that he had information regarding a number of murders that might prove helpful to Dyer in obtaining a sentence reduction. The Investigator and Brown discussed information regarding two murders and the method of payment to Brown for this information. At the end of the call, the Investigator disclosed his true name, but still did not reveal to Brown that he was an investigator working on behalf of Smallwood or that he was not Dyer's uncle. Nor did he

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Dec. 30, 2003) (Plea Agreement).

[4] Because this prosecution, when commenced, included the potential for the imposition of capital punishment, two very competent and experienced attorneys, Salvato and Manitta, were appointed to represent defendant. *See* 18 U.S.C. § 3005 (requiring that defendant indicted for treason or a capital crime, upon his request, be assigned two counsel to represent him). And settled authority makes clear that the appointment of two attorneys should continue even if, as here, the government elects not to seek the death penalty in the event of conviction. *See* United States v. Boone, 245 F.3d 352, 358 (4th Cir. 2001) (holding that § 3005 establishes a right to two attorneys where the death penalty may be imposed, even if the government does not ultimately seek the death penalty) (citing United States v. Watson, 496 F.2d 1125 (4th Cir. 1973)).

[5] *See* 18 U.S.C. § 3006A(e)(1) (upon request by *ex parte* application, a court may authorize counsel to obtain investigative, expert, or other services necessary for adequate representation when a defendant is financially unable to do so himself).

[6] The record does not reflect the precise nature, content, or accuracy of this information.

[7] Although it appears that the recorder was activated quite near the beginning of the call, the transcript does not include the opening lines of the call.

[8] The Investigator noted that phone calls are routinely recorded at the Northern Neck Regional Jail and that he merely activated his recorder so that he would have his own record of the conversation.

correct Brown's impression that he was willing to pay Brown for the information on Dyer's behalf. Importantly, it is clear that at no time prior to this telephone call did Salvato or Manitta direct the Investigator to speak with Brown or to tape record the telephone conversation; that decision was made solely by the Investigator.

Following the recorded telephone conversation, the Investigators contacted Salvato and Manitta to explain what had occurred with respect to their contact with Brown and the recorded telephone call. Although counsel believed that further discussions with Brown might yield additional information helfpul to Smallwood, they directed the Investigators to have no further contact with Brown. It appears that both Brown and Dyer thereafter attempted repeatedly to call the Investigators, who, acting on counsel's instructions, did not return the calls.

After learning of the recorded telephone conversation between Brown and the Investigator, Salvato and Manitta promptly called a representative of the local chapter of the Virginia State Bar [9] **[**10]** to seek advice on the appropriate course of action they should follow in the circumstances. Because this was an unrecorded telephone contact, no written record exists **[**8]** concerning precisely what information Salvato and Manitta provided to the local Bar representative **[*694]** or what advice the representative offered. Nonetheless, it appears that after being advised of the essential facts, the Bar representative acknowledged the troubled provenance of the tape recorded telephone conversation, but went on to advise Salvato and Manitta that because their first obligation was to represent their client zealously, they were required to use the tape at trial and to use it in a manner that maximized its advantage to their client. Salvato and Manitta decided to follow this advice [10] and thus decided not to give notice to Brown's counsel or the Court of the existence and circumstances of the recorded conversation between the Investigator and Brown or of their intention to offer the tape into evidence at trial. Instead, Salvato and Manitta sought to introduce the recording in the midst of the trial in an attempt to impeach Brown's credibility by showing that Brown had attempted to sell information and encouraged others to commit perjury to obtain reduced sentences. Brown's counsel, taken entirely by surprise, was quite upset that the Investigators had spoken with Brown **[**9]** and recorded the conversation without the counsel's knowledge or consent. Further, he strenuously objected to counsel's failure to notify him of the recording before seeking to introduce it at trial. This attempt to introduce the tape into evidence also prompted immediate objections from the government. In the end, Smallwood, by counsel, was permitted to impeach Brown by cross-examining him about his efforts to sell information to other inmates, but the tape and transcript of the call itself were not admitted into evidence. See *United States v. Smallwood,* Case No. 03cr245 (E.D. Va. Feb. 17, 2004) (Trial Transcript). [11] In so ruling, the Court made clear that no opinion was expressed with respect to the propriety of the Investigator's communication with Brown or trial counsel's failure to disclose the recording promptly upon learning of its existence.

On July 22, 2004, the Investigators submitted a voucher requesting payment in the amount of $ 6759.23 for investigative services performed on behalf of Smallwood. Given the concern that at least a portion of the investigation had been conducted in violation of appropriate ethical standards, the request was held in abeyance pending the submission of briefs and a hearing on the matter. On February 22, 2005, a hearing was held at which the parties, including the Investigators, were afforded the opportunity to clarify the

[9] Although the record is unclear in this respect, Salvato explained at the hearing that this representative was the "local bar counsel or bar prosecutor" of the local chapter of the Virginia State Bar, whom Salvato knew from having previously served with him on the local Ethics Committee. Notably, the record does not reflect that Salvato and Manitta attempted to call the Virginia State Bar Legal Ethics Hotline, established by the Virginia State Bar to provide informal ethics opinions over the telephone. *See* Virginia State Bar, Legal Ethics Opinions, *at* http://www.vsb.org/profguides/opinions.html (last visited Apr. 13, 2005). Nor does the record reflect that they requested a written Legal Ethics Opinion from the Virginia State Bar Standing Committee on Legal Ethics. *See id.;* Va. Sup. Ct. R., Part 6, § IV, P10 (establishing rules for promulgation of Legal Ethics Opinions), *available at* http://www.vsb.org/profguides/org.pdf (last visited Apr. 13, 2005).

[10] Of course, the local Bar representative's opinion, given informally and over the telephone, was not binding and thus, counsel were under no obligation to follow it. History reflects that such advice may miss the mark. *See, e.g., In re Ryder, 263 F. Supp. 360, 362-63 (E.D. Va. 1967)* (advice given by local bar leaders was found to be neither controlling nor in every case entirely accurate).

[11] Brown admitted at trial that he had attempted to sell information to other inmates and was thoroughly cross-examined on this point.

underlying facts. The matter is **[**11]** now ripe for disposition.

II.

A. Communication with a Represented Person

The question whether it was proper for the Investigator to communicate with Brown without the consent of Brown's counsel properly divides into two parts. It is first appropriate to consider whether the Investigator's communications with Brown, if conducted by a lawyer, would have been proper. This is so because if a lawyer might properly have communicated with Brown as the Investigator did here, it is unnecessary to reach the second question, which is whether an investigator or other **[*695]** assistant employed by a lawyer to assist in investigating or preparing a case must, in doing so, abide by a lawyer's ethical obligations regarding communications with represented parties. Put differently, the second question is whether a lawyer's investigator or assistant may communicate with a represented party when a lawyer may not ethically do so.

These questions are appropriately answered by reference to the Virginia Rules of Professional Conduct. [12] And these Rules make unmistakably clear that ***HN1***[] a lawyer may not ethically contact or direct others to contact a known represented party about the subject of that **[**12]** representation without the knowledge or consent of that party's counsel. *See* Rule 4.2, Va. R. Prof'l Conduct. Thus, Rule 4.2 states unambiguously that,

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4.2, Va. R. Prof'l Conduct.

Significantly, the Rule's underlying rationale is not limited to parties in a formal proceeding, but rather extends to communications with any represented individual when the communications involve the subject of the representation. As comment 5a to Rule 4.2 **[**13]** makes clear,

> Concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved *where a person is a target of a criminal investigation,* knows this, and has retained counsel to receive advice with respect to the investigation."

Rule 4.2 cmt. 5a, Va. R. Prof'l Conduct (emphasis added). Moreover, the same concerns arise where, as here, "a *'third party' witness* furnishes testimony in an investigation or proceeding and although not a formal party, has decided to retain counsel to receive advice with respect thereto." *Id.* (emphasis added); *see also United States v. Franklin, 177 F. Supp. 2d 459 (E.D. Va. 2001)* (disqualifying defense attorney for communications with government witness without his counsel's consent). And notably, ***HN2***[] a violation of Rule 4.2 occurs even where the represented party consents to the communication. *See Franklin, 177 F. Supp. at 467* ("[Uncounseled] consent in no way mitigates whether a violation of Rule 4.2 has occurred."). Because such consent is uncounseled, it cannot qualify as the knowing and intelligent **[**14]** consent required for the Rule. In sum, then, a lawyer may not communicate with a person known to be represented about a matter relevant to the representation without the consent of the person's lawyer.

Given these settled principles, it is clear that Salvato, Manitta or any other lawyer would have violated Rule 4.2 had he or she communicated with Brown, as did the Investigator here, concerning any aspect of the *Smallwood* case without the consent of Brown's lawyer. Here, Salvato and Manitta, as well as the Investigators, knew Brown was represented by counsel in connection with his testimony against Smith and Smallwood. Moreover, they also knew that Brown's lawyer had not consented to any communication, nor would he be likely to do so. This is particularly so given the real risk that such an interview might ultimately prove harmful to Brown's efforts to win a Rule 35 reduction **[*696]** in his sentence in exchange for his testimony as a government witness in the *Smallwood* case. Thus, although Brown and the Investigator discussed the sale of information in cases unrelated to the *Smallwood* case, it is plain that the discussion was aimed at collecting information to impeach Brown's

[12] *See* Local Rule 57.4(l), E.D. Va. Local Crim. R. (with one exception not relevant here, ethical standards relating to criminal law practice in the Eastern District of Virginia are governed by the Virginia Rules of Professional Conduct as published in the version effective January 1, 2000).

credibility **[**15]** as a witness testifying against Smallwood and was therefore related to the "subject of the representation." Rule 4.2, Va. R. Prof'l Conduct. Accordingly, this communication, if conducted by a lawyer, would have violated Rule 4.2.

The Investigator pointed out at the hearing that Brown, not the Investigator, initiated the recorded telephone conversation and that the call took the Investigator by surprise. Yet, this is ultimately of no consequence, for what matters under the Rule is not which party initiated the communication, but that the communication occurred. Nor does it matter that the Investigator was surprised by the call; his surprise did not compel him to accept the call and participate in the communication; he could, of course, quite easily have declined to speak with Brown. The Investigator did not terminate the conversation once Brown came on the line, nor did he inform Brown that he was an investigator working on Smallwood's behalf. Instead, he permitted Brown to remain under the mistaken impression that the Investigator was a relative of Dyer interested in aiding Dyer by purchasing information from Brown so that Dyer could obtain government assistance in securing a sentence **[**16]** reduction. [13] It follows, therefore, that this communication, if conducted by a lawyer, would have constituted a breach of the lawyer's professional ethics, subjecting the lawyer to discipline.

