GEORGE MASON AMERICAN INN OF COURT

LEGAL ETHICS UPDATES 2021

October 26, 2021

Team Members:

The Honorable Susan F. Earman

Dennis J. Quinn, Esquire

Brian Coleman, Esquire

Jonathan P. Lienhard, Moderator

Bianca Hancock-Siggers, Student Member

Kyle Manuel, Student Member

Meena Tadros, Student Member

Agenda

- Opening remarks 7:30pm – 7:40pm
- LEOs and Skits 7:40pm – 8:20pm
- Concluding Observations 8:20pm – 8:30pm

1. PROPOSED and REJECTED RULE 1.8 (K)
SEX WITH CLIENTS

1. 2009 LEO 1853 exploitation of clients
    a. ABA Model rules >40 states adhere to the model rule
        i. A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed prior the client-lawyer relationship
    b. 2019 Ethics Committee of the Virginia State Bar began seeking a rule change
        i. 2021 a Petition was filed and rejected by The Supreme Court of Virginia.

Viewing of vignette -(5 minutes time through viewing of video)

    c. Conduct to consider
        i. Ability to represent
        ii. Fiduciary relationship
        iii. Possible interference with independent professional judgment
        iv. Conflict of Interests between Client and lawyer
        v. Confidentiality issues
        vi. Prejudices to the client matter at hand
        vii. Possible coercion for sexual favors
        viii. Sex in lieu of fees

Discussion of all the possible ethical violations of rules 10 minutes for a total of 15 minutes on this topic

Supporting material for discussion

Many problems arise from the impropriety and unfair exploitation of the lawyer's fiduciary position as well as the lawyer's untold influence and potential personal conflict when they have an intimate relationship with a client.

In 2019 the Ethics Committee of the Virginia Star Bar began seeking rule changes for sexual relationships with clients. The Committee desired a bright line rule rather than the advisory opinion provided in LEO 1853. The proposed language in concert with the ABA model rules stated in essence that a lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. Over 40 states in the United States adhere to this language of the model rules of the ABA. One would think that Virginia would have been a part of this group; however, the Commonwealth does not include this express rule.

The Petition of the Virginia State Bar to the Supreme Court of Virginia "In the Matter of Rules of Professional Conduct 1.8, 1.10, and 1.15 was filed early May 7th of 2021 seeking this rule change. The petition was denied July 21, 2021.

There are no provisions in the Virginia Rules of Professional Conduct that specifically prohibit sexual relationships between lawyer and client; however, the lawyer must consider that such conduct could:

(1) jeopardize the lawyer's ability to competently represent the client (Rule 1.1),

(2) wrongfully exploit the lawyer's fiduciary relationship with the client,

(3) interfere with the lawyer's independent professional judgment (Rule 2.1),

(4) create a conflict of interest between the lawyer and the client (Rule 1.7, Rule 1.7 Comment [10], Rule 1.8(b) and Rule 1.10(a)),

(5) jeopardize the duty of confidentiality owed to the client (Rule 1.6(a))

(6) potentially prejudice the client's matter (Rule 1.3(c)). Additionally, a lawyer who intentionally uses the fiduciary relationship of lawyer and client to coerce sexual favors from a client may be found to have violated Rule 8.4(b)'s prohibition against a deliberately wrongful act

that reflects adversely on the lawyer's fitness to practice law. Also, when a lawyer solicits sexual favors in lieu of charging the client legal fees, the lawyer will have violated Rule 8.4(b).

Skit/Scenario

Sexual relations with attorney

Domestic Relations attorney client relationship

Scene: phone conversation between female client and male attorney
Background information Domestic Relations Client in contested a matter concerning child custody, spousal support, child support, as well as other equitable distribution matters.

Client (you all can come up with names): Hello, may I speak with attorney _____ there? Hi Joe, this is Mary do you have time to talk?

Joe: Sure it's getting towards the end of my work day, what is going on? What is your concern today?

Client: I am really stressed right now, the household bills are piling up, the kids are acting out. My nerves are frazzled, and I am concerned and anxious about our upcoming hearing. I just don't know if I can keep it together.

Attorney typing on a computer or laptop or reviewing documents leans back in his chair with a smirk on his face and replies - I understand how emotional this can be, divorce is stressful your entire life is in upheaval…… hey listen I am about finished here at the office and I have quite an appetite (again devious smile on his face)…. For uh some food. Why don't you meet me for a drink and we can chat some more, let's say in about an hour at that bar we go to, you know, the one…see you soon (smiling).
Cut scene
Chyron overlay (sexual encounter occurred)

Second attorney client vignette (if you want) (either gender can portray client or attorney)
Client A in lobby of attorney office, office staff at a desk – both impatiently waiting for an attorney behind closed doors as the attorney is very late for the next apt.
Close up of attorney's office door. over lay "when Harry met Sally deli fake orgasm scene"
Close scene with waiting client and office staff looking at each other perplexed

2. LEGAL ETHICS OPINION 1850
OUTSOURCING OF LEGAL SERVICES

I. 2010 LEO 1850: Outsourcing Services
   A. The VSB approved amendments to LEO 1850 in 2020.
   B. Petition Filed to the Supreme Court on October 29, 2020.

II. Amendments approved by the Court on January 12, 2021.

Viewing of vignette -(5 minutes time through viewing of video)

III. Forms of outsourcing include but are not limited to:
   A. Material reproduction
   B. Document retention database creation
   C. Legal research
   D. Case and litigation management
   E. Reviewing discovery materials
   F. Patent searches
   G. Drafting contracts

IV. The new Amendment says a lawyer can outsource to lawyers and nonlawyers who are not associated with the firm or under the direct supervision of the outsourcing lawyer if the outsourcing lawyer:
   A. Monitors the work and is competent to the layers requirement
   B. Protects the confidence of the client
   C. Bills appropriately
   D. Gets the consent of the client in advance of the outsourcing

Discussion of all the possible ethical violations of rules 10 minutes for a total of 15 minutes on this topic

Skit/Scenario

Associate Tim has been working on a new commercial litigation matter in Fairfax County, Virginia Circuit Court and realizes the firm is short staffed and in need of further assistance on this matter. He walks into Partner Jane's office to discuss the possibility of obtaining outside assistance.

Tim: Jane, the Evil Empire case is moving fast. We could use an extra lawyer or two to assist with document review.

Jane: No problem. I know just the legal type to help. He works out of his house in Iowa. He never passed the bar but is really good at doc review. Does it for all sorts of firms across the country. Runs his whole operation off of one laptop. Perfect for our needs.

Tim: Is it a problem he isn't a lawyer?

Jane: Of course not. Many doc reviewers aren't lawyers. Besides, Evil Empire won't care. Just don't mention it. All they need to know if that he is an extra paralegal for their case. Best part is he charges us small town Iowa rates and we charge Evil Empire D.C. Area rates. Win, win.

Tim: This being a sensitive intellectual property case, do we need to make sure he complies with Evil Empire's document security policy?

Jane: I really don't think that is necessary. After all, who would hack into some small- town computer?

Tim: I still think we need to think about using someone like this.

Jane: I understand. If makes you feel better, let's ask our Firm ethics guru, Joe, tomorrow. I'd ask now but he just left to have drinks with a client.

3. LEGAL ETHICS OPINION 1878.
SUCCESSOR COUNSEL'S ETHICAL DUTY TO INCLUDE IN A WRITTEN ENGAGEMENT AGREEMENT PROVISIONS RELATING TO PREDECESSOR COUNSEL'S QUANTUM MERUIT LEGAL FEE CLAIM IN A CONTINGENT FEE MATTER.

Legal Fees

I. Liens

A. *Quantum Meruit* Liens

1. Discharged without cause
2. Lawyers must observe the ethical requirements in the Rules of Professional Conduct to adequately explain the fees charged to a client, how those fees are calculated, and Reasonable Fees
3. Ethics Opinion 1812'

Viewing of vignette -(5 minutes time through viewing of video)

4. Rule 1.5 (Fees)
    a) Reasonable
    b) Explained to clients at inception
    c) ABA Formal Opinion 487
        (1) Client obligations when replacing counsel.
        (2) 1.5(b) and 1.5 (c) require successor counsel to advise client in writing of potential obligations to pay legal fees based upon quantum meruit.
        (3) Rule 1.4, informed decisions explanations
        (4) Written Documentation Compliance
            (a) Contingent fee notice
            (b) The state of the law in Virginia surrounding liens and quantum meruit awards
            (c) Statement that client's recovery may be subject to the discharged attorney's liens and successor attorney's contingency fee
            (d) Who bears the expense of determining predecessor fee entitlement?

II. Negotiation and Litigation

A. Successor Counsel representing client in negotiation and litigation involving prior counsel's claims of lien

1. Rule 1.7(a)(2)-Conflicts of Interest
2. Rule 1.7(b)- Informed Consent
    a) Case-by-case assessment

Discussion of all the possible ethical violations of rules 10 minutes for a total of 15 minutes on this topic

Facts:

Client is injured in a motor vehicle accident when a State Farm insured rear-ends him. Client retains Personal Injury Lawyer A to pursue a personal injury claim against State Farm. The written retainer provides for attorney's fees of 1/3 of the gross settlement/verdict amount in addition to reimbursement of costs advanced. The written retainer provides that if the Personal Injury Lawyer A's law firm is discharged, then Personal Injury Lawyer A will have a lien based on an hourly rate of $300 per hour. State Farm denies liability in the case despite it being a rear-end accident and makes no offers.

Personal Injury Lawyer A contacts all witnesses and gets statements, gathers all medical records/bills, and files a lawsuit in Arlington Circuit Court. Personal Injury Lawyer A propounds discovery, answers discovery, deposes all relevant parties, and sets up a meeting with plaintiff's treating orthopedic surgeon – who agrees that back surgery is causally related to the motor vehicle accident. State Farm, while continuing to deny liability for a rear-end accident also secures a Rule 4:10 "Independent Medical Examination" which denies any causal connection between the back surgery and the motor vehicle accident. As such, State Farm makes no offers, and the case is set for trial. At this point, Personal Injury Lawyer A has put in 50 hours of time on the case and advanced $5,000 for court reporters, medical records, and expert witness fees.

Client is angry that the case has not settled. He sees a commercial for Personal Injury Lawyer B which promises quick and easy settlements. Client discharges Personal Injury Lawyer A and hires Personal Injury Lawyer B on a 1/3 contingency fee of any gross settlement prior to trial or 40% if the case goes to trial in addition to reimbursement of costs advanced. Personal Injury Lawyer A then asserts a lien for $15,000 in fees along with $5,000 for costs advanced. Personal Injury Lawyer B takes the case to verdict and gets a verdict of $100,000.

Skit/Scenario

Scene 1:

Lawyer A: "I'm sorry to hear about your injuries in this car accident - but yes we do handle personal injury cases and we do it on a 1/3 contingency fee basis plus costs."

Client: "what does this part here mean about a lien at $300 per hour if I fire you?"

Lawyer A: "It means that since we work on a contingency fee and we don't get paid unless and until you get paid, if you discharge us after we've done all of the work, we would be entitled to a lien to compensate us for our work put in."

Client: "well, I'm sure that will never happen because this is an open and shut case. I was rear-ended and I was injured, so the insurance company will never fight with me."

Time Lapse…….2 years later

SCENE 2:

Client: "I don't understand. Why aren't you settling my case? This case is so straight forward. I was rear-ended and I had back surgery. I never had back problems before this, so clearly it is related to the accident."

Lawyer A: "I agree with you, but the insurance company is fighting it. They aren't admitting that their driver was at fault."

Client: "But I was rear-ended."

Lawyer A: "Yes, but their driver is claiming you cut him off. That is why I had to track down all the witnesses. We deposed them and they did great."

Client: "Well at least the insurance company won't be fighting on the damages."

Lawyer A: "About that…… the Rule 4:10 examination with their doctor came back and their doctor says the surgery isn't related to the accident. Their doctor says that you should have been better in 6-8 weeks. But don't worry, I met with your doctor, and he says this back surgery is absolutely related to the accident.

Client: "Maybe you just need to tell them they are wrong. Maybe I need a better lawyer."

Lawyer A: "Unfortunately, some of these cases just have to go to trial. We're ready for it."

SCENE 3:

Client: (WATCHING CHEESY COMMERCIAL for Lawyer B)

Lawyer B in commercial: “Come to see my firm……we scare all of the insurance companies into making offers and get quick and easy settlements for our clients!”

Client: “That is the lawyer who I need! I’m terminating Lawyer A”

TIME LAPSE TO MEETING BETWEEN LAWYER B and CLIENT

Lawyer B: “Our retainer is 1/3 if we settle the case and 40% if we go to trial! But the insurance companies are scared of me!

Client: “I remember Lawyer A saying something about if I fired him, he would have a lien, do you know what he was talking about? I don’t see anything in your representation agreement about that.”

Lawyer B: “Just sign here…..quick and easy settlements are the best!” while slipping NOTICE OF LIEN paper into file.

Questions:

1) Can Personal Injury Lawyer A assert a lien?
    - Answer: Yes – Virginia permits *quantum meruit* liens
2) Is Personal Injury Lawyer A's lien reasonable?
    - Answer: Likely depends on the circumstances.
        i. Under Ethics Opinion 1812 there are instances when a discharged counsel's compensation based on his hourly rate would result in an unreasonable fee:
            1. However, this is a disputed liability and disputed damages case in what appears to a complex medical issue to establish medical causation.
            2. Answer is likely different if Personal Injury Lawyer A were claiming a $15,000 lien on a case that has a $15,000 value. Rule 1:5 requires that fees be reasonable. A lien that equates to 100% of the recovery does not seem reasonable.
3) Does Personal Injury Lawyer B have to advise client that Personal Injury Lawyer A may have a lien?
    - Answer: Yes – Rule 1.5(b) and 1.5(c) require that successor counsel, at the inception of the proposed representation in a contingent fee matter, advise the client in writing of the potential obligation to pay legal fees based upon quantum meruit to prior counsel
        i. Although each attorney's fee must be reasonable under Rule 1:5(a) a client who discharges their first counsel without cause may be obligated to pay combined fees in excess of the contingency fee which applied to the engagement with predecessor counsel.
        ii. Rule 1.4(b) requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions.
4) Does Personal Injury Lawyer B have to address this in writing?
    - Answer: YES
    - Committee recommends that successor counsel in a contingent fee matter include in the representation agreement:

i. “the state of the law in Virginia regarding perfection of attorneys’ liens and quantum meruit awards available to attorneys discharged without cause;”
ii. “a statement that the client’s recovery may be subject to both the discharged lawyer’s attorney’s fees and the continent fee charged by the successor lawyer; and whether the discharged lawyer’s lien would be included within or in addition to the successor lawyer’s contingency fee;”
iii. “who bears the expense (legal fees and court costs, if any) of determining predecessor counsel’s fee entitlement, to include the cost of adjudicating the validity and amount of any claimed lien, through an interpleader action or otherwise.”

5) Can Personal Injury Lawyer B represent the client in negotiations and litigation involving Personal Injury Lawyer A’s claim of lien
   - Answer: It depends. Successor counsel may represent the client in negotiations and litigations involving the predecessor counsel’s claim of lien provided there is no conflict under Rule 1.7(a)(2) or that they obtain informed consent to a potential conflict in accordance with Rule 1.7(b)
     i. Rule 1.7(a)(2) addresses conflict of interest when the personal interest of the lawyer presents a significant risk that her competent and diligent representation of the client would be materially limited
     ii. Informed consent under Rule 1.7(b)

4. LEGAL ETHICS OPINION 1890 COMMUNICATIONS WITH REPRESENTED PERSONS

I. LEO 1890: Communications with represented persons

A. In 2019 the VSB filed a petition with the Virginia Supreme Court requesting approval of LEO 1890. The Court sent the opinion back requesting modification.

II. The Court approved the modified version in 2021 and modified Comment 7 to Section II, Rule 4.2.

Viewing of vignette -(5 minutes time through viewing of video)

III. Rule 4.2 - No contact rule

A. A lawyer, who is representing a client, cannot communicate with a person about a subject when the lawyer knows the person to be represented by another lawyer in the matter, unless the law authorizes him to do so.

IV. LEO 1890 considerations regarding Rule 4.2

A. Rule applies if the represented person initiates or consents to the *ex parte* contact.

B. Only applies only if the communication is about the subject of the representation in the same matter.

C. Lawyer has to know the person is represented for the rule to apply.

D. Rule applies if the communicating lawyer is self-represented.

E. Represented people can communicate directly with each other, but the lawyers cannot use them as a workaround.

F. A lawyer cannot use an investigator or third party as a workaround.

G. By law government lawyers may be allowed to have *ex parte* investigative contacts with represented persons.

H. Does not apply to communications with former constituents of represented organizations.

I. In house counsel does not keep another lawyer from taking to the organization members. Outside counsel does not keep lawyers from communicating with in house counsel.

J. After the insurance company has assigned the case to defense counsel, Plaintiff's counsel may communicate directly with the company.

K. If a represented person is looking for a second opinion or replacement counsel, a lawyer can communicate directly with them.
L. The rule permits communications authorized by law.
M. Opposing counsel being uncooperative or withholding or failing to communicate settlement is not basis for direct communication with a represented advisory.

Discussion of all the possible ethical violations of rules 10 minutes for a total of 15 minutes on this topic.

Skit/Scenario

A woman has surgery at a large hospital to repair chronic problems with her lower back. Several months later, she feels her back is even worse than before the surgery. She consults another surgeon who suspects the first surgeon didn't do a good job and might have committed medical malpractice.

The women hires an attorney to investigate a medical malpractice case against the surgeon and the hospital. The lawyer reviews the medical records and identifies the names of all hospital employees who provided any medical care to his client. The lawyer determines he will interview the various employees as part of his reasonable inquiry before he determines whether to bring a lawsuit against the hospital. The surgeons who performed the surgery are not employees of the hospital but are independent contractors.

The lawyer first contacts one of the scrub nurses who participate in the surgery. The nurse tells the lawyer she has already been interviewed by the lawyer representing the hospital about the surgery and feels uncomfortable speaking with the patient's lawyer. The lawyer continues the interview anyway and obtains information that may support his medical malpractice claim.

The lawyer next contacts a radiologist who reviewed the patient's pre and post-surgery x-rays. The radiologist is not an employee of the hospital but is employed by a radiology practice that is affiliated with the hospital. The radiologist volunteers to speak with the attorney and gives his impressions of the success of the surgery based on his review of the films, which also seems to support an allegation of medical malpractice.

The lawyer next speaks with physical therapist employed by the hospital who conducted the patient's physical therapy for the week following the surgery. The therapist is happy to speak with the lawyer and tells him that the patient didn't seem to recover from the surgery as quickly as other patients she has worked with and wonders if the surgery was successful or if the doctor made a mistake.