Given that a lawyer plainly could not ethically have communicated with Brown as the Investigators did here, it is necessary to consider whether the Investigators, as the lawyers' assistants and agents, may be held to the same ethical standard even though they are not members of the Bar. The answer to this question is readily apparent. Simply put, ***HN3***[] a lawyer should not be able to avoid ethical strictures that bind lawyers by using an assistant to engage in the proscribed conduct. In other words, in general, what a lawyer may not ethically do, his investigators **[**17]** and other assistants may not ethically do in the lawyer's stead. Were this not so, a lawyer might easily circumvent many ethical obligations through the use of an assistant or investigator who, given only a hint, cunningly perceives that his employer's cause can be aided by engaging in conduct that might be ethically forbidden to the lawyer. [14] **[**19]** Further, it would give **[*697]** unscrupulous lawyers an incentive to provide those in their charge with only limited ethical direction. For these reasons, the Virginia Rules of Professional Conduct plainly contemplate that a lawyer's investigators or assistants, when acting on the lawyer's behalf, must abide by the ethical obligations of the legal profession as the Rules establish an affirmative duty for a lawyer to "make reasonable efforts to ensure that [his nonlawyer assistants'] conduct is compatible with the professional obligations of the lawyer." *See* Rule 5.3, Va. R. Prof'l Conduct (2000). To be sure, ***HN4***[] a lawyer must, of necessity, often act through and with the help of assistants who are nonlawyers in order to accomplish the lawyer's work, and thus the prudential concerns and ethical bounds that constrain the legal profession are of equal **[**18]** importance whether a lawyer acts directly or through the efforts of assistants or investigators. [15] In general, therefore, a lawyer's assistants or investigators must abide by the lawyer's ethical obligations when they act on behalf of the lawyer.

Nor is there any reason to depart from this general rule in the case of Rule 4.2. A represented party is equally susceptible to manipulation in the best interests of one's own client by a lawyer's assistant or investigator as by a

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[13] It is worth noting that even had Brown knowingly consented to a conversation with Smallwood's lawyer, without the knowledge and consent of Brown's counsel, any such communication still would have been improper. *See* Franklin, 177 F. Supp. 2d at 467-68.

[14] Such a possibility calls to mind Henry II's infamous words, in reference to the Archbishop of Canterbury, Thomas a Becket, his friend and principal antagonist: "Will no one rid me of this turbulent priest?" *See* John Gillingham, *The Angevins, in The Lives of the Kings & Queens of England* 54 (Antonia Fraser ed. 1995); *see also* Will Durant, *The Age of Faith: A History of Medieval Civilization -- Christian, Islamic, and Judaic -- from Constantine to Dante: A.D. 325-1300* 669-672 (1950); John Bartlett, *Bartlett's Familiar Quotations* 127:2 (Justin Kaplan ed., 17 ed. 2002). As we know, four of Henry's knights overheard this remark and obligingly murdered Becket in Canterbury Cathedral. But as we also know, Henry paid dearly for his wayward words. Becket was swiftly canonized and the murder aroused such great public sentiment against Henry that he was forced to perform penance, including (i) a pilgrimage to Canterbury, walking the last three miles on bare bleeding feet and (ii) allowing the monks to scourge him while he lay prostrate at Becket's tomb. And, not to be omitted from this telling is that Henry's assistants -- his knight assassins -- received their due, too; they were executed.

[15] Of course, most assistants, unless lawyers themselves or members of some other professional association, cannot themselves be held accountable for unethical behavior unless it also amounts to criminal conduct. Nonetheless, the fact that corrective measures cannot usually be implemented directly against these assistants does not mean that their conduct is

lawyer. [16] Thus, it is sensible to conclude that a lawyer's assistants and investigators, when acting on behalf of the lawyer, must comply with Rule 4.2's commands for communications with represented parties. In this case, therefore, the Investigators' communication with Brown, a represented party, was improper as it concerned a subject relevant to Brown's testimony **[**20]** against Smallwood and took place without the knowledge or consent of Brown's counsel.

B. Tape Recording of Telephone Conversation

Whether the Investigators acted properly by recording the telephone conversation with Brown is again a question that is appropriately divided into two parts. **[**21]** The first issue is whether a lawyer who spoke with Brown, via telephone, as the Investigators did here, properly could have recorded that telephone conversation without Brown's consent. And second, if a lawyer could not ethically have recorded the conversation, it is appropriate to consider whether the Investigators may be held to the same standard.

Analysis properly begins with the recognition that ***HN5***[ ] in Virginia it is not a criminal offense for a person to record a conversation where the person "is a party to the communication or one of the parties to the communication has given prior consent" to the recording. *Va. Code § 19.2-62(B)(2)*. In other words, in Virginia, **[*698]** there is no criminal prohibition against recording a telephone conversation *provided* one of the parties to the conversation has consented to the recording. Yet, this does not end the analysis here, for as the Supreme Court of Virginia has noted, "conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful." *Gunter v. Virginia State Bar, 238 Va. 617, 621, 385 S.E.2d 597, 6 Va. Law Rep. 777 (Va. 1989)*. And while a lawyer's recording of **[**22]** a telephone conversation with the knowledge and consent of one, but not all, parties to the conversation is not a crime in Virginia, the Supreme Court of Virginia nonetheless considers this to be "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Rule 8.4 of the Virginia Rules of Professional Conduct. *Id.* (applying precursor to Rule 8.4). As the Supreme Court reasoned, this sensible conclusion follows because the surreptitious recording of a conversation is an "'underhand practice' designed to 'ensnare' an opponent." *Id.* Thus, to record or advise others to record a conversation without the consent of the other party is "more than a departure from the standards of fairness and candor which characterize the traditions of professionalism." *Id.* This principle applies with equal force whether a lawyer recorded the conversation himself or encouraged another to do so. *Id.* (disciplining lawyer for directing client to install wiretap on client's home without his wife's consent). [17] **[**24]** In this case, the Investigators recorded the conversation with Brown without his knowledge or consent to the recording. Indeed, Brown did not even know the Investigators' **[**23]** true identity. Thus, if a

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beyond regulation. In certain circumstances, as here, it may be possible to sanction such assistants and investigators by reducing their compensation.

[16] *See also United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990)* (stating that "both government lawyers and government agents must be aware and respectful of the ethical guideline that forbids *ex parte* contacts with a represented defendant."); ***Upjohn Co. v. Aetna Casualty & Sur. Co., 768 F. Supp. 1186, 1213-14 (W.D. Mich. 1991)*** (finding that ethical no-contact rule applies to nonlawyers hired by lawyers to collect evidence from adverse party); *Restatement (Third) of the Law Governing Lawyers § 99 cmt. b* (2000) ("The [no-contact rule] also applies to nonlawyer employees and other agents of a lawyer, such as an investigator.").

[17] Worth noting is the existence of two pertinent Legal Ethics Opinions of the Virginia State Bar Standing Committee on Legal Ethics. In one opinion, the Standing Committee on Legal Ethics opined that a lawyer, or an agent acting at his direction, may record a conversation with the knowledge and consent of only one party, if he is engaged in a criminal investigation or housing discrimination investigation. *See* Standing Committee on Legal Ethics, Legal Ethics Opinion 1738 (2000) (summarizing Virginia law regarding surreptitious recordings by attorneys). While it might be argued that the Investigators were engaged in a "criminal investigation" when they recorded the conversation with Brown, a subsequent Legal Ethics Opinion appears to narrow the exception for "criminal investigations" to those involved in "law enforcement." *See* Standing Committee on Legal Ethics, Legal Ethics Opinion 1765 (2000).

In any event, it is important to note that these Opinions are not binding authority. *See* Va. Sup. Ct. R., Part 6, § IV, P10(c)(vi) ("Any [Advisory Opinion of the Committee on Legal Ethics] expresses the judgment of the Committee and is advisory only. It shall have no legal effect and is not binding on any judicial or administrative tribunal."). It is the Supreme Court of Virginia's teaching in *Gunter* on this issue that is binding and this teaching is that a lawyer may not ethically record a conversation without the consent of all parties to the conversation. *See Gunter, 238 Va. at 621*.

lawyer had recorded the conversation with Brown, as the Investigators did here, it plainly would have violated Rule 8.4. [18]

Again, there is no reason to depart from the general rule that a lawyer's assistants and investigators are required to abide by the lawyer's ethical obligations when acting on the lawyer's behalf. As plainly seen by the attempt to introduce this recording in this case, such recordings taken by a lawyer's investigators are equally capable of "'ensnaring' an opponent" as are recordings taken by a **[*699]** lawyer. *238 Va. at 621*. Thus, a lawyer's assistants and investigators may not ethically record a telephone conversation without the knowledge and consent of all parties to that conversation. It follows, therefore, that the recording of the conversation with Brown was improper.

In reaching these conclusions -- that both **[**25]** the conversation with Brown itself and the recording of that conversation were improper -- the purpose is not to impugn the motives or integrity of any of the parties involved, but rather to clarify the appropriate ethical guidelines for the future. In sum, then, the following conclusions and lessons may be drawn from this episode:

> (i)*HN6*[] just as a lawyer may not communicate with a represented party about the subject of the representation without the consent of that person's lawyer, neither may a lawyer's investigator or other assistant do so;
>
> (ii) *HN7*[] a lawyer's investigator or other assistant, like a lawyer, may not tape record conversations with the knowledge or consent of only one party to the conversation but without the knowledge and consent of other parties;
>
> (iii) the lawyers in this case did not engage in any improper conduct nor did they knowingly authorize the Investigators to do so. At most, the lawyers may be faulted for failing to anticipate that events would occur that would require them to instruct the Investigators regarding their ethical obligations. Arguably, these events were not reasonably foreseeable in the circumstances. Nonetheless, the facts of this **[**26]** case are a useful reminder that lawyers are obligated to take affirmative steps to instruct and supervise their investigators or other assistants to ensure that they are aware of, and ultimately comply with, the lawyers' ethical obligations; in other words, it is incumbent upon an attorney to take all reasonable steps necessary to avoid inadvertent deception or unethical conduct carried out by his assistants or investigators. *See* Rule 5.3(b), Va. R. Prof'l Conduct ("[A] lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."). [19]
>
> (iv) *HN8*[] an investigator or other assistant has an affirmative duty to learn and abide by a lawyer's ethical obligations; he may not simply claim ignorance of these duties and proceed to act with impunity; instead, investigators or other assistants should seek direction from their lawyer-employers when presented with areas of ethical ambiguity or uncertainty.