Based upon these interviews, the lawyer files a medical malpractice case against the hospital and the surgeons.

Communication With Persons Represented By Counsel

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.

Comments

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(h). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4

The Honorable Susan Friedlander Earman, Fairfax County General District Court

Susan Earman has been a Presiding Judge of the Fairfax General District Court since 2019. Prior to taking the bench, she worked alongside her father and uncle for 25 years in their family law firm, Friedlander, Friedlander & Earman P.C., focusing on civil litigation with a concentration in land use and real estate.

A native of Northern Virginia, Earman earned a Bachelor of Arts in mathematics from the University of Virginia and her Juris Doctor from the George Mason University School of Law. Earman also served as a planning commissioner for the City of Falls Church for five years and then on its Board of Zoning Appeals for 10 years.

Dennis J. Quinn, Carr Maloney P.C.

Dennis Quinn concentrates his practice on professional liability, commercial litigation, and ethics counseling. He successfully represented hundreds of clients in legal malpractice actions, accounting malpractice actions, and ethical complaints, trying cases in most of the state and federal courts in the District of Columbia, Virginia, and Maryland. Dennis regularly advises lawyers and law firms on ethical issues, and frequently speaks to bar associations and professional groups on ethics, risk management, and the avoidance of malpractice claims and bar complaints. He serves as Carr Maloney's General Counsel.

Dennis has been active in numerous bar activities over the years. He currently serves as Chair of the Virginia State Bar's Standing Committee on Legal Ethics and was an elected representative to the Virginia State Bar Council from 2012-2020. In 2010-2011 he served as President of the Virginia Association of Defense Attorneys and was on its Board of Directors for seven years. Dennis was also on the faculty of Virginia State Bar's Professionalism Course taught to all newly admitted Virginia attorneys.

After graduating law school, Dennis spent six years on active duty in the U.S. Navy Judge Advocate General's Corps, where he tried over 120 criminal and civil cases. During the Persian Gulf War, he served as the staff judge advocate to an amphibious battle group that fought in several combat operations off the coast of Kuwait.

In 1993, he joined the White House Counsel's Office as Special Counsel to the President, responsible for overseeing the background investigations of all political appointees. Upon leaving the White House, he served as Senior Counsel to the John F. Kennedy Assassination Records Review Board. In that capacity, he was in charge of the medical records dealing with JFK's medical treatment and autopsy.

Brian Coleman, The Law Offices of Locklin & Coleman, PLLC

Mr. Coleman began his legal career as a Judicial Law Clerk to the Honorable Mary Grace O'Brien in the Prince William County Circuit Court. The clerkship offered an invaluable experience to learn about the litigation process from within the courthouse. Upon completion of his clerkship, Mr. Coleman accepted a job in Fairfax as a trial attorney with a major insurance company where he spent 6.5 years aggressively defending complex personal injury and wrongful death cases. Mr. Coleman returned to Manassas and joined Kevin Locklin on the plaintiff side in January of 2017.

As a former insurance defense attorney, Mr. Coleman is well versed in the tactics that insurance carriers frequently use in order to deny claims and he will effectively negotiate settlements or try cases when the insurance company refuses to make a fair offer. Mr. Coleman's experience defending personal injury cases will help to prepare clients for depositions, defense medical examinations, and trial.

A native of Falls Church, Virginia, Mr. Coleman now lives in Annandale with his wife, kids and two dogs. Mr. Coleman's hobbies include traveling with his wife, playing adult league ice hockey and soccer, and mountain biking.

Jonathan P. Lienhard, Holtzman Vogel Baran Torchinsky Josefiak PLLC

Jonathan has practiced law for over 24 year and practices in the areas of commercial litigation, election law litigation, and white-collar criminal defense. He began his career as a Navy JAG Corps prosecutor in Norfolk, Virginia, and served as a Special Assistant U.S. Attorney in the Eastern District of Virginia. Jonathan has tried cases before juries and judges in federal court, state court, and military courts-martial. He has also argued cases before the Virginia Supreme Court.

Jonathan holds an AV rating from Martindale-Hubbell, has been recognized as a "top lawyer" in Northern Virginia Magazine, and is admitted to practice in Virginia, Maryland, the District of Columbia, and before the Supreme Court of the United States.

After being raised in northern Virginia, he attended the University of Notre Dame, where he earned his B.A. and his J.D. A former President of the Fauquier County Bar Association, Jonathan is a member of the Virginia State Bar Litigation Section Board of Governors. He also serves on the Executive Committee of American Legion, Post 72, in Warrenton, and is Master Member of the George Mason chapter of the American Inn of Court. Jonathan resides in Warrenton, Virginia, with his wife and three children.

APPENDIX

Topic 1: Rule 1.8 (K)

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
RULES OF PROFESSIONAL CONDUCT 1.8, 1.10, AND 1.15

PETITION OF THE VIRGINIA STATE BAR

Brian L. Buniva, President
Karen A. Gould, Executive Director
James M. McCauley, Ethics Counsel
Emily F. Hedrick, Assistant Ethics Counsel
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-3565
Phone (804) 775-0500
Fax (804) 775-0501

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
RULES OF PROFESSIONAL CONDUCT 1.8, 1.10, AND 1.15

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 changes to Rules of Professional Conduct 1.8, 1.10, and 1.15, as set forth below. The proposed changes to Rule 1.8(k) and associated re-enumeration of Rule 1.10(d) were approved by a vote of 55 to 2, and the proposed changes to Rule 1.8(b), Comment [1] to Rule 1.10 and to Comment [1] to Rule 1.15 were approved by unanimous vote of the Council of the Virginia State Bar on April 21, 2021 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed amendments to Rules 1.8, 1.10, and 1.15. The proposed changes fall into three categories: a prohibition on sexual

relationships with clients under Rule 1.8(k) and an associated renumbering of Rule 1.10's cross-reference to Rule 1.8; a revision to Rule 1.8(b) that modifies the scope of information protected under that rule; and revisions to comments to Rules 1.10 and 1.15 to clarify that certain conduct is mandatory by replacing the word "should" with "must".

A. Rule 1.8(k)

This proposed rule amendment would add a paragraph to Rule 1.8, Conflict of Interest: Prohibited Transactions, to explicitly forbid a lawyer from having sexual relations with a client during the representation. This proposal would bring the rules in line with the ABA model rules and over 40 jurisdictions that address this issue as part of Rule 1.8 rather than only through an advisory ethics opinion.

The issue of sexual relationships with clients is currently addressed in LEO 1853 (Appendix, Page 74), which does not expressly forbid the conduct but rather identifies several different conflicts of interest or other concerns that might be present in specific situations where a lawyer has a sexual relationship with a client. Because the risk of violating other rules of professional conduct is so significant, LEO 1853 ultimately concludes that a lawyer *should not* have sex with a client but is not prohibited from entering a sexual relationship with a client. While much of the reasoning in LEO

1853 supports a bright line prohibition, LEO 1853 stops short:

> Rules 1.3(c), 1.8(b), and 1.7(a)(2) reflect the fundamental fiduciary obligation of a lawyer not to exploit a client's trust for the lawyer's benefit, which implies that the lawyer *should not* abuse the client's trust by taking sexual or emotional advantage of a client.

While the Committee agrees with LEO 1853's reasoning, it believes that the best position is that a lawyer must not abuse the client's trust by having sexual relations with a client during the professional engagement, unless the sexual relationship predated the professional engagement and the lawyer's representation of that client is not "materially limited" by the lawyer's personal relationship with that client. *See* Rule 1.7(a)(2). This result is exactly what the proposed rule would achieve.

Although courts and disciplinary cases have condemned lawyer-client sex, lawyers have continued to engage in sexual relations after commencement of the professional relationship, asserting that if the sexual relationship is between two consenting adults, the matter is none of the regulatory bar's business[1], that the client's case was not prejudiced, or that no harm to the client had occurred. But the concept that these relationships

[1] The proposed Rule 1.8(k) is not an attempt by the VSB to regulate personal decisions by the lawyer and client to have a sexual relationship. The proposed rule regulates the professional conduct of a lawyer during the legal representation of the client which falls squarely within the bar's regulatory objectives. If the lawyer and client wish to pursue a sexual relationship, then the lawyer must withdraw from the professional relationship.

are truly consensual is untenable. Where is the client's ability to say "no" when her attorney tells her he will abandon her lawsuit to keep her home unless she agrees to have sex? Reported cases are filled with clients who have said that they submitted to their attorney's sexual advances out of fear that refusing to submit would affect the quality of their representation at a time of vulnerability and dependence on the attorney.[2]

LEO 1853 essentially puts the burden on the client, and in turn the Bar discipline system, to prove that the representation of the client was adversely affected by the existence of the sexual relationship that the Respondent lawyer will claim was "consensual." While the burden is always (appropriately) on the Bar to prove disciplinary offenses by clear and convincing evidence, the offense here should properly be considered the existence of the sexual relationship itself, not any follow-on effects it had on the lawyer's representation of the client. Those effects are separate offenses and should be treated as such, rather than as necessary to prove the misconduct of the sexual relationship itself.

Beyond that, adopting proposed Rule 1.8(k) sends a clear message

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2 *See, e.g., In re Vogel*, 482 S.W.3d 520 (Tenn. 2016); *Iowa Supreme Court Atty. Disciplinary Bd. v. Moothart*, 860 N.W.2d 598 (Iowa 2015); *Disciplinary Counsel v. Detweiler*, 135 Ohio St.3d 447, 989 N.E.2d 41 (2013); *Disciplinary Counsel v. Moore*, 101 Ohio St.3d 261, 804 N.E.2d 423 (2004); *Akron Bar Ass'n v. Williams*, 104 Ohio St.3d 317, 819 N.E.2d 677 (2004); *Matter of Berg*, 264 Kan. 254, 955 P.2d 1240 (1998); *In re Rinella*, 175 Ill.2d 504, 677 N.E.2d 909 (1997).

that this conduct is not acceptable under any circumstances. On a practical level, many lawyers might expect to see this topic addressed in Rule 1.8, since that is how a majority of jurisdictions approach the issue, and do not necessarily know or appreciate that they also need to consider LEOs on this topic. And on a symbolic level, it reaffirms the Bar's commitment to protecting clients from predatory behavior.

Rule 1.8(b)

Rule 1.8(b) currently uses the phrase "information relating to the representation of a client," which is the same as the ABA standard for confidentiality but is broader than our Rule 1.6; the proposal amends 1.8(b) to mirror 1.6 and then adds new Comment [2] (which is adapted from ABA Model Comment [5]) to provide some context for 1.8(b). This is a substantive change to the rule, since it changes the standard for information protected under the rule from "information relating to the representation of a client" to "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," and it effectively equalizes the standard between Rules 1.6 and 1.8. Under the current rules, Rule 1.8(b) protects a different

set of information than Rule 1.6 does, and since Rule 1.6 is the primary rule on confidentiality, the Committee determined that its standard should be applied throughout the rules.

Rule 1.10

If Rule 1.8(k) is adopted (banning sexual relations with a client) then current Rule 1.8(k) will become Rule 1.8(l). This in turn will require an amendment to Rule 1.10(d) to say that "[t]he imputed prohibition of improper transactions is governed by Rule 1.8(l)," instead of Rule 1.8(k).

Rule 1.10 Comment [1] defines what makes a group of lawyers a "firm." The last sentence, discussing the *per se* conflict under Rule 1.7(b)(3), refers to "the Rule that the same lawyer *should* not represent opposing parties in litigation." [Emphasis added.] The proposal replaces "should" with "must" as it is not permissible for the same firm to represent opposing parties in the same litigation.

Rule 1.15

Rule 1.15 Comment [1] repeatedly uses the word "should" to describe what is required. As above, the proposed amendments replace "should" with "must" to clarify that these are mandatory obligations.

The proposed rule changes are included below in Section III.

II. Publication and Comments

A. Rule 1.8(k)

The Standing Committee on Legal Ethics approved proposed Rule 1.8(k) at its meeting on December 12, 2019 (Appendix, Page 4). The Virginia State Bar issued a publication release dated December 13, 2019, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 6). Notice of proposed Rule 1.8(k) was also published in the bar's January 2020 newsletter (Appendix, Page 10), on the bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 23), on the bar's "News and Information" page on January 7, 2020 (Appendix, Page 34), and in the *Virginia Lawyer Register*, February 2020 issue, Volume 68 (Appendix, Page 38).

Eleven comments were received, from Kevin Martingayle, Sandra Bowen, Andrew Straw, deez132@yahoo.com (no other identification provided), Amy McDougal, James Wrenn, Leo Rogers (on behalf of the Local Government Attorneys), Leslie Haley, Hilton Oliver, Peter Owen, and John Crouch (Appendix, Page 39). The only change the Committee made in response to the comments was to remove the phrase "or regularly consults with" from proposed Comment [19], based on the suggestion in Leslie Haley's comment. This change narrows the scope of the rule as

applied to counsel for an entity, which the Committee agreed was an appropriate limitation for the reasons stated in Ms. Haley's comment. This change also addresses some of the scenarios raised by Mr. Owen's comment.

Several comments asked whether there is a need for a rule to address this issue and whether something has changed since LEO 1853 was adopted. The reasons for the Committee's determination that a rule is necessary and appropriate are addressed above in the first section of this petition.

Several comments also raised, in different ways, questions about whether "sexual relationship" should be defined in the rule or comments. The Committee considered this both before and after receiving comments on the proposal and concluded that a specific definition is not necessary at this time. There is no shortage of resources that attempt to define a sexual relationship, and the Committee, bar counsel, and disciplinary tribunals will be able to use standard methods of rule interpretation to apply the rule as specific factual scenarios arise. Should problems arise with this approach as the rule is applied, the Committee can revisit the comments equipped with better knowledge about what needs to be clarified.

B. Rules 1.8(b), 1.10, and 1.15

The Standing Committee on Legal Ethics approved the amendments to Rules 1.8(b), 1.10, and 1.15 at its meeting on February 27, 2020 (Appendix, Page 5). The Virginia State Bar issued a publication release dated February 27, 2020, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 8). Notice of the proposed rule amendments was also published in the bar's March 2020 newsletter (Appendix, Page 13), on the bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 28), and on the bar's "News and Information" page on February 28, 2020 (Appendix, Page 36).

Two comments were received, from John Crouch and Leo Rogers (on behalf of the Local Government Attorneys) (Appendix, Page 68). The substance of Mr. Crouch's comment addressed a proposal to amend Comment [11] to Rule 3.3, which is not before the Court at this time.

III. Proposed Rule Changes

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information ~~relating to representation of a client~~ protected under Rule 1.6 for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas,

unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(~~l~~k) While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

COMMENT

Transactions Between Client and Lawyer

[1] Rule 1.8(a) states the general principle that ~~As a general principle,~~ all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products

manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. ~~Similarly, paragraph (b) does not limit an attorney's use of information obtained independently outside the attorney-client relationship.~~

[2] Use of information protected by Rule 1.6 for the advantage of the lawyer or a third person or to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client or third party make such a purchase. Paragraph (b) prohibits the use of a client's confidential information for the advantage of the lawyer or a third party or to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b). Paragraph (b) does not limit an attorney's use of information obtained independently outside the attorney-client relationship.

[3~~2~~-5] *ABA Model Rule* Comments not adopted.

[6] A lawyer may accept ordinary gifts from a client. For example, an ordinary gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[7-8] *ABA Model Rule* Comments not adopted.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue

lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality, Rule 1.7 concerning conflict of interest, and Rule 5.4(c) concerning the professional independence of a lawyer. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[12] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

[13-15] *ABA Model Rule* Comments not adopted.

Acquisition of Interest in Litigation

[16] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances or payment of the costs of litigation set forth in paragraph (e).

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client

confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Like a conflict arising under paragraph (i) of this Rule, this conflict is personal to the lawyer and is not imputed to other lawyers in the firm with which the lawyer is associated.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (k) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from

having a sexual relationship with a constituent of the organization who supervises or directs that lawyer concerning the organization's legal matters.

RULE 1.10 Imputed Disqualification: General Rule

***

(d) The imputed prohibition of improper transactions is governed by Rule 1.8(kl).

***

COMMENT

Definition of "Firm"

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

that the same lawyer ~~should~~ must not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other.

***

RULE 1.15 Safekeeping Property

***

COMMENT

[1] A lawyer ~~should~~ must hold property of others with the care required of a professional fiduciary. Securities ~~should~~ must be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. For purposes of this Rule, the term "fiduciary" includes personal representative, trustee, receiver, guardian, committee, custodian, and attorney-in-fact. All property that is the property of clients or third persons ~~should~~ must be kept separate from the lawyer's business and personal property and, if funds, in one or more trust accounts. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

***

IV. Conclusion

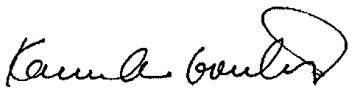
The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

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 changes were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed changes to Rules 1.8, 1.10, and 1.15 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

Brian L. Buniva, President



Karen A. Gould, Executive Director

Dated this 7th day of May, 2021.

VIRGINIA Lawyers Weekly

Lawyer accepts 2-year suspension for relationships with clients

By: Peter Vieth March 15, 2021

A lawyer who was turned in to the Virginia State Bar by the Virginia Beach commonwealth's attorney has admitted he tried to cultivate a three-way romantic relationship with two clients, including one in jail.

Scott A. Lehman also used his trust account as a personal checking account and lied about his suspended law license, according to his admissions in an agreed disposition with the VSB.

In a March 12 hearing, Lehman agreed to a two-year suspension with terms that include a three-year probation period with the possibility of disbarment if he violates the rules again.

Commonwealth's Attorney Colin D. Stolle filed a bar complaint in September 2019 saying Lehman had engaged in inappropriate relationships with two criminal clients. One of the clients told officers at the Virginia Beach jail that she had been having sexually charged conversations with Lehman using the jail's video visitation system.

Officers retrieved the non-confidential recordings and said they observed Lehman trying to entice his jailed client into having sex with him and another woman who was with him on some of the recordings. Lehman agreed he provided the client with money to spend in the jail.

The VSB tried to subpoena Lehman's records of his representation of both clients, and the bar suspended his license when he did not produce some of the trust and billing records. The bar discovered Lehman was using his trust account for personal funds.

The bar said lawyers later reported Lehman was still making court appearances in early 2020 despite his administrative suspension in December 2019. Lehman reportedly told an investigator he was appearing in order to withdraw from his cases, but the investigator found cases where Lehman had not withdrawn as counsel.

At the March 12 hearing, Lehman expressed contrition and regret about the violations. He said he had romantic relationships with the two clients before they became clients. He said he had the best interests of the clients in mind despite the personal relationships.

The VSB ethics committee has been considering whether to recommend an ethics rule that would specifically forbid most sexual relations with a client, but the language proposed last year would offer an exception for relationships that predate the lawyer-client relationship.