[27]** In the end, it is clear that neither the lawyers nor the Investigators knowingly engaged in any improper conduct. And significantly, the Investigators' itemized statement reflects that the interview with Brown was a comparatively small portion of the services the Investigators performed on Smallwood's behalf. Accordingly, **[*700]** it is appropriate to grant the Investigators' request for payment in its entirety with the caution that in the future, a lawyer's investigators and other assistants should be cautious to observe the ethical strictures required of both members of the legal

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[18] The fact that the call may have been recorded by Northern Neck Regional Jail as a matter of routine is of no consequence. The ethical obligation is not rooted in notions of the duped party's reasonable expectation of privacy, but rather in the ethical obligation to avoid conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4, Va. R. Prof'l Conduct.

[19] While Salvato and Manitta concluded that their duty of client loyalty required not only that they use the recording, but that they not disclose it until the midst of trial, it would have been preferable for Salvato and Manitta to notify Brown's counsel and the Court prior to the trial's commencement of the recording's existence and of their intention to introduce it. The concern that earlier disclosure of the recording might have caused Brown to tailor his testimony does not outweigh the importance of avoiding any inference of ratification of the Investigators' conduct. *See* Rule 5.3, Va. R. Prof'l Conduct ("[A] lawyer shall be responsible for conduct of [a nonlawyer employed or retained by or associated with the lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved ….").

profession and those they employ.

An appropriate Order will issue.

Alexandria, VA

April 14, 2005

T. S. Ellis, III

United States District Judge

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As of: October 11, 2019 2:30 AM Z

Zaug v. Va. State Bar

Supreme Court of Virginia

February 28, 2013, Decided

Record No. 121656

Reporter
285 Va. 457 *; 737 S.E.2d 914 **; 2013 Va. LEXIS 35 ***; 2013 WL 749501

HEATHER ELLISON ZAUG v. VIRGINIA STATE BAR, EX REL. FIFTH DISTRICT - SECTION III COMMITTEE

Prior History: [*1]** FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA. Lon Edward Farris, James F. Almand, and John J. McGrath, Jr., Judges Designate.

Disposition: Reversed, vacated, and dismissed.

Core Terms

caller, communicating, answered, rules of professional conduct, deposition, emotional, circuit court, the Rule, principles

Case Summary

Procedural Posture
Appellee state bar issued a charge of misconduct alleging that appellant attorney had violated Va. Sup. Ct. R. pt. 6, § II, *R. 4.2 of the Virginia Rules of Professional Conduct* (*Rule 4.2*). A three-judge panel of the Circuit Court of the City of Alexandria (Virginia) upheld the misconduct charge under *Rule 4.2*. The attorney appealed.

Overview
Under *Rule 4.2*, attorneys were ethically prohibited from communicating about the subject of representation with a person represented by another attorney unless they had that attorney's consent or were authorized by law to do so. While *Rule 4.2* categorically and unambiguously forbade an attorney from initiating such communications and required an attorney to disengage from such communications when they were initiated by others, the Rule did not require attorneys to be discourteous or impolite when they did so. Here, it was undisputed that the attorney, who was representing a doctor in a medical malpractice case, did not initiate the telephone call with one of the plaintiffs. There was no evidence in the record, and the state bar did not assert, that the attorney intended to gain advantage from it. Likewise, there was no evidence that the attorney deliberately or affirmatively prolonged the telephone call. On these specific and narrow facts, and construing *Rule 4.2* to advance behavior that was both professional and ethical, the appellate court concluded that no violation occurred in the case.

Outcome
The judgment of the circuit court was reversed. The misconduct charge was dismissed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Legal Ethics > Professional Conduct > General Overview

HN1 **Appeals, Standards of Review**

When the appellate court reviews a lawyer discipline proceeding, the State Bar has the burden of proving by clear and convincing evidence that the attorney violated the relevant Rules of Professional Conduct. The appellate court conducts an independent examination of the entire record. The appellate court considers the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Bar, the prevailing party in the trial court. The appellate court accords the trial court's factual findings substantial weight and view those findings as prima facie correct. Although it does not give the trial court's conclusions the weight of a jury verdict, the appellate court will sustain those conclusions unless it appears

that they are not justified by a reasonable view of the evidence or are contrary to law. The Virginia Rules of Professional Conduct are Rules of the Virginia Supreme Court. *Va. Code Ann. § 54.1-3909*. The interpretation of such Rules is a question of law the appellate court reviews de novo.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties

HN2 **Professional Conduct, Opposing Counsel & Parties**

Va. Sup. Ct. R. pt. 6, § II, *R. 4.2 of the Virginia Rules of Professional Conduct* (Rule) states that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. The commentary provides guidance for interpreting the scope and meaning of the Rule. Comment 3 states that the Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel. Further, Comment 4 states, in part, that this Rule does not prohibit communication with a represented person concerning matters outside the representation.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties

HN3 **Professional Conduct, Opposing Counsel & Parties**

Viewed in the light of the commentary, it is clear that the Bar must prove three separate facts to establish a violation of the Va. Sup. Ct. R. pt. 6, § II, *R. 4.2 of the Virginia Rules of Professional Conduct* (Rule): (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. While the first two facts may occur in any order, both must occur before an attorney violates the Rule.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties

HN4 **Professional Conduct, Opposing Counsel & Parties**

"Immediately" does not mean "instantaneously," and Va. Sup. Ct. R. pt. 6, § II, *R. 4.2 of the Virginia Rules of Professional Conduct* does not obligate an attorney to hang up on a represented person without regard to courtesy.

Legal Ethics > Professional Conduct > General Overview

HN5 **Legal Ethics, Professional Conduct**

The Virginia Rules of Professional Conduct are precisely what they are described by their title to be: rules of professional conduct. They exist to further, not to obstruct, the professionalism of Virginia attorneys. Professionalism embraces common courtesy and good manners, and it informs the Rules and defines their scope. Accordingly, the court will not construe the Rule to penalize an attorney for an act that is simultaneously non-malicious and polite.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties

HN6 **Professional Conduct, Opposing Counsel & Parties**

Attorneys must understand that they are ethically prohibited from communicating about the subject of representation with a person represented by another attorney unless they have that attorney's consent or are authorized by law to do so. Va. Sup. Ct. R. pt. 6, § II, *R. 4.2 of the Virginia Rules of Professional Conduct* (Rule) categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications when they are initiated by others. But the Rule does not

require attorneys to be discourteous or impolite when they do so.

Counsel: Bernard J. DiMuro (Michael S. Lieberman; DiMuroGinsberg, on briefs), for appellant.

Seth M. Guggenheim, Assistant Ethics Counsel (Edward L. Davis, Bar Counsel; Kathryn R. Montgomery, Deputy Bar Counsel, on brief), for appellee.

Amicus Curiae: Virginia Association of Defense Attorneys (Jeffrey H. Geiger; Sands Anderson, on brief), in support of appellant.

Judges: OPINION BY JUSTICE WILLIAM C. MIMS.

Opinion by: WILLIAM C. MIMS

Opinion

[915] [*460]** PRESENT: All the Justices

OPINION BY JUSTICE WILLIAM C. MIMS

In this appeal of right from a judgment entered by a three-judge circuit court in a disciplinary hearing, we consider whether an attorney violated *Rule 4.2 of the Virginia Rules of Professional Conduct.*

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Heather Ellison Zaug is an attorney licensed to practice law in the Commonwealth of Virginia and admitted to the Bar of this Court. In April 2010, Zaug and Richard L. Nagle, her partner, represented a doctor in a medical malpractice action brought by Ian, Yanira, and Vincent W. Copcutt. The Copcutts were represented by Judith M. **[***2]** Cofield.

On April 15, Yanira Copcutt ("Yanira") telephoned the firm's office to speak with Nagle. He could not take the call because he was on his way to depose Vincent Copcutt ("Vincent"). A staff member transferred the call to Zaug. Zaug admits that she knew the call concerned Vincent's deposition but she denies knowing who the caller was when she answered. There is no recording or transcript of the call.

The parties agree that Yanira was distraught. According to Zaug, the call lasted approximately 60 seconds. It is undisputed that Yanira told Zaug about the toll the litigation was taking on her family and that Vincent's deposition needed to be cancelled. According to Zaug, she apologized and told Yanira that she could not help her and that Yanira needed to contact Cofield.

[916]** According to Zaug, she then attempted to terminate the call but Yanira resisted "with an outpouring of emotion." Yanira said that she had been unable to reach Cofield and that she wanted to speak to Nagle. Zaug reiterated that "[w]e can't help you. You need to try to reach Ms. Cofield. I'll try to contact Mr. Nagle and they'll have to sort this out." She then terminated the call.

[*461] Another attorney at the firm witnessed **[***3]** part of the call. The witness testified that it lasted about 30 seconds from the time Zaug realized who the caller was and corroborated her recollection of her side of the conversation from that point forward.

According to Yanira, Zaug addressed her by name when she answered the call, saying, "Hi, Mrs. Copcutt." Yanira told Zaug that Vincent's deposition needed to be canceled. When Zaug asked what was wrong with the deposition, Yanira started crying, rambling, and describing the emotional difficulties associated with the injury caused by Zaug's client's alleged malpractice. Further, Yanira told Zaug that she wanted to dismiss the lawsuit.[1]

After Vincent's deposition, **[***4]** Yanira told Cofield about her conversation with Zaug. Cofield thereafter filed a complaint with the Virginia State Bar ("the State Bar") in which she set forth Yanira's account of the conversation. The State Bar issued a charge of misconduct alleging that Zaug had violated *Rule 4.2 of the Virginia Rules of Professional Conduct.*

The charge of misconduct was heard by the Fifth District Section III Committee pursuant to Paragraph 13-16 of Part 6, Section IV of the Rules of this Court. After a hearing, the district committee issued a determination that Zaug's conduct constituted a violation of the Rule. The district committee imposed the sanction of a dismissal de minimis.

[1] Yanira testified at a hearing to disqualify Zaug as counsel in the underlying litigation. Nagle objected that her description of Zaug's statements was inadmissible hearsay. On the basis of Cofield's response that the statements were not offered for the truth of the matter asserted, the circuit court overruled the objection. Accordingly, the parties to this appeal dispute the evidentiary value of Yanira's testimony for the purpose of the disciplinary proceeding. For the reasons stated herein, we do not address this question.

Zaug appealed the district committee's determination to the circuit court pursuant to Paragraph 13-17(A) of Part 6, Section IV of the Rules of this Court. Sitting by designation pursuant to *Code § 54.1-3935(B)*, a three-judge panel of the court affirmed the findings of the district committee and the sanction of a dismissal de minimis. Zaug perfected a timely appeal of right from the court's judgment pursuant to *Code § 54.1-3935(E)* and *Rule 5:21(b)(2)(ii)*.