Nevertheless, Lehman agreed that his conduct violated a rule barring representation if there is a significant risk of conflict with a personal interest of the lawyer.

Lehman, who represented himself in the bar proceeding, also agreed that his statements about his post-suspension appearances involved criminal or deliberately wrongful acts as well as dishonesty, fraud, deceit or misrepresentation. His two-year suspension was effective March 12.

The VSB was represented by Assistant Bar Counsel Christine Corey.

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VIRGINIA Lawyers Weekly

Lawyer accused of trying to have sex with client

By: Peter Vieth August 31, 2020

A Virginia Beach lawyer – now under administrative suspension – faces state bar charges that he tried to entice a jailed client to join him and his girlfriend in a three-way sexual liaison.

The action comes as the Virginia State Bar considers recommending a separate rule provision addressing lawyers who have sex with clients.

Attorney Scott A. Lehman was reported to the VSB by the Virginia Beach commonwealth's attorney, according to a certification of allegations filed Aug. 18. The prosecutor's complaint to the VSB was based on conversations allegedly recorded on the jail's video visitation system.

The client was locked up at the Virginia Beach jail on a probation violation charge when she reported to jail officers that she had been discussing sexual matters with Lehman using the jail's video visitation system, the certification said. She told the officers Lehman was representing her on the understanding she would engage in a sexual relationship after her release, the VSB alleged.

Lehman reportedly communicated with the client from his home using the jail's video system. The video visitation system is not considered secure for confidential attorney-client communication, the VSB said.

Officers pulled up recordings of the video contacts during July and August of last year and saw a pattern of Lehman "cultivating a three-person romantic relationship" between himself and the two women, according to the certification.

Lehman reportedly talked of sexual activity with his girlfriend, who was seen with him on the video, and about his hope that the jailed client could join in when she was released, the certification said. He allegedly made a number of explicit suggestions listed in the complaint.

The girlfriend also became a client, according to the certification. After she was charged with DUI, resisting arrest and open container, she allegedly signed retainer agreements with Lehman in July 2019 for him to represent her on both criminal and civil matters.

Meanwhile, the jailed client terminated her business relationship with Lehman and the court assigned other counsel, the bar said.

The VSB alleges that Lehman violated Rule 1.7 (a)(2) barring representation that poses a significant risk of conflict due to a personal interest of the lawyer.

The VSB Council is expected to consider recommending a separate rule provision explicitly barring sexual relations with a client in the absence of a pre-existing relationship.

Lehman was not fully cooperative with the VSB investigation, according to the certification. He allegedly did not provide trust or billing records for one of the clients in response to a subpoena. The VSB suspended Lehman's license Dec. 2 for noncompliance.

Lehman also faces accusations that he used his trust account as a personal checking account and that he continued to practice law after his suspension.

No date had been set for a disciplinary hearing as of Aug. 28. It was not clear if Lehman had retained counsel. He was not available for comment as of Aug. 31.

Updated Sept. 1 to add reference to suspension in the lede.

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Topic 2: Legal Ethics Opinion 1850

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
REVISED LEGAL ETHICS OPINION 1850

PETITION OF THE VIRGINIA STATE BAR

Brian L. Buniva, President
Karen A. Gould, Executive Director
James M. McCauley, Ethics Counsel
Emily F. Hedrick, Assistant Ethics Counsel
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-3565
Phone (804) 775-0500
Fax (804) 775-0501

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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
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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 amendments to Legal Ethics Opinion 1850, as set forth below. The proposed amendments were approved by a unanimous vote of the Council of the Virginia State Bar on October 23, 2020 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed amendments to LEO 1850. In the proposed revisions to LEO 1850 (2010), the Committee concludes a lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the

outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed advance consent to outsourcing the work. The proposed revisions simplify and streamline the scenarios and analysis in the opinion and clarify what a lawyer must disclose to a client when outsourcing services.

Specifically, the revisions to the opinion emphasize that a lawyer who outsources work to a lawyer or nonlawyer working outside the direct supervision of a lawyer in the firm must obtain the client's consent to disclose confidential information and must adequately explain how fees for the outsourced services will be billed to the client. If the lawyer or nonlawyer to whom the work is being outsourced works on site or under the direct supervision of the outsourcing lawyer, they can be considered "associated" with the firm for purposes of the ethics rules and the lawyer may bill for that work in the same way that they bill for any lawyer or employee, even if the charge is more than what the firm pays the staffing agency, vendor, or the lawyer/nonlawyer directly. On the other hand, if the fee is billed to the client as a disbursement, then the lawyer must disclose the actual amount of the disbursement and any mark-up or surcharge on

the amount actually paid to the nonlawyer.

The proposed changes are included below in Section III as a clean version of the proposed revised opinion. A comparison document showing the changes from the original version is included in the Appendix (Appendix, Page 23).

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed amendments to LEO 1850 at its meeting on December 12, 2019 (Appendix, Page 4). The Virginia State Bar issued a publication release dated December 13, 2019, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 5). Notice of the proposed amendments was also published in the bar's newsletter on January 7, 2020 (Appendix, Page 7) and on the bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 10) and on the bar's "News and Information" page on December 16, 2019 (Appendix, Page 15).

Three comments were received, from Rogers (on behalf of the Local Government Attorneys), Weaver, and Crouch (Appendix, Page 17). The Committee made a number of primarily grammatical changes in response to Crouch's comments. The substantive change is at line 110 of the proposed opinion, which discusses the fact that disclosure of confidential

information between lawyers in a firm is permitted, but disclosure to others outside of the firm generally is not. The commenter was correct that Comment [5a] was not the most helpful reference for that statement, so the Committee replaced that reference with a citation to Comment [6] to Rule 1.6 and also added the phrase "when outsourcing" at line 105 to clarify that the requirement for client consent to disclosure of confidential information applies to outsourcing arrangements, not to consultations with another lawyer as permitted by Comment [5a]. The Committee also added language at line 113 of the proposed opinion to point out that certain types of outsourcing for office management purposes do not require client consent per Rule 1.6(b)(6).

The Committee did not make the change to the "Billing and Fees" section suggested by that comment; the Committee decided to retain the conclusion established in LEOs 1712 and 1735 that a lawyer (or law firm) can add a surcharge to a disbursement as long as that surcharge is adequately disclosed to the client and the client consents. *See also* ABA Formal Opinion 93-379 (1993).

III. Proposed Legal Ethics Opinion

LEGAL ETHICS OPINION 1850 OUTSOURCING OF LEGAL SERVICES

This opinion deals with the ethical issues involved when a lawyer considers outsourcing legal or non-legal support services to lawyers or paralegals. Many lawyers already engage in some form of outsourcing to provide more efficient and effective service to their clients. Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example. Law firms have always and will always engage other lawyers and nonlawyers in the provision of various legal and non-legal support services. Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the lawyer the opportunity to seek the services of outside lawyers and staff in complex matters. Legal outsourcing also gives sole practitioners and small law firms more flexibility in not having to hire staff or employees when they experience temporary work overflows for which a contract lawyer or non-lawyer may be appropriate.

A few examples of outsourcing arrangements are:

1. A Virginia law firm retains an outsourced law firm in India to conduct patent searches and to prepare patent applications for some of its clients. Lawyers and nonlawyers at the outsourced firm may work on the

matters. The outsourced firm will not have access to any client confidences except confidential information that is necessary to perform the patent searches and prepare the patent applications. The outsourced law firm regularly does patent searches and applications for U.S. law firms. In some situations, the outsourced law firm might be hired through an intermediary company that verifies the credentials of the firm and checks conflicts; in other situations, the Virginia law firm might directly retain the outsourced law firm.

2. A Virginia law firm occasionally hires Lawyer Z, who works for several firms on an as-needed contract basis, to perform specific legal tasks such as legal research and drafting legal memoranda and briefs. Lawyer Z is a Virginia-licensed lawyer who works out of her home and works on an hourly basis for the law firm, but does not meet with firm clients. She has access to firm files and matters only as needed for the discrete tasks she is hired to perform.

3. A Virginia law firm sends legal work involving legal research and brief writing to a legal research "think tank" to produce work product that is then incorporated into the work product of the law firm.

On the other hand, a situation that may be colloquially called "outsourcing" but that does not raise any of the concerns identified in this

opinion is: a Virginia law firm regularly hires Lawyer Y to perform specific legal tasks for them, which may or may not involve contact with firm clients, working directly with and under the supervision of lawyers in the law firm. In that scenario, Lawyer Y is working under the direct supervision of lawyers in the firm and has full access to information about the firm's clients, and therefore is associated with the firm for purposes of the Rules of Professional Conduct, including confidentiality and conflicts.

Applicable Rules and Opinions

The applicable Rules of Professional Conduct are: Rule 1.1, Competence, Rule 1.2(a), Scope of Representation, Rule 1.4, Communication, Rule 1.5, Fees, Rule 1.6, Confidentiality of Information, Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, and Rule 5.5, Unauthorized Practice of law; Multijurisdictional Practice of Law.

Applicable legal ethics opinions are LEOs 1712 and 1735, regarding the use of temporary lawyers and contract lawyers.

Analysis

A lawyer's ethical duties when outsourcing tasks fall into four categories: supervision of nonlawyers, including unauthorized practice of law issues, client communication and the need for consent to outsourcing

arrangements, confidentiality, and billing and fees. This opinion will address each of these categories in order.

Supervision and unauthorized practice of law

The lawyer's initial duty when considering outsourcing, as established by Rule 5.3(b), is to exercise due diligence in the selection of lawyers or nonlawyers. Lawyers have a duty to be competent in the representation of their clients and to ensure that those who are working under their supervision perform competently. See Rule 1.1. To satisfy the duty of competence, a lawyer who outsources legal work must ensure that the tasks in question are delegated to individuals who possess the skills required to perform them and that the individuals are appropriately supervised to ensure competent representation of the client.

The lawyer must also consider whether the lawyer or nonlawyer understands and will comply with the ethical rules that govern the initiating lawyer's conduct and will act in a manner that is compatible with that lawyer's professional obligations, just as in any other supervisory situation. In order to comply with Rule 5.3(b), the lawyer must be able to adequately supervise the nonlawyer if the work is outsourced. Specifically, the lawyer needs to review the nonlawyer's work on an ongoing basis to ensure its quality, the lawyer must maintain ongoing communication to ensure that the

nonlawyer is discharging the assignment in accordance with the lawyer's directions and expectations, and the lawyer needs to review thoroughly all work product to ensure its accuracy and reliability and that it is in the client's interest. The lawyer remains ultimately responsible for the conduct and work product of the nonlawyer. Rule 5.3(c).

The Committee recommends that overseas outsourcing, in particular, should include a written outsourcing agreement to protect the law firm and its clients. The agreement should include assurances that the outsourced firm or vendor will meet all professional obligations of the hiring lawyer, specifically including confidentiality, information security, conflicts, and the unauthorized practice of law. The hiring lawyer should make reasonable inquiry and act competently in choosing a provider that will honor these obligations and use reasonable measures to supervise the vendor's work.

Client communication and consent

In LEO 1712, the Committee concluded that when a lawyer hires a temporary lawyer to work on a client's matter, the lawyer must advise the client of that fact and must obtain the client's consent to the arrangement if the temporary lawyer will perform independent work for the client and will not work under the direct supervision of a lawyer in the firm. Applying Rules 1.2(a) and 1.4, the Committee concluded that the client is entitled to know

who is involved in the representation and can refuse to allow the use of an outsourced lawyer or nonlawyer. Extending that analysis to other outsourcing situations, a lawyer must obtain informed consent from the client if the lawyer is outsourcing legal work to a lawyer or nonlawyer who is not associated with or working under the direct supervision of a lawyer in the firm that the client retained, even if no confidential information is being shared outside of the firm.

Confidentiality

If, when outsourcing, confidential client information will be shared with a lawyer or nonlawyer outside of the law firm (where "outside of the law firm" means neither associated with the firm nor directly supervised by a lawyer in the firm), the lawyer must secure the client's consent in advance. The implied authorization of Rule 1.6(a) and its Comment [6][1] to share confidential information within a firm generally does not extend to entities or individuals working outside the law firm. Thus, in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. The exception to this requirement is when the

1 Rule 1.6, Comment [6]: Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be limited to specified lawyers.

outsourced service is an "office management" task of the types identified in Rule 1.6(b)(6)[2], for which client consent is not required. In all cases, the lawyer needs to ensure that appropriate measures have been employed to educate the nonlawyer on the lawyer's duties to protect client confidences.

When sharing or storing confidential information, the lawyer must act reasonably to safeguard the information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by anyone under the lawyer's supervision. *See* Rule 1.6, Comment [19]. For example, the nonlawyer should assure the lawyer that policies and procedures are in place to protect and secure data while in transit and that he or she understands and will abide by the policies and procedures. Written confidentiality agreements are strongly advisable in outsourcing relationships. The outsourcing lawyer should also ask the nonlawyer whether he or she is performing services for any parties adverse to the lawyer's client, and remind him or her, preferably in writing, of the need to safeguard the confidences and secrets of the lawyer's current and former clients. *See* Rule 1.6, Comment [5c].[3]

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2 Rule 1.6(b)(6): To the extent a lawyer reasonably believes necessary, the lawyer may reveal 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.
3 Rule 1.6 Comment [5c]: Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

Billing and Fees

In LEO 1712, the Committee discussed the issue of payment arrangements when legal services are outsourced or when temporary lawyers are used. The Committee reiterated its position in LEO 1735, which deals with a lawyer independent contractor. This Committee opines that if payment is billed to the client as a *disbursement*, then the lawyer must disclose the actual amount of the disbursement including any mark-up or surcharge on the amount actually disbursed to the nonlawyer. Any mark-up or surcharge on the disbursement billed to the client is tested by the principles articulated in ABA Formal Opinion 93-379 (1993):

> When that term ["disbursements"] is used, clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if a lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.
>
> It is the view of this Committee that in the absence of disclosure to the contrary it would be improper for the lawyer to assess the surcharge on these disbursements over and above the amount actually incurred unless the lawyer incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper for the lawyer to charge the client the full rate and to retain the profit instead of giving the client the discount. Clients

> could view this practice as an attempt to create profit centers when they had been told they would be billed for disbursements.
>
> On the other hand, if the lawyer or firm hires a contract lawyer or non-lawyer to work on site or under the direct supervision of the lawyer such that they are considered "associated" with the firm, the lawyer or firm may bill the client for the usual or customary charge the firm would bill for any other associate or employee even if that amount is more than what the firm pays the staffing agency or vendor. The amount paid to the staffing agency or vendor is an overhead expense that the firm is not required to disclose to a client.

This Committee believes that these same principles apply in the case of outsourced legal services. Fees must be reasonable, as required by Rule 1.5(a), and adequately explained to the client, as required by Rule 1.5(b). Further, in a contingent fee case it would be improper to charge separately for work that is usually done by the client's own lawyer and that is incorporated into the standard fee paid to the lawyer, even if that cost is paid to a third-party provider.

Conclusion

A lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services

appropriately, and (4) obtains the client's informed consent in advance of outsourcing the work.

IV. CONCLUSION

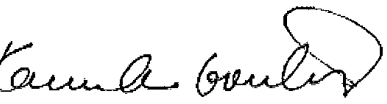
The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

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 amendments to LEO 1850 were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed amendments to Legal Ethics Opinion 1850 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

By 
Brian L. Buniva, President

By 
Karen A. Gould, Executive Director

Dated this 29th day of October, 2020.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 12th day of January, 2021.

On October 29, 2020, came the Virginia State Bar, by Brian L. Buniva, 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 amendment to Legal Ethics Opinion No. 1850.

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. 1850 be amended as follows, effective immediately:

LEGAL ETHICS OPINION 1850. OUTSOURCING OF LEGAL SERVICES.

This opinion deals with the ethical issues involved when a lawyer considers outsourcing legal or non-legal support services to lawyers or paralegals. Many lawyers already engage in some form of outsourcing to provide more efficient and effective service to their clients. Outsourcing takes many forms: reproduction of materials, database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example. Law firms have always and will always engage other lawyers and nonlawyers in the provision of various legal and non-legal support services. Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the lawyer the opportunity to seek the services of outside lawyers and staff in complex matters. Legal outsourcing also gives sole practitioners and small law firms more flexibility in not having to hire staff or employees when they experience temporary work overflows for which a contract lawyer or non-lawyer may be appropriate.

A few examples of outsourcing arrangements are:

1. A Virginia law firm retains an outsourced law firm in India to conduct patent searches and to prepare patent applications for some of its clients. Lawyers and nonlawyers at the outsourced firm may work on the matters. The outsourced firm will not have access to any client

confidences except confidential information that is necessary to perform the patent searches and prepare the patent applications. The outsourced law firm regularly does patent searches and applications for U.S. law firms. In some situations, the outsourced law firm might be hired through an intermediary company that verifies the credentials of the firm and checks conflicts; in other situations, the Virginia law firm might directly retain the outsourced law firm.

2. A Virginia law firm occasionally hires Lawyer Z, who works for several firms on an as-needed contract basis, to perform specific legal tasks such as legal research and drafting legal memoranda and briefs. Lawyer Z is a Virginia-licensed lawyer who works out of her home and works on an hourly basis for the law firm, but does not meet with firm clients. She has access to firm files and matters only as needed for the discrete tasks she is hired to perform.

3. A Virginia law firm sends legal work involving legal research and brief writing to a legal research "think tank" to produce work product that is then incorporated into the work product of the law firm.

On the other hand, a situation that may be colloquially called "outsourcing" but that does not raise any of the concerns identified in this opinion is: a Virginia law firm regularly hires Lawyer Y to perform specific legal tasks for them, which may or may not involve contact with firm clients, working directly with and under the supervision of lawyers in the law firm. In that scenario, Lawyer Y is working under the direct supervision of lawyers in the firm and has full access to information about the firm's clients, and therefore is associated with the firm for purposes of the Rules of Professional Conduct, including confidentiality and conflicts.

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are: Rule 1.1, Competence, Rule 1.2(a), Scope of Representation, Rule 1.4, Communication, Rule 1.5, Fees, Rule 1.6, Confidentiality of Information, Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, and Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law.

Applicable legal ethics opinions are LEOs 1712 and 1735, regarding the use of temporary lawyers and contract lawyers.

ANALYSIS

A lawyer's ethical duties when outsourcing tasks fall into four categories: supervision of nonlawyers, including unauthorized practice of law issues, client communication and the need for consent to outsourcing arrangements, confidentiality, and billing and fees. This opinion will address each of these categories in order.