II. ANALYSIS

HN1[] When we review a lawyer discipline proceeding, "the State **[***5]** Bar has the burden of proving by clear and convincing evidence that **[*462]** the attorney violated the relevant Rules of Professional Conduct." *Weatherbee v. Virginia State Bar, 279 Va. 303, 306, 689 S.E.2d 753, 754 (2010)* (citing *Barrett v. Virginia State Bar, 272 Va. 260, 268 n.4, 634 S.E.2d 341, 345 n.4 (2006)*; *Blue v. Seventh District Committee, 220 Va. 1056, 1062, 265 S.E.2d 753, 757 (1980)*; *Seventh District Committee v. Gunter, 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971)*).

> We conduct an independent examination of the entire record. We consider the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Bar, the prevailing party in the trial court. We accord the trial court's factual findings substantial weight and view those findings as prima facie correct. Although we do not give the trial court's conclusions the weight of a jury verdict, we will sustain those conclusions unless it appears that they are not justified by a reasonable view of the evidence or are contrary to law.

Id. at 306, 689 S.E.2d at 754-55 (quoting *Anthony v. Virginia State Bar, 270 Va. 601, 608-09, 621 S.E.2d 121, 125 (2005)* (internal quotation marks and citation **[***6]** omitted)). The **[**917]** Virginia Rules of Professional Conduct are Rules of this Court. See *Code § 54.1-3909*. The interpretation of such Rules is a question of law we review de novo. *LaCava v. Commonwealth, 283 Va. 465, 469-71, 722 S.E.2d 838, 840 (2012)*.

HN2[] *Rule 4.2 of the Virginia Rules of Professional Conduct* states that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The commentary provides guidance for interpreting the scope and meaning of the Rule. Comment 3 states,

> [t]he Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently **[*463]** representing that person, if that person is seeking a "second opinion" **[***7]** or replacement counsel.

(Emphasis added.) Further, Comment 4 states, in relevant part, "This Rule does not prohibit communication with a represented person . . . concerning matters outside the representation."

HN3[] Viewed in the light of the commentary, it is clear that the Bar must prove three separate facts to establish a violation of the Rule: (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. While the first two facts may occur in any order, both must occur before an attorney violates the Rule.

Zaug admits that she was aware of the subject of the telephone call when she answered it, and this is reflected in the district committee's factual findings. However, the record does not disclose when she became aware that the caller was a represented person. Although Yanira testified at the hearing on her motion to disqualify counsel that Zaug addressed her as Mrs. Copcutt when she answered the call, thereby **[***8]** indicating Zaug knew the identity of the caller at the time she answered, Zaug denied knowing the identity of the caller until Yanira described the emotional toll the litigation was having on her family.

The circuit court made no factual findings and merely affirmed the district committee's determination. However, the district committee made no finding resolving this dispute of fact. To the contrary, the district committee found only that Zaug "was aware she was speaking with Copcutt either at the time she took the telephone call or concomitantly therewith." We are

unable to decipher the meaning of this finding. "Concomitantly" means "in a concomitant manner." Webster's Third New International Dictionary 471 (1993). "Concomitant" means "accompanying or attending esp[ecially] in a subordinate or incidental way[;] occurring along with or at the same time as and with or without a causal relationship." Id.

Accordingly, the finding does not determine whether Zaug knew the identity of the caller when she answered or soon thereafter. Consequently, this finding does not answer the question of when Zaug knew both (a) the identity of the party with whom she was communicating **[*464]** and (b) the subject **[***9]** of the communication.[2] Further, at oral argument, the State Bar conceded that there was no evidence of how much time elapsed between the instant Zaug knew both pieces of information and the end of the call.

[918]** Nevertheless, "[w]e conduct an independent examination of the entire record." *Weatherbee, 279 Va. at 306, 689 S.E.2d at 754*. Zaug testified that she answered, "This is Heather, how can I help you?" The caller responded, "I need to speak with Mr. Nagle. The deposition needs to be cancelled." Nonplussed by the response, Zaug then said, "This is Heather Zaug. I work with Mr. Nagle on the case. Who is this? How can I help you?" At that point, according to Zaug, Yanira began her emotional outburst, stating that the litigation was too much for her family. Zaug then knew the identity of the caller.

According to Zaug, she then said, "I'm sorry. I cannot help you. You need to try to speak with Ms. Cofield. Have you tried to reach Ms. Cofield?" Yanira's emotional outpouring continued **[***10]** for an unspecified number of seconds before Zaug concluded the call by stating, "I'm sorry. We can't help you. You need to try to reach Ms. Cofield. I'll try to contact Mr. Nagle and they'll have to sort this out." Zaug's witness testified that this interval lasted no longer than 30 seconds. The dispute between Zaug and the State Bar focuses on this uncertain period of time.

Both parties argue the meaning and intent of the word "immediately" in Comment 3. The State Bar argues that Zaug violated the Rule when she failed to terminate the call by hanging up during Yanira's emotional outburst. Zaug argues that such conduct would violate the principles of professionalism which infuse and imbue the proper practice of law. *HN4*[⬆] "Immediately," she contends, does not mean "instantaneously," and the Rule does not obligate an attorney to hang up on a represented person without regard to courtesy. We agree with Zaug.

In the course of being admitted to the Bar of this Court, every attorney swears the following oath:

> Do you solemnly swear or affirm that you will support the Constitution of the United States and the Constitution of the Commonwealth of Virginia, and that you will faithfully, honestly, **[*465]** professionally, **[***11]** and courteously demean yourself in the practice of law and execute your office of attorney at law to the best of your ability, so help you God?

(Emphasis added). See also *Code § 54.1-3903*.

Further, the State Bar publishes principles of professionalism on its website. The preamble states,

> From Thomas Jefferson to Oliver Hill, Virginia lawyers have epitomized our profession's highest ideals. Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves "professionally and courteously."

Virginia State Bar, Principles of Professionalism, *http://vsb.org/pro-guidelines/index.php/principles/* (last visited Jan. 10, 2013). The principles state that, "In my conduct toward everyone with whom I deal, I should [r]emember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession," and "I should [t]reat everyone as I want to be treated — with respect and courtesy." Id.

HN5[⬆] The Virginia Rules of Professional Conduct are precisely what they are described by their title to be: rules of professional conduct. **[***12]** They exist to further, not to obstruct, the professionalism of Virginia attorneys. Professionalism embraces common courtesy and good manners, and it informs the Rules and defines their scope. Accordingly, we will not construe the Rule to penalize an attorney for an act that is simultaneously non-malicious and polite.

The State Bar argues that to permit Zaug's conduct creates a so-called "distraught caller exception" or a

[2] The district committee found that Zaug knew Copcutt was a represented person and that Zaug neither had Cofield's consent nor was authorized by law to engage in the communication. Those facts are not in dispute.

"60-second call exception" to *Rule 4.2*, obscuring an otherwise bright-line rule of ethical conduct. We agree with the State Bar that *HN6*[↑] attorneys must understand that they are ethically prohibited from communicating about the subject of **[**919]** representation with a person represented by another attorney unless they have that attorney's consent or are authorized by law to do so. The Rule categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications when they are initiated by others. But the Rule does not require attorneys to be discourteous or impolite when they do so.

[*466] In this case, it is undisputed that Zaug did not initiate the telephone call. There is no evidence in the record, and the State **[***13]** Bar does not assert, that Zaug intended to gain advantage from it. Likewise, there is no evidence that Zaug deliberately or affirmatively prolonged it. On these specific and narrow facts, and construing *Rule 4.2* to advance behavior that is both professional and ethical, we conclude that no violation occurred in this case. For these reasons, we will reverse the judgment of the circuit court, vacate the sanction imposed, and dismiss the charge of misconduct.

Reversed, vacated, and dismissed.

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 2nd day of October, 2019.

On June 19, 2019 came the Virginia State Bar, by Marni E. Byrum, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10-4, and filed a Petition requesting amendments to Legal Ethics Opinion No. 1872.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1872 be amended as follows, effective immediately:

LEGAL ETHICS OPINION 1872. VIRTUAL LAW OFFICE AND USE OF EXECUTIVE OFFICE SUITES.

This opinion is an examination of the ethical issues involved in a lawyer's or firm's use of a virtual law office, including cloud computing, and/or executive office suites. These issues include marketing, supervision of lawyers and nonlawyers in the firm, and competence and confidentiality when using technology to interact with or serve clients.

A virtual law practice involves a lawyer/firm interacting with clients partly or exclusively via secure Internet portals, emails, or other electronic messaging.[1] This practice may be combined with an executive office rental, where a lawyer rents access to a shared office suite or conference room. This space is generally either unstaffed or staffed by an employee of the rental

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[1] Stephanie Kimbro, a practitioner and scholar of virtual law offices, defines a virtual law practice as one where "[t]he use of an online client portal allows for the initiation of the attorney/client relationship through to completion and payment for legal services. Attorneys operate an online backend law office as a completely web-based practice or in conjunction with a traditional law office." http://virtuallawpractice.org/about/, accessed Jan. 22, 2013.

company who provides basic support services to all users of the space, rather than by an employee of the lawyer. The space is also not exclusive to the lawyer — even if she has exclusive access to a particular office or conference room, the suite is open to all other "tenants." Lawyers who maintain a virtual practice, who work from home, or who wish to expand their geographic profile without the higher costs of exclusive office space and staff all use these spaces as client meeting locations. In other words, virtual law offices and executive office suites do not always go together, but they frequently do.

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 1.1[2], 1.6(a) and (d)[3], 5.1(a) and (b)[4],

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[2] **Rule 1.1. Competence.**
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[3] **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:
* * *
(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.
* * *
(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

[4] **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.

5.3(a) and (b)[5], and 7.1[6]. The relevant legal ethics opinions are LEOs 1600, 1791, 1818, and 1850.

ANALYSIS

Virtual law offices involve issues that are present in all types of law offices – confidentiality, communication with clients, and supervision of employees – but that manifest themselves in a new way in this context. *See also* LEO 1850 (exploring similar concerns in context of outsourcing legal support services).

A lawyer must always act competently to protect the confidentiality of clients' information, regardless of how that information is stored/transmitted, but this task may be more difficult when the information is being transmitted and/or stored electronically through third-party software and storage providers. The lawyer is not required, of course, to absolutely guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to

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(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

[5] **Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.**
With respect to a nonlawyer employed or retained by or associated with a lawyer:
(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
* * *

[6] **Rule 7.1. Communications Concerning a Lawyer's Services.**
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

the representation of a client. *See* Rule 1.6(d). When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination.[7]

Similarly, although the method of communication does not affect the lawyer's duty to communicate with the client, if the communication will be conducted primarily or entirely electronically, the lawyer may need to take extra precautions to ensure that communication is adequate and that it is received and understood by the client. The Committee previously concluded in LEO 1791 that a lawyer could permissibly represent clients with whom he had no in-person contact, because Rule 1.4 "in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*." On the other hand, one of the aspects of communication required by Rule 1.4 is that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the

[7] See LEO 1818, where the Committee concluded that a lawyer could permissibly store files electronically and destroy all paper documents as long as the client was not prejudiced by this practice, but noted that the lawyer may need to consult outside technical assistance and support for assistance in using such a system.

representation." Use of the word "explain" necessarily implies that the lawyer must take some steps beyond merely providing information to make sure that the client actually is in a position to make informed decisions. A lawyer may not simply upload information to an Internet portal and assume that her duty of communication is fulfilled without some confirmation from the client that he has received and understands the information provided.