Supervision and Unauthorized Practice of Law

The lawyer's initial duty when considering outsourcing, as established by Rule 5.3(b), is to exercise due diligence in the selection of lawyers or nonlawyers. Lawyers have a duty to be competent in the representation of their clients and to ensure that those who are working under their supervision perform competently. *See* Rule 1.1. To satisfy the duty of competence, a lawyer who outsources legal work must ensure that the tasks in question are delegated to individuals who possess the skills required to perform them and that the individuals are appropriately supervised to ensure competent representation of the client.

The lawyer must also consider whether the lawyer or nonlawyer understands and will comply with the ethical rules that govern the initiating lawyer's conduct and will act in a manner that is compatible with that lawyer's professional obligations, just as in any other supervisory situation. In order to comply with Rule 5.3(b), the lawyer must be able to adequately supervise the nonlawyer if the work is outsourced. Specifically, the lawyer needs to review the nonlawyer's work on an ongoing basis to ensure its quality, the lawyer must maintain ongoing communication to ensure that the nonlawyer is discharging the assignment in accordance with the lawyer's directions and expectations, and the lawyer needs to review thoroughly all work product to ensure its accuracy and reliability and that it is in the client's interest. The lawyer remains ultimately responsible for the conduct and work product of the nonlawyer. Rule 5.3(c).

The Committee recommends that overseas outsourcing, in particular, should include a written outsourcing agreement to protect the law firm and its clients. The agreement should include assurances that the outsourced firm or vendor will meet all professional obligations of the hiring lawyer, specifically including confidentiality, information security, conflicts, and the

unauthorized practice of law. The hiring lawyer should make reasonable inquiry and act competently in choosing a provider that will honor these obligations and use reasonable measures to supervise the vendor's work.

Client Communication and Consent

In LEO 1712, the Committee concluded that when a lawyer hires a temporary lawyer to work on a client's matter, the lawyer must advise the client of that fact and must obtain the client's consent to the arrangement if the temporary lawyer will perform independent work for the client and will not work under the direct supervision of a lawyer in the firm. Applying Rules 1.2(a) and 1.4, the Committee concluded that the client is entitled to know who is involved in the representation and can refuse to allow the use of an outsourced lawyer or nonlawyer. Extending that analysis to other outsourcing situations, a lawyer must obtain informed consent from the client if the lawyer is outsourcing legal work to a lawyer or nonlawyer who is not associated with or working under the direct supervision of a lawyer in the firm that the client retained, even if no confidential information is being shared outside of the firm.

Confidentiality

If, when outsourcing, confidential client information will be shared with a lawyer or nonlawyer outside of the law firm (where "outside of the law firm" means neither associated with the firm nor directly supervised by a lawyer in the firm), the lawyer must secure the client's consent in advance. The implied authorization of Rule 1.6(a) and its Comment [6][1] to share confidential information within a firm generally does not extend to entities or individuals working outside the law firm. Thus, in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. The exception to this requirement is when the outsourced service is an "office management" task of the types identified in Rule 1.6(b)(6)[2], for which client consent is not required. In all cases, the lawyer

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[1] Rule 1.6, Comment [6]: Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be limited to specified lawyers.

[2] Rule 1.6(b)(6): To the extent a lawyer reasonably believes necessary, the lawyer may reveal

needs to ensure that appropriate measures have been employed to educate the nonlawyer on the lawyer's duties to protect client confidences.

When sharing or storing confidential information, the lawyer must act reasonably to safeguard the information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by anyone under the lawyer's supervision. *See* Rule 1.6, Comment [19]. For example, the nonlawyer should assure the lawyer that policies and procedures are in place to protect and secure data while in transit and that he or she understands and will abide by the policies and procedures. Written confidentiality agreements are strongly advisable in outsourcing relationships. The outsourcing lawyer should also ask the nonlawyer whether he or she is performing services for any parties adverse to the lawyer's client, and remind him or her, preferably in writing, of the need to safeguard the confidences and secrets of the lawyer's current and former clients. *See* Rule 1.6, Comment [5c].[3]

Billing and Fees

In LEO 1712, the Committee discussed the issue of payment arrangements when legal services are outsourced or when temporary lawyers are used. The Committee reiterated its position in LEO 1735, which deals with a lawyer independent contractor. This Committee opines that if payment is billed to the client as a *disbursement*, then the lawyer must disclose the actual amount of the disbursement including any mark-up or surcharge on the amount actually disbursed to the nonlawyer. Any mark-up or surcharge on the disbursement billed to the client is tested by the principles articulated in ABA Formal Opinion 93-379 (1993):

> When that term ["disbursements"] is used, clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if a lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the

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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.

[3] Rule 1.6 Comment [5c]: Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

> court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.
>
> It is the view of this Committee that in the absence of disclosure to the contrary it would be improper for the lawyer to assess the surcharge on these disbursements over and above the amount actually incurred unless the lawyer incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper for the lawyer to charge the client the full rate and to retain the profit instead of giving the client the discount. Clients could view this practice as an attempt to create profit centers when they had been told they would be billed for disbursements.
>
> On the other hand, if the lawyer or firm hires a contract lawyer or non-lawyer to work on site or under the direct supervision of the lawyer such that they are considered "associated" with the firm, the lawyer or firm may bill the client for the usual or customary charge the firm would bill for any other associate or employee even if that amount is more than what the firm pays the staffing agency or vendor. The amount paid to the staffing agency or vendor is an overhead expense that the firm is not required to disclose to a client.

This Committee believes that these same principles apply in the case of outsourced legal services. Fees must be reasonable, as required by Rule 1.5(a), and adequately explained to the client, as required by Rule 1.5(b). Further, in a contingent fee case it would be improper to charge separately for work that is usually done by the client's own lawyer and that is incorporated into the standard fee paid to the lawyer, even if that cost is paid to a third-party provider.

CONCLUSION

A lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law,

(2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed consent in advance of outsourcing the work.

A Copy,

Teste:

Clerk

Topic 3: Legal Ethics Opinion 1878

1878

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 17th day of May 2021.

On March 5, 2021, came the Virginia State Bar, by Brian L. Buniva, 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, Paragraph 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1878.

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. 1878 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1878. SUCCESSOR COUNSEL'S ETHICAL DUTY TO INCLUDE IN A WRITTEN ENGAGEMENT AGREEMENT PROVISIONS RELATING TO PREDECESSOR COUNSEL'S *QUANTUM MERUIT* LEGAL FEE CLAIM IN A CONTINGENT FEE MATTER.

INTRODUCTION

This opinion examines the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a *quantum meruit* basis against the proceeds of a recovery.[1]

A lawyer discharged without cause from representation in a contingent fee matter may assert a lien upon the proceeds of a recovery ultimately obtained in the same matter by successor counsel. The Virginia cases[2] which address a discharged attorney's *quantum meruit* fee entitlement do not set forth how a successor attorney's legal fee should be calculated under these circumstances.[3]

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[1] *See* § 54.1-3932 of the 1950 Code of Virginia, as amended, and Virginia Legal Ethics Opinion 1865 (2012), "Obligations of a Lawyer in Handling Settlement Funds when a Third Party Lien or Claim Is Asserted."

[2] *Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820 (1996); *Fary v. Aquino*, 218 Va. 889, 241 S.E.2d 799 (1978); *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 234 S.E.2d 282 (1977).

[3] In contrast, for example, Louisiana has identified a governing legal principle that the total fee charged by both attorneys could not exceed the largest fee to which the client had agreed. *See Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (1979) (remanding a case to the trial court to adjudicate *both* original counsel's and successor counsel's respective fee entitlements.)

It is beyond the purview of this Committee to advocate a legal principle which limits either counsel's fee to a given percentage or dollar amount of the recovered sums, or to a particular method of calculation. Lawyers must, however, observe the *ethical* requirements in the Rules of Professional Conduct to adequately explain fees charged to a client, how those fees are calculated and to impose only reasonable fees. Successor counsel in a contingent fee matter must adequately explain at the *inception* of the representation the client's *potential* obligation to all counsel and should ensure that her fee ultimately charged to the client is reasonable. Rules 1.5(a) and (b) provide:

> RULE 1.5. Fees.
>
> (a) **A lawyer's fee shall be reasonable.** The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.
>
> (b) **The lawyer's fee shall be adequately explained to the client.** When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. [Emphasis added.]

QUESTIONS AND ANALYSES

A. What must successor counsel address in her written contingent fee agreement when predecessor counsel may be entitled to a fee based on *quantum meruit*?

An attorney who accepts a case wherein predecessor counsel has performed legal services

toward effecting the ultimate recovery must advise the client of potential liability to predecessor counsel for work performed by the latter prior to discharge. Successor counsel may not have knowledge of the nature and extent of the work performed by the client's former attorney or the opportunity to review predecessor counsel's complete file before being engaged by the client. For example, the client may have engaged or consulted with successor counsel before discharging the predecessor counsel. Successor counsel's information about the status of the claim at the time she is engaged may be limited or even nonexistent. The successor attorney nonetheless must advise the client that the predecessor attorney may have an enforceable lien for fees which will be in addition to successor counsel's legal fees.

The Committee recognizes that the successor attorney may lack information sufficient to advise the client of the value of predecessor counsel's services. Even if the predecessor counsel has identified a dollar amount for his claimed lien,[4] the amount of the lien or the lien itself may be in dispute or challenged. Under some circumstances, it may be difficult for the client, predecessor counsel, and successor counsel to agree upon how predecessor counsel is to be compensated when a recovery is achieved. In addition to the "unknown" of the recovery to be had, if any, there are other "unknowns," such as the balance of work which will actually be required to complete the matter and the extent to which predecessor counsel's legal services will have contributed to the recovery and relieved successor counsel from performing services otherwise required. Without knowledge of what tasks were performed by the discharged lawyer, it is also possible that the successor lawyer will duplicate those tasks. The presence of unknowns may require that how predecessor counsel will be compensated must await the time of recovery upon the claim. Nevertheless, if successor counsel accepts a contingent fee client knowing that the client has discharged their former attorney, successor counsel must advise the client of the predecessor attorney's potential lien for fees against the settlement or recovery obtained by successor counsel.