Finally, the technology that enables a lawyer to practice "virtually" without any face-to-face contact with clients can also allow lawyers and their staff to work in separate locations rather than together in centralized offices. As with other issues discussed in this opinion, a partner or other managing lawyer in a firm always has the same responsibility to take reasonable steps to supervise subordinate lawyers and nonlawyer assistants, but the meaning of "reasonable" steps may vary depending upon the structure of the law firm and its practice. Additional measures may be necessary to supervise staff who are not physically present where the lawyer works.

The use of an executive office/suite rental or any other kind of shared, non-exclusive space, either in conjunction with a virtual law practice or as an addition to a "traditional" office-based practice, raises a separate issue. A non-exclusive office space or virtual law office that is advertised as a location of the firm must be an office where the lawyer provides legal services. A lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case. *See* Rule 7.1. As discussed above in the context of Internet-based service providers, a lawyer must also pay careful attention to protecting confidentiality if any client information is stored or received in a shared space

staffed by nonlawyers who are not employees of the law firm and may not be aware of the nature or extent of the duty of confidentiality.

A Copy,

Teste:

Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
RULE OF PROFESSIONAL CONDUCT 3.8
PROPOSED COMMENT 5

PETITION OF THE VIRGINIA STATE BAR

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed new Comment 5 to Rule 3.8, as set forth below. The proposed comment was approved by a 47-13 vote of the Council of the Virginia State Bar on February 23, 2019 (Appendix at 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed amendments to Rule 3.8, Additional Responsibilities of a Prosecutor. Proposed Comment 5 is an entirely new comment that explains what "disclosure" means as used in Rule 3.8(d), regarding a prosecutor's duty to make known to the defense the existence of exculpatory evidence. Comment 5, as approved by Council, provides as follows:

[5] Paragraph (d) requires disclosure of the existence of exculpatory

> evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.
> ***

The proposed comment makes clear that the prosecutor's obligation is triggered only once the existence of exculpatory evidence becomes known to the prosecutor, and that the prosecutor must disclose and identify particular evidence that he or she knows to be exculpatory.

Current Rule of Professional Conduct 3.8 and its Comments

Rule 3.8 and its comments currently provide as follows:

> **Rule 3.8**
>
> **Additional Responsibilities of A Prosecutor**
>
> A lawyer engaged in a prosecutorial function shall:
>
> (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
> (b) not knowingly take advantage of an unrepresented defendant;
> (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
> (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
> (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

[1a] Paragraph (a) prohibits a prosecutor from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause. The prohibition recognizes that charges are often filed before a criminal investigation is complete.

[1b] Paragraph (b) is intended to protect the unrepresented defendant from the overzealous prosecutor who uses tactics that are intended to coerce or induce the defendant into taking action that is against the defendant's best interests, based on an objective analysis. For example, it would constitute a violation of the provision if a prosecutor, in order to obtain a plea of guilty to a charge or charges, falsely represented to an unrepresented defendant that the court's usual disposition of such charges is less harsh than is actually the case, e.g., that the court usually sentences a first-time offender for the simple possession of marijuana under the deferred prosecution provisions of *Code of Virginia* Section 18.2-251 when, in fact, the court has a standard policy of not utilizing such an option.

[2] At the same time, the prohibition does not apply to the knowing and voluntary waiver by an accused of constitutional rights such as the right to counsel and silence which are governed by controlling case law. Nor does (b) apply to an accused appearing *pro se* with the ultimate approval of the tribunal. Where an accused does appear *pro se* before a tribunal, paragraph (b) does not prohibit discussions between the prosecutor and the defendant regarding the nature of the charges and the prosecutor's intended actions with regard to those charges. It is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if nothing in the manner of the offer suggests coercion and the tribunal ultimately finds that the defendant's waiver of his right to counsel and his guilty plea are knowingly made and voluntary.

[3] The qualifying language in paragraph (c), i.e., ". . . after a party has been charged with an offense," is intended to exempt the rule from application during the investigative phase (including grand jury) when a witness may be requested to maintain secrecy in order to protect the integrity of the investigation and support concerns for safety. The term

> "encourage" in paragraph (c) is intended to prevent a prosecutor from doing indirectly what cannot be done directly. The exception in paragraph (d) also recognizes that a prosecutor may seek a protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
> [4] Paragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence or situations (paragraph (e)) where the lawyer/prosecutor does not have knowledge or control over the *ultra vires* actions of law enforcement personnel who may be only minimally involved in a case.

History of This Proposal

The Committee's efforts to address a prosecutor's duty to disclose the existence of exculpatory evidence, particularly in a "needle in a haystack" situation where a piece of known exculpatory evidence is included in a large volume of other materials, began with proposed LEO 1888. That opinion was based on a hypothetical scenario involving 200 hours of recorded jail calls, including one statement that the prosecutor knew to be exculpatory, and the proposed opinion concluded that the prosecutor was required to specifically identify that exculpatory statement to the defense lawyer. After the proposed opinion was released for public comment, the Committee withdrew the opinion, based in part on concerns about the ability to address this issue through a hypothetical scenario, and in part on the decision that the interpretation of the phrase "disclose the existence of" was better suited to a comment to the Rule rather than a legal ethics opinion.

The Committee then drafted a proposed Comment 5 to Rule 3.8 and released it for public comment. After receiving comments on that proposal, the Committee agreed to withdraw that proposed comment and establish a working group to ensure that the views of all stakeholders, including the Virginia Association of Commonwealth's Attorneys ("VACA"), were included in the Committee's process. The working group subsequently produced the following comment, which was adopted by the Committee and submitted to Council, where it was amended before being adopted. The proposal, which was approved by the working group and by the Committee and submitted to Council at its February 2019 meeting, read:

> [5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely disclose the evidence. What constitutes sufficient disclosure is dependent on the circumstances. In many cases, providing a copy of or access to the evidence or information is sufficient. In some circumstances, additional steps may be necessary to fulfill the disclosure obligation.

Council Proceedings

At the February 23, 2019, Council meeting, there were several motions made to delay or reconsider the proposal, as well as several motions to amend the text of proposed Comment 5. Motions to defer consideration of proposed Comment 5 until Council's June meeting and to send it back to the Committee for

further study in order to strengthen the obligations placed on the prosecutor both failed. A motion to amend the proposal to require that the prosecutor take "good faith" steps to disclose exculpatory evidence failed, as did a motion to add a sentence to the comment to indicate that it is aspirational. Ultimately, Council approved a motion to amend the proposed comment by deleting the final three sentences and modifying the now-last sentence to require that the prosecutor "identify and disclose" known exculpatory evidence, rather than just "disclose" the evidence. The amended comment, adopted by Council by a vote of 47 to 13, provides as follows:

> [5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.
> ***

Analysis

Rule 3.8(d) requires a prosecutor "make timely disclosure" of the "existence of evidence" that the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, but the rule does not specify what form that disclosure must take, nor whether disclosure requires more than mere production of the evidence. The Committee was of the opinion that "disclosure…of the existence of evidence" means more than just making the

evidence available to be found by the defense, and particularly that a "needle in a haystack" scenario is not compatible with the prosecutor's obligations under this Rule.

The Committee also felt that, even when there was no intentional concealment of exculpatory evidence, a prosecutor has not disclosed the existence of exculpatory evidence when he or she includes one piece of exculpatory evidence within hundreds or thousands of pages of non-exculpatory evidence. The proposed comment makes explicit that the prosecutor's duty to disclose the "existence of [exculpatory] evidence" requires the prosecutor to do more than merely produce or make available the exculpatory evidence.

Brady v. Maryland, 373 U.S. 83 (1963) and its progeny established a prosecutor's legal duty to turn over exculpatory evidence to the defense. Rule 3.8(d) is not coextensive with a prosecutor's legal obligations in several respects. Notably, as emphasized in the proposed comment, Rule 3.8(d) applies only to evidence that the prosecutor knows exists and is exculpatory, whereas the prosecutor's legal obligations include information known to law enforcement but not to the prosecutor personally, and even require the prosecutor to learn of "any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). *Cf. Workman v. Commonwealth*, 272 Va. 633, 646 (2006) (". . . the individual prosecutor has a duty to learn of any

favorable evidence known to the others acting on the government's behalf in the case, including the police."). Rule 3.8(d) and proposed Comment 5 do not put any burden on the prosecutor to look for exculpatory evidence, but rather to disclose and identify it once it becomes known to the prosecutor.

The legal requirement of *Brady* disclosure only applies to evidence that is "material" to the defendant's guilt or punishment, whereas Rule 3.8(d) does not include any materiality standard and requires disclosure of any evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." *Brady v. Maryland*, 373 U.S. at 87. The *Brady* standard is inherently backward-looking as it is generally applied and interpreted in post-conviction proceedings, whereas the Rules of Professional Conduct, and especially the comments to the rules, are primarily addressed to lawyers analyzing their own prospective conduct. Accordingly, Rule 3.8(d) requires broader disclosure, at an earlier stage in the proceeding, than the *Brady* standard requires, balanced with the actual knowledge standard of Rule 3.8(d) which does not require the prosecutor to search for or take responsibility for information that is not actually known to the prosecutor. *See also* Va. Legal Ethics Op. 1862 (2012) (explaining how the ethics rule was rewritten after *Read v. Virginia State Bar*, 233 Va. 560 (1987), and that the prosecutor's *ethica*l duty under Rule 3.8(d) is not co-extensive with the prosecutor's *legal* duty under *Brady*).

Proposed Comment 5 as amended and adopted by Council applies to all circumstances, not merely a "needle in a haystack" or other situations in which defense counsel would be required to wade through large volumes of non-exculpatory material to locate the exculpatory evidence. Rather, the proposed comment makes it clear that a prosecutor must always identify and disclose exculpatory evidence once he or she knows that it is exculpatory. As compared to the comment proposed by the Committee, it removes any uncertainty or need for judgment calls by prosecutors about whether they are obligated to do more than provide access to exculpatory evidence, since identifying the exculpatory evidence will be necessary in every case regardless of the timing or circumstances of disclosure.

The proposed amendment is included below in Section III.

II. Publication and Comments

The Committee approved the proposed amendment at its meeting on October 9, 2018 (Appendix at 8). The Virginia State Bar issued a publication release dated October 11, 2018, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix at 9). Notice of the proposed amendment was also published on the bar's website on the "Rule Changes" page (Appendix at 11) and in the bar's E-News on November 1, 2018 (Appendix at 13).

Eight comments were received from: Kennedy (Appendix at 14); Shaia (Appendix at 17); Ferguson (Appendix at 18); Boyce (Appendix at 20); Hakes (Appendix at 22); Reis (Appendix at 24); Evans on behalf of VACA (Appendix at 26); and Blair on behalf of Local Government Attorneys of Virginia (Appendix at 29).

The Committee received comments from prosecutors criticizing the proposed comment because it does not offer sufficient guidance, is potentially duplicative of procedural discovery rules, and because it reaches the wrong conclusion. VACA argues that "disclosure" is synonymous with "production," and therefore the proposed comment goes beyond what is required by Rule 3.8(d) by suggesting that additional steps beyond just production may be required in certain situations. The Committee considered these comments and determined not to make any change to the proposal in light of the issues raised.

The Committee also reviewed the new rules governing criminal discovery and concluded that the discovery rules do not affect the issues raised by Rule 3.8(d) and proposed Comment 5, as both the discovery rules and Rule 3.8 indicate that a prosecutor's obligations under the two sets of rules are not coextensive, and a prosecutor's ethical obligations can and do extend beyond what is required by legal, constitutional, and procedural rules. The Committee also concluded that the proposed comment provides necessary guidance and clarification that "disclosure"

is not the same as "production" and that a prosecutor may have to do more than merely produce exculpatory evidence in order to satisfy this duty of disclosure.

The VACA comment letter also argues that the Committee, and the Bar, mischaracterize the process that led to this proposal, and that the working group never reached a consensus because the prosecutors did not agree to the proposed language. However, other members of the working group, including a report from its chair, Judge Robert J. Humphreys (Appendix at 31), agree that the group reached a consensus on the proposed language.

III. Proposed Rule Change

Rule 3.8 Additional Responsibilities of a Prosecutor

***

[5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.

***

IV. Conclusion

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and

regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The proposed rule change was developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed new Comment 5 to Rule 3.8 for the reasons stated above.

Respectfully submitted,

VIRGINIA STATE BAR

Leonard C. Heath, Jr., President

Karen A. Gould, Executive Director

Dated this 5th day of March, 2019.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 2nd day of October, 2019.

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective December 1, 2019.

On June 19, 2019, came the Virginia State Bar, by Marni E. Byrum, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, and presented to the Court a petition, approved by the Council of the Virginia State Bar, praying that Rule 4.4, Part Six, Section II of the Rules of Court, be amended. The petition is approved and Rule 4.4 is amended to read as follows:

Rule 4.4. Respect for Rights of Third Persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information.

Comments

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on

methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently and is privileged, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures and to abide by any instructions to return or destroy the document or information that was inadvertently sent. Regardless of whether it is obvious that the document or electronically stored information was inadvertently sent, the receiving lawyer knows or reasonably should know that the document or information was inadvertently sent if the sender promptly notifies the receiving lawyer of the mistake. If the receiving lawyer lacks actual or constructive knowledge that the document or electronically stored information was inadvertently sent, then paragraph (b) does not apply. Similarly, the lawyer may know that the document or electronically stored information was inadvertently sent but not that it is privileged; in that case, the receiving lawyer has no duty under this rule.

This Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or

electronically stored information'' includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer and that it contains privileged information.

[3] Preservation of lawyer-client confidences is such a vital aspect of the legal system that it is appropriate to require that lawyers not take advantage of a mistake or inadvertent disclosure by opposing counsel to gain an undue advantage. *See* LEO 1702. This means that the lawyer is prohibited from informing the lawyer's client of relevant, though inadvertently disclosed, information, and that the lawyer is prevented from using information that is of great significance to the client's case. In such cases, paragraph (b) overrides the lawyer's communication duty under Rule 1.4. As stated in Comment [1], diligent representation of the client's interests does not authorize or warrant intrusions into privileged communications.

Where applicable discovery rules, agreements, or other law permit the recipient to contest the sender's claim of privilege, use of such a process does not constitute "use" as prohibited by this rule, and the recipient may sequester the document or information pending resolution of that process. When there is no such applicable law, such as in a matter that does not involve litigation, the recipient lawyer must abide by the sender's instructions to return or destroy the document. *See also* LEO 1871.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective December 1, 2019.

A Copy,

Teste:

Clerk

ETHICS – 2019 UPDATES IN VIRGINIA

ETHICS OVERVIEW

RULE 1.18

Proposed Comment 6 would take out language that was inconsistent with Rule 1.18, Duties to Prospective Client.

The Standing Committee on Legal Ethics approved the proposed rule change, but delayed the submission to Bar Counsel to make further changes.

RULE 1.18 - HYPO

You work in a firm specializing in corporate law, specifically mergers and acquisitions. One day you get a call from Company X indicating that they are interested in acquiring Company Y. You run a conflicts check and see that there are no conflicts with any current clients. You meet with Company X to talk about the merger generally, but do not begin to discuss many of the relevant facts relating to the desired merger. However, Company X ultimately decides not to retain your services for the transaction.

A few weeks later, you receive a call from Company Y. Company Y tells you that it received a proposal from Company X to acquire it. Company Y would like to retain you as counsel in the transaction. May you take Company Y on as a client?

(a) **Yes, unless you received information from Company X that could be significantly harmful if used in the matter and you believe that an effective screen could not be engaged to protect the Company Y.**

(b) **Yes, so long as you get informed consent in writing from both Company Y and Company X and you took reasonable measures to avoid exposure to more disqualifying information than was necessary to determine whether to represent the prospective client.**

(c) **Yes, because you have not learned information from Company X that could be significantly harmful to it in representing Company Y.**

RULE 1.18 - EXPLANATION

(a) Yes, unless you received information from Company X that could be significantly harmful if used in the matter and you believe that an effective screen could not be engaged to protect the Company Y.

Incorrect. This goes to the proposed change in the rule, namely that you can represent Company Y unless you received information that could harm Company X in your prospective client meeting, but if that were the case there would be no need to screen anyone.

(b) Yes, so long as you get informed consent in writing from both Company Y and Company X and you took reasonable measures to avoid exposure to more disqualifying information than was necessary to determine whether to represent the prospective client.

Incorrect. Because Company X did not reveal any information that would be adverse to it, there is no need to get informed consent in writing from both Company X and Company Y and no other measures to avoid exposure are necessary. Although consent from both sides is always a good idea.

(c) Yes, because you have not learned information from Company X that could be significantly harmful to it in representing Company Y.

Correct. Because you did not discuss the merger in detail, you are likely not subject to 1.18 (c) and so there is no need to get permission from both Company X and Company Y. You may represent Company Y.

RULE 1.18 – PROPOSED CHANGE

Comment [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter ~~and the lawyer believes that an effective screen could not be engaged to protect the client.~~

LEO 1750

Amended the guidance on Advertising and Solicitation that was originally adopted in 2001 and updated it to make it consistent with the newly adopted Rule 7.1.

Amended LEO 1750 was approved on October 2, 2019, and is effective immediately.

LEO 1750 - HYPOTHETICAL

A.

Have you been injured in a car accident and need a lawyer. Call 555-5867-5309. No recovery, no fee.

B.

Have you been injured in a car accident and need a lawyer. Call 555-5867-5309 to reach the most experienced lawyer in Virginia.

C.

Have you been injured in a car accident and need a lawyer. Call 555-5867-5309. Call me to discuss your case.

James Spader (an actor) reads this advertisement.

LEO 1750 - EXPLANATION

A.

No recovery, no fee.

According to Rule 7.1 this phrase is false or misleading if the client **might** be responsible for advanced costs and expenses. The term fee is misleading in this instance because it is not clear that fee also refers to court costs.

B.

Most experienced lawyer in Virginia.

According to Rule 7.1 this phrase is self-laudatory and amounts to a comparative statement that cannot be factually substantiated and therefore is designed to mislead laypeople and, as such, undermine public confidence in our legal system.

C.

James Spader

According to Rule 7.1 it is misleading to imply that an actor is a member of the firm. The advertisement must disclose that the actor is not associated with the firm or that the advertisement is a dramatization.

LEO 1872

The revisions to LEO 1872 update references to Rule 1.6(d), on a lawyer's duty to protect confidential information, and Rule 7.1, on advertising; the revisions also remove references to former Regulation 7 Governing Applications for Admission to the Virginia Bar Pursuant to Rule 1A:1 of the Supreme Court of Virginia since that regulation has been modified and no longer requires that lawyers admitted to practice by motion maintain a physical office space.

LEO 1872 was approved on October 2, 2019, and is effectively immediately.

LEO 1872 – HYPOTHETICAL 1

Ditcher, Quick, and Hyde, a divorce firm in Fairfax, recently decided to expand their practice to Alexandria. Instead of renting an office building, the firm decided to use rent a private office in a larger shared office space. One of the associates, Anna Turney, lives near the new office and is the primary person providing the firm's legal services in Alexandria out of this new office.

Can the firm advertise their legal services in Alexandria even though it is not their primary firm address and they only rent an office in the larger office building?

LEO 1872 – EXPLANATION 1

Can the firm advertise their legal services in Alexandria even though it is not their primary firm address and they only rent an office in the larger office building?

Answer: Yes. Under LEO 1872, the only requirements for advertising for a firm is that legal services be provided in that location or office. This advertisement also would likely not violate Rule 7.1 because it is not misleading, based on the scenario.

LEO 1872 – HYPOTHETICAL 2

Mel Practiss, a solo practitioner in Culpeper, wants to advertise his legal services in Arlington. He does not keep a physical office in Arlington, but believes that since LEO 1791 states he does not need to meet with clients in person that he can rent an office space in Arlington after he starts getting clients.

May he use an alternative address in Arlington to indicate to clients that his practice is more geographically diverse than just Culpeper?

LEO 1872 – EXPLANATION 2

May he use an alternative address in Arlington to indicate to clients that his practice is more geographically diverse than just Culpeper?

Answer: No. Under Leo 1872, an attorney cannot list an alternative or rented office space for the purposes of misleading clients into believing that an attorney has a more geographically diverse practice than what it actually has. Because Mel does not practice in Arlington and has not practiced in Arlington, he cannot advertise that he does for the purposes of misleading clients. *Also see* Leo 1750.

LEO 1872 – HYPOTHETICAL 3

Elle O'Quent, a senior partner at her firm, supervises several associates and administrative staff. Due to a change in her personal life, Elle recently moved a few hours away. Her firm agreed to let her practice from a home office that they helped her set up.

May Elle virtually supervise her subordinate lawyers and assistants?

LEO 1872 – EXPLANATION 3

May Elle virtually supervise her subordinate lawyers and assistants?

Answer: Probably. So long as she takes reasonable steps to ensure that her responsibility as a supervising attorney are met. Depending on the type and structure of the firm, the meaning of "reasonable" may vary and may require additional measures to ensure adequate supervision.

LEO 1872 – HYPOTHETICAL 4

Lou Pohl recently passed the bar and was hired as an associate at a civil defense firm. Lou negotiated a generous work-from-home benefit and will work exclusively from home - saving 2.5 hours of commuting every day.

Can Lou's supervising attorney manage him within the confines of LEO 1872 if Lou works solely from his home office and not in the main office?

LEO 1872 – EXPLANATION 4

Can Lou's supervising attorney manage him within the confines of LEO 1872 if Lou works solely from his home office and not in the main office?

Answer: Probably. This is just the converse of Elle's situation. Lou's supervising attorney may need to take additional measures while managing Lou, but this work agreement is not prohibited.

LEO 1872 – HYPOTHETICAL 5

John Slaughter, a personal injury attorney, is obsessed with google. He recently learned that the Cloud has nothing to do with the weather. He decides to take advantage of his new knowledge and moved all of his electronic files to the Cloud.

Can John use the Cloud to store documents?

LEO 1872 – EXPLANATION 5

Can John use the Cloud to store documents?

Answer: It depends. If John wants to continue using an outside digital storage provider, he must carefully select the vendor, instruct the vendor to keep the documents confidential, and have a reasonable expectation that the vendor will keep the data confidential and inaccessible to others. When selecting a vendor, John should examine the vendor's terms of use to asses whether or not the vendor can comply with the above requirements. If John cannot make this assessment on his own, he should consult with someone who is qualified to make that assessment.

RULE 4.4(B)

Rule 4.4, Respect for Rights of Third Persons, now includes paragraph (b) and Comments [2] and [3]. These changes codify the guidance currently found in LEO 1702, regarding a lawyer who receives privileged information that was inadvertently sent.

Adopted October 2, 2019, and effective on December 1, 2019.

RULE 4.4(B) - HYPOTHETICAL

In a civil case, a lawyer represents the defendant, a client accused of stealing money from the plaintiff. At the outset of the representation, defendant sends his lawyer a letter stating:

Dear Lawyer: I want you to know that I did steal the money, but keep this fact a secret from everybody, and do everything possible to help me beat this rap.

Defense counsel filed an answer denying all material allegations of the complaint. During discovery, defense counsel inadvertently disclosed the client's letter to plaintiff's counsel as part of defendant's voluminous response to plaintiff's broad discovery request seeking all relevant documents. Plaintiff's counsel was thrilled to see the letter.

1. Can plaintiff's counsel use the letter at trial to cross the defendant?

2. Provided that he immediately informs defense counsel of the inadvertent disclosure, can plaintiff's counsel inform his client of the letter?

RULE 4.4(B) – EXPLANATION 1

1. Can plaintiff's counsel use the letter at trial to cross examine the defendant?

Answer: No. The Supreme Court of Virginia has approved revisions to Rule 4.4, effective December 1, 2019, by adding the following to the Rule:

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information.

Thus plaintiff's counsel is required to immediately notify defense counsel of the disclosure, and immediately terminate any review or use of the document.

RULE 4.4(B) – EXPLANATION 2

2. Provided that he immediately informs defense counsel of the inadvertent disclosure, can plaintiff's counsel inform his client of the letter?

Answer: No. Although the Rule itself does not address this issue, comment [3] to the Rule makes explicit that plaintiff's counsel cannot inform his client of the inadvertent disclosure. The Rule and comments to it, do not address the obligations of a lawyer receiving documents inappropriately obtained by the sending person.

RULE 4.4(B) - HISTORY

In December of 2018, the Committee on Legal Ethics proposed to include Rule 4.4(b) and additional comments to this rule. Before a vote was held, a member suggested that Comment 3 to Rule 4.4(b) should include an exception when the disclosure shows fraud. The Standing Committee on Legal Ethics concluded that no further changes to the rule were needed for the following reasons: First, the Committee believes that Rule 4.4(b) does not limit a lawyer's duties under Rule 3.3(d) to report fraud on a tribunal by a third party, once that fraud is clearly established. Second, in any situation where fraud on a tribunal is a concern, the matter would by definition be before a tribunal for purposes of proposed Comment [3], which allows the receiving lawyer to raise the matter to the court for resolution. Finally, the Committee was concerned about the possibility that creating an exception to the rule would create a slippery slope – if lawyers are permitted to review and use information that they believe establishes a fraud on a tribunal, then a lawyer who receives inadvertently disclosed information would be much more likely to review the information hoping to find justification to use the information to her client's advantage.

RULE 3.8 COMMENT 5

Rule 3.8 Comment 5 clarifies Additional Responsibilities of a Prosecutor and provides more information about the meaning of disclosure in Rule 3.8.

[5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.

RULE 3.8 CMT 5 - HYPOTHETICAL

A brawl occurred in Richmond late at night. One of the people in the brawl shot and killed another person in the brawl. The police interviewed several witnesses and found out the following:

- Art, told the police that the murderer was a fat white male, over 6 feet and 3 inches tall, with a pot belly, dressed in a blue shirt with black pants.
- Bob, told the police that the murderer was an Hispanic male of average height and weight, who was wearing a blue shirt and red pants.
- Carl, told the police that the murderer was a shorter dark-skinned man wearing a blue shirt and white pants.
- Don, told the police that he could not describe the shooter very well, but that the shooter deliberately shot at each of the victim's thighs to seriously harm him and keep him from running.

The police reduced all of these conversations to written statements. Art and Bob signed their witness statements. Carl and Don were unwilling to sign any statements.

Police eventually arrested Joe Laredo for the murder of one of the people involved in the fight. Laredo is an Hispanic male of average height and weight. He is represented by counsel.

RULE 3.8 CMT 5 – HYPOTHETICAL 1

1. Laredo's attorney prepared an elaborate defense and subpoenaed several witnesses to testify, but never requested that the prosecutor turn over any files. Was the prosecutor nevertheless required to turn over files favorable to Laredo which his lawyer never requested?

RULE 3.8 CMT 5 – EXPLANATION 1

1. Laredo's attorney prepared an elaborate defense and subpoenaed several witnesses to testify, but never requested that the prosecutor turn over any files. Was the prosecutor nevertheless required to turn over to Laredo's attorney files favorable to Laredo which his lawyer never requested?

Answer: Yes. Newly adopted Supreme Court Rule 3.8(d) provides that a prosecutor shall:

(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court;

This clearly means that the prosecutor must turn over to Laredo's counsel any files favorable to Laredo, even when his attorney does not request them.

RULE 3.8 CMT 5 – HYPOTHETICAL 2

2. Laredo's attorney requested that the prosecutor turn over to him all of the files in his possession, whether or not favorable to Laredo. Can a prosecutor decline to turn over any of his files favorable to Laredo because the request is blatantly overbroad?

RULE 3.8 CMT 5 – EXPLANATION 2

2. Laredo's attorney requested that the prosecutor turn over to him all of the files in his possession, whether or not favorable to Laredo. Can a prosecutor decline to turn over any of his files favorable to Laredo because the request is blatantly overbroad?

Answer: No. Under Rule 3.8(d) the prosecutor does *not need to turn over* files which are *not favorable* to Laredo, the prosecutor *must turn over* files *favorable* to Laredo.

RULE 3.8 CMT 5 – HYPOTHETICAL 3

3. Long before trial, Laredo's attorney requested that the prosecutor turn over all files favorable to Laredo. Shortly thereafter, the prosecutor turned over voluminous files, including all of the witness statements or interviews, except for Art's witness statement. But the prosecutor did turn over Art's witness statement the morning of trial. Did this disclosure of Art's statement satisfy the prosecutor's duties under Rule 3.8(d)?

RULE 3.8 CMT 5 – EXPLANATION 3

3. Long before trial, Laredo's attorney requested that the prosecutor turn over to him all files favorable to Laredo. Long before trial, the prosecutor turned over voluminous files, including all of the witness statements or interviews, except for Art's witness statement. But the prosecutor did turn over Art's witness statement the morning of trial. Did this disclosure of Art's statement satisfy the prosecutor's duties under Rule 3.8(d)?

Answer: No. Under the Rule the disclosure must be "timely." The disclosure of Art's statement at the start of the trial, when defense counsel has no reasonable opportunity to contact Art ahead of time, is not "timely."

RULE 3.8 CMT 5 – HYPOTHETICAL 4

4. Laredo's attorney requested that the prosecutor disclose all files "favorable" to Laredo. Could the prosecutor decline to turn over Don's witness statement because Don said Laredo fired in self-defense, and was therefore favorable to the prosecution?

RULE 3.8 CMT 5 – EXPLANATION 4

4. In a prosecution for murder, could the prosecutor refuse to turn over Don's statements because it showed that Laredo committed a serious intentional crime by shooting at the victim's legs?

Answer: No. Even though Don's statement is unfavorable to Laredo on the charge of intentional murder, it also shows that Laredo intended to commit a lesser crime. Rule 3.8(d) requires the prosecutor to disclose evidence which tends to "mitigate the degree of the offense, or reduce the punishment."

RULE 3.8 CMT 5 – HYPOTHETICAL 5

5. When the police produced evidence for the prosecutor, different officers brought different boxes of evidence at different times. Carl's witness statement, which was favorable to Laredo, was brought in a box which the prosecutor inadvertently never opened. Was the prosecutor required to open all of the boxes, and find Carl's statement and disclose it to the defendant?

RULE 3.8 CMT 5 – EXPLANATION 5

5. When the police produced evidence for the prosecutor, different officers brought different boxes of evidence at different times. Carl's witness statement, which was favorable to Laredo, was brought in a box which the prosecutor inadvertently never opened. Was the prosecutor required to open all of the boxes, and find Carl's statement and disclose it to the defendant?

ANSWER: Apparently not. The rule requires disclosure only of evidence which the "prosecutor knows" about. The prosecutor also was not required by Rule 3.8(d) to turn over Bob's statement, describing the murderer as an Hispanic male of average height and weight, because it was not favorable to Laredo, but disclosure might be required by other sources of law, if Bob testifies.

LEO 1890

This proposed opinion addresses 15 different scenarios arising under Rule of Professional Conduct Rule 4.2 and collects authorities including Rule 4.2 and its comments, other LEOs, case law, and other states' ethics opinions to explain the purpose and application of Rule 4.2 to the most common issues raised by the rule.

Proposed LEO 1890 is up for public comment and will be submitted for approval at the Bar Council meeting on October 25, 2019.

RULE 4.2 – NO CONTACT RULE

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

LEO 1890 – HYPOTHETICAL 1

As a prosecutor, you have offered a plea agreement to the defendant. However, you are of the reasonable belief that defense counsel has not communicated such plea agreement to the defendant.

Is this a reasonable justification to directly communicate with the defendant?

LEO 1890 – EXPLANATION 1

Is this a reasonable justification to directly communicate with the defendant?

Answer: Generally, the answer is no. A lawyer's inability to properly communicate with opposing counsel or a lawyer's reasonable belief that opposing counsel has withheld or failed to communicate settlement offers is not a basis to bypass opposing counsel and have direct communication with a represented adversary, such as forwarding copies of settlement offers directly to an opposing party.

LEO 1890 – HYPOTHETICAL 2

Henry is a resident of a nursing home. Henry's care is provided by a team of nurses, certified nursing assistants, and other attendants, all employed by the nursing home. Henry suffers cardiac arrest due to pills he received while at the nursing home. Henry's attorney files a complaint, alleging that the nursing home breached the standard of care for nursing homes by not properly training, managing, and supervising its care staff.

The nursing home's attorney answers the complaint. Henry's counsel seeks to speak directly with a number of the nursing home staff including current directors, resident care staff, and administrative staff. In addition, he also seeks to communicate with a number of former directors and employees of the nursing home.

Under *Rule 4.2*, is this permissible?

LEO 1890 – EXPLANATION 2

Answer: Yes and no. If a corporation or organization is represented by counsel with respect to a matter or controversy, Rule 4.2 prohibits *ex parte* communications with employees of the represented corporation or organization if the employee is in the entity's 'control group' or is the "alter ego" of the entity. On the other hand, the Rule generally does not apply to communications with former employees or a represented organization. As Comment 7 to Rule 4.2 explains:

"In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the 'alter ego' of the organization. The 'control group' test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's 'control group.'

The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's 'control group.' If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule."

LEO 1890 – EXPLANATION 2

It is also important to note that some circuit courts and federal courts in Virginia have interpreted this Rule differently or more broadly. Some courts have prohibited *ex parte* communications not only where the control group or alter ego theory applies, but also where the activities or statements of an employee are part of the focus of the litigation or would make the employer vicariously liable as a result of the employee's statements or activities. For example, in *Pruett v. Virginia Health Services, Inc.*, No. CL03-40, 2005 Va. Cir. LEXIS 151, at *12-13 (Va. Cir. Ct. Aug. 31, 2005), the facts of which are similar to this hypothetical, the defendant nursing home filed a motion for a protective order to bar the plaintiff and/or plaintiff's counsel from having any *ex parte* communications with former employees of the defendant corporation as well as current employees who were not a part of the defendant corporation's "control group."

In the end, the *Pruett* Court granted the motion to bar *ex parte* contact with current "control group" employees as well as non "control group" employees who provided resident care. Plaintiff's counsel was, however, permitted to have *ex parte* contact with all current employees on matters which did not relate to the acts or omissions alleged to have caused injury, damage, or death to the plaintiff's decedent. Additionally, as to the former employees of the defendant's nursing home, the *Pruett* Court denied the motion and allowed the plaintiff to have *ex parte* contact with former employees, including those who were previous members of the entity's "control group."

LEO 1890 – EXPLANATION 2

Nevertheless, communications with former employees can be limited. While Rule 4.2 generally permits contact with a former employee or agent, even if the person had formerly been within a category of those whom contact was prohibited, the communicating attorney may not ask the former employee about any confidential communications the employee had with the organization's counsel while the employee was employed by the organization. Seeking information about confidential communications would impair the organization's confidential relationship with its lawyer and, therefore, violate Rule 4.4 (Respect for Rights of Third Persons).

LEO 1890 – HYPOTHETICAL 3

Defense Attorney represents a defendant who is charged with a crime. Defense Attorney obtains authorization to retain a private investigator for pre-trial investigation. Defense Attorney learns that the government's star witness, Snitch, is selling information that may be used to obtained a reduced sentence. Defense Attorney decides to send the investigator to learn more information about Snitch's scheme. Days later, Defense Attorney receives a call from the investigator and learned that the investigator spoke with Snitch over the telephone, wherein the investigator recorded the call. During the call, Snitch was under the mistaken impression that the investigator was someone who might be willing to purchase information on other criminal activities. At that time, the investigator did not disclose his true identity as an investigator working for the defendant nor did he correct Snitch's mistaken impression of who Snitch thought was on the line.

Defense Attorney never directed the investigator to speak with Snitch or record the telephone conversation. All of these decisions were made solely by the investigator.

LEO 1890 – HYPOTHETICAL 3A

(1) Can a lawyer use an investigator or another third party to communicate directly with a represented person?

LEO 1890 – EXPLANATION 3A

(1) Can a lawyer use an investigator or another third party to communicate directly with a represented person?

Answer: No. Generally, Rule 4.2 prohibits an attorney from using an investigator or another third party to communicate with a represented person. It is logical that if a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of a representation, he or she may not circumvent the Rule by sending an investigator to do on her behalf that which he or she is forbidden to do.

LEO 1890 – HYPOTHETICAL 3B

(2) The decision to speak with Snitch and record the call was entirely the investigator's. Defense Attorney never directed the investigator to speak with Snitch and did not become aware of the recorded call until after the fact. Can the investigator's communications with Snitch now be imputed to Defense Attorney?

LEO 1890 – EXPLANATION 3B

(2) The decision to speak with Snitch and record the call was entirely the investigator's. You never directed your investigator to speak with Snitch and did not become aware of the recorded call until after the fact. Can the investigator's communications with Snitch now be imputed to you?

Answer: Yes. When determining if a non-lawyer or investigator's contact with a represented person can, in fact, be imputed to a lawyer supervising or responsible for an investigation, there are two ethical considerations to keep in mind.

First, a lawyer cannot violate or attempt to violate a rule of conduct through the agency of another. Rule 8.4(a).

Second, a lawyer having direct supervisory authority over a non-lawyer agent may be responsible for conduct committed by that agent, if the rules of conduct would have been violated had the lawyer engaged in the conduct; and, the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or, the lawyer knows or should have known of the conduct at a time when its consequences could be avoided or mitigated but fails to take remedial action. Rule 5.3.

LEO 1890 – EXPLANATION 3B

The facts of this case are based on an Eastern District court case – United States v. Smallwood, decided in 2005. Discussing whether an investigator hired by a lawyer must abide by an attorney's ethical obligations in Virginia, the Court explained a lawyer must, of necessity, often act through and with the help of assistants who are non-lawyers in order to accomplish the lawyer's work, and thus the prudential concerns and ethical bounds that constrain the legal profession are of equal importance whether a lawyer acts directly or through the efforts of assistants or investigators. In general, therefore, a lawyer's assistants or investigators must abide by the lawyer's ethical obligations when they act on behalf of the lawyer. Nor is there any reason to depart from Rule 4.2. A represented party is equally susceptible to manipulation in the best interests of one's own client by a lawyer's assistant or investigator as by a lawyer. Thus, it is sensible to conclude that a lawyer's assistants and investigators, when acting on behalf of the lawyer, must comply with Rule 4.2's commands for communications with represented parties. *United States v. Smallwood*, 365 F. Supp. 2d 689, 691 (2005). Essentially, what a lawyer may not ethically do, his investigators and other assistants may not ethically do in the lawyer's stead. *Id*. at 696.

LEO 1890 – HYPOTHETICAL 4

Attorney Smith represents Dr. Goode in a medical malpractice action brought by Maggie Hahn. Maggie is represented by counsel. During discovery, Maggie calls Attorney Smith's office and asks to speak to Attorney Smith. Attorney Smith is told by the receptionist that "someone" is on the phone regarding the Hahn case. When Attorney Smith picks up the phone, Maggie immediately responds that the upcoming deposition needs to be cancelled. Nonplussed by the response, Attorney Smith proceeds to ask who she is speaking with. At that point, Maggie begins an emotional outburst, declaring in between sobs that the litigation is too much for her.

Now, Attorney Smith realizes that Maggie is the caller. Attorney Smith politely interrupts and says she cannot not help Maggie and that Maggie needs to reach out to her own counsel. Despite this, Maggie continues her emotional outpouring for several more seconds before Attorney Smith interrupts again to state that she can not help Maggie, that Maggie needs to speak to her own counsel and even offers to contact her counsel so that they could sort this out. Attorney Smith then concludes the call. In total, the call lasts less than a couple of minutes.

Maggie eventually informed her counsel of her conversation with opposing counsel.

LEO 1890 – HYPOTHETICAL 4A

(1) Does Rule 4.2 apply when the represented person initiates or consents to the *ex parte* communication?

LEO 1890 – EXPLANATION 4A

(1) Does Rule 4.2 apply when the represented person initiates or consents to the *ex parte* communication?

Answer: Yes. Comment [3] of Rule 4.2: The Rule applies even though the represented person initiates or consents to the communication. A lawyer must **immediately terminate** communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

Under this Rule, it is ultimately of no consequence who initiates the communication. Rather, what does matter is simply that the communication occurred.

LEO 1890 – HYPOTHETICAL 4B

(2) But, didn't Attorney Smith violate the Rule when she failed to "immediately terminate" the call by hanging up during Maggie's outburst the moment she realized to whom she was speaking?

LEO 1890 – EXPLANATION 4B

(2) But, didn't Attorney Smith violate the Rule when she failed to "immediately terminate" the call by hanging up during Maggie's outburst the moment she realized to whom she was speaking?

Answer: This hypothetical is based on the facts of *Zaug v. Va. State Bar, 285 Va. 457 (2013)*. In that case, the Court determined that the attorney did not violate the Rule by not immediately hanging up the phone on the represented person.

In *Zaug*, the Court established that the State Bar must prove three separate facts to establish a violation of Rule 4.2: (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. While the first two facts may occur in any order, both must occur before an attorney violated the Rule. *Id.* at 463. Furthermore, the Court explained that "immediately" did not mean "instantaneously." *See id.* at 464.

LEO 1890 – EXPLANATION 4B

Based on the Rule, the Court agreed with the State Bar "that attorneys must understand that they are ethically prohibited from communicating about the subject of representation with a person represented by another attorney unless they have that attorney's consent or are authorized by law to do so. The Rule categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications [even] when they are initiated by others. But the Rule does not require attorneys to be discourteous or impolite when they do so." *Id*. at 465.

In the end, it was undisputed that Zaug did not initiate the telephone call and the Court concluded that there was no evidence that Zaug intended to gain advantage from the call nor that Zaug deliberately or affirmatively prolonged the call. On the specific and narrow facts of the *Zaug* case, and construing *Rule 4.2* to promote behavior that is both professional and ethical, the Court found no violation of the Rule by Zaug, thereby reversing the judgment of the lower court, vacating the sanction imposed, and dismissing the charge of misconduct.