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[4] *See* Legal Ethics Opinion 1812 (2005), "Can Lawyer Include in a Fee Agreement a Provision Allowing for Alternative Fee Arrangements Should Client Terminate Representation Mid-Case without Cause". There are instances when a discharged counsel's compensation based on his hourly rate would result in an unreasonable fee.

ABA Formal Opinion 487, issued on June 18, 2019,[5] speaks to successor counsel's obligation to provide an adequate explanation of her fees thusly:

> **Although Rules 1.5(b) and 1.5(c) do not specifically address obligations when one counsel replaces another, both rules are designed to ensure that the client has a clear understanding of the total legal fee, how it is to be computed, when it is to be paid, and by whom . . . .** A contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel in circumstances addressed by this opinion is inconsistent with these requirements of Rule 1.5(b) and (c). To avoid client confusion, making the disclosure in the fee agreement itself is the better practice, but this disclosure may be made in a separate document associated with the contingent fee agreement and provided to the client at the same time. [Emphasis and ellipsis added.]

In 1989, the San Francisco Bar Association issued LEO 1989-1, which answered, among others, the question under review here: "Where a client discharges Lawyer A in a contingency fee case and consults Lawyer B, may Lawyer B replace Lawyer A on a contingency fee basis without advising the client of Lawyer A's claim for fees?" The opinion concluded that

> a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney. This will enable the client to knowingly and intelligently determine whether to pursue litigation and choose an appropriate attorney.

In reaching that conclusion, the writers stated that

> it is better practice for an attorney who proposes to succeed a discharged attorney in a contingency fee matter to advise the client concerning the discharged attorney's *quantum meruit* claim for fees, particularly under current California law **where the client's obligation to the discharged attorney for payment of the *quantum meruit* claim could be in addition to the contingency fee paid the successor attorney . . . .** [Emphasis and ellipsis added.]

This Committee endorses the view expressed in San Francisco Bar Association's issued

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[5] Fee Division with Client's Prior Counsel
https://www.americanbar.org/content/dam/aba/images/news/2019/06/FormalOpinion487.pdf

LEO 1989-1 and ABA Formal Opinion 487, and further opines that Virginia Rules of Professional Conduct 1.5(b) and (c)[6] *require* that successor counsel, at the inception of proposed representation in a contingent fee matter, advise her client in writing of the client's potential obligation to pay legal fees based upon *quantum meruit* to prior counsel. Successor counsel should address both the client's potential fee obligation to prior counsel and to successor counsel under her contingency fee agreement. Although *each* attorney's fee must be reasonable under Rule 1.5(a), a client who discharges her first counsel without cause may be obligated to pay combined fees in excess of the contingent fee which applied to her engagement with predecessor counsel. The important consideration is that successor counsel must make the client aware of that possibility. *See also* Rule 1.4(b), which requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In order to document compliance with the obligations imposed by Rules 1.4 and 1.5(b) and (c), the Committee recommends that successor counsel in a contingent fee matter include in her proposed contingent fee agreement with the client, the following general principles (but this exact language is not required):

a. the state of the law in Virginia regarding perfection of attorneys' liens and *quantum meruit* awards available to attorneys discharged without cause;
b. a statement that the client's recovery may be subject to both the discharged lawyer's attorney's lien and the contingent fee charged by the successor lawyer; and whether the discharged lawyer's lien would be included within or in addition to the successor lawyer's contingency fee;

[6] Rule 1.5(c), pertaining to contingent fee agreements, requires that "A contingent fee agreement shall state in writing the method by which the fee is to be determined . . . ." Thus, to the extent possible, the agreement should identify the means of determining the reasonable fee required by Rule 1.5(a) in view of predecessor counsel's agreed or adjudicated *quantum meruit* fee entitlement in the event of a recovery via settlement or trial.

c. who bears the expense (legal fees and court costs, if any) of determining predecessor counsel's fee entitlement, to include the cost of adjudicating the validity and amount of any claimed lien, through an interpleader action or otherwise.

B. May successor counsel represent the client in negotiations and litigation involving the prior counsel's claim of lien?

One of the circumstances giving rise to a concurrent conflict of interest under Rule 1.7(a)(2)[7] is when "a personal interest of the lawyer" presents a "significant risk" that her competent and diligent representation of the client would be "materially limited." Thus, there may be instances when successor counsel cannot provide diligent and competent representation to a client because successor counsel herself would not be capable of exercising the independent professional judgment and objectivity required to assess the value of the relative contributions which she and the predecessor attorney made in effecting the recovery. The client may need independent legal advice and advocacy regarding the calculation of successor counsel's fee, the value of predecessor counsel's *quantum meruit* lien, or the apportionment of any recovery among counsel claiming a lien on the recovery and the client.

Contracts between attorneys and their clients stand on a different footing than conventional contracts:

> Contracts for legal services are not the same as other contracts. "[I]t is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each." *Krippner v. Matz*, 205 Minn. 497, 506, 287 N.W. 19, 24 (1939).

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[7]RULE 1.7 Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

* * *

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Heinzman v. Fine, Fine, Legum and Fine, 217 Va. at 962, 234 S.E.2d at 285, (1977). Although the *Heinzman* court was speaking to the issue of the enforceability of a discharged attorney's contract, the principle that contracts between lawyers and clients stand on a different footing than ordinary commercial contracts applies equally to successor counsel.

Whether a concurrent conflict of interest exists for successor counsel to represent her client in the determination of fees to be paid predecessor counsel must be assessed on a case-by-case basis. For example, a successor attorney, whose contingent fee agreement contains a provision for adjustment of her own fee by the amount of the predecessor attorney's *quantum meruit* claim so as to limit the client's liability to payment of a specific total fee, may ethically represent the client in negotiations with or litigation against prior counsel, but at no additional charge to the client. ABA Formal Opinion 487 addresses the ethical issues involved when successor counsel seeks to charge her client fees related to any dispute with predecessor counsel regarding his fees:

> Successor counsel's compensation for representing the client in the client's dispute with predecessor counsel must be reasonable, which in this context means, at a minimum, that the successor counsel cannot charge the client for work that only increases the successor counsel's share of the contingent fee and does not increase the client's recovery. Successor counsel must also obtain the client's informed consent to any conflict of interest that exists due to successor counsel's dual roles as counsel for the client *and* a party interested in a portion of the proceeds.

The "informed consent" referred to in the hypothetical posed in ABA Formal Opinion 487 must be obtained under Rule 1.7(b).[8] But, as stated above, whether a concurrent conflict of

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[8] RULE 1.7 Conflict of Interest: General Rule.

* * *

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client

interest exists with its commensurate duty to obtain informed consent must be assessed on a case-by-case basis.

In sum, successor counsel may represent the client in negotiations and litigation involving the prior counsel's claim of lien, provided she has explained to the client any potential material limitations conflict by acting in a dual role. In these situations where successor counsel's representation is materially limited by a concurrent conflict of interest, the client's informed consent must be obtained pursuant to Rule 1.7(b).

CONCLUSION

Successor counsel in a contingent fee matter must charge a reasonable fee and must adequately explain her fee to the client. If the client, predecessor counsel, and successor counsel cannot determine or agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel must advise the client of the client's potential obligation to pay fees on a *quantum meruit* basis to discharged counsel, as well as the successor counsel's fees under her contingent fee agreement, each of which must be reasonable using the factors identified in Rule 1.5(a). When applicable, successor counsel should advise the client that the combined fees of both lawyers may exceed the amount which would have been paid to predecessor counsel in the event the client had not changed counsel. Successor counsel may represent the client in negotiations and litigation involving the predecessor counsel's claim of lien, provided that there is no conflict under Rule 1.7(a)(2) or that she obtains informed consent to a potential conflict in accordance with Rule 1.7(b).

A Copy,
Teste:
Douglas B. Robelen, Clerk

By:
Deputy Clerk

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against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

Topic 4: Legal Ethics Opinion 1890

LEO 1890

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 6th day of January, 2021.

On November 18, 2019, the Virginia State Bar, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, Paragraph 10-4, filed a petition requesting approval of Legal Ethics Opinion No. 1890. On April 3, 2020, the Court referred the opinion back to the Virginia State Bar and stated that it was willing to consider approving the opinion without Section 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." Thereafter, on September 3, 2020, the Virginia State Bar filed a modified version of Legal Ethics Opinion No. 1890 without Section 8 and requested the Court's approval.

It appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements necessary to ensure adequate review and protection of the public interest. Upon due consideration of all materials submitted, the Court orders that Legal Ethics Opinion No. 1890 is hereby approved, as amended, effective immediately as set forth below, *infra* at 2-16, modified without prior Section 8, and renumbered accordingly. Ancillary to that approval, it is hereby ordered that Comment 7 to Section II, Rule 4.2 of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court be modified effective immediately as set forth below:

COMMENT 7 TO SECTION II, RULE 4.2

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[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a

communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(h). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Rule 4.4.

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 in the same matter.

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

9. 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.

10. 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.

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

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

13. 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. *Grievance Comm. for Southern Dist. New York v.Simels*, 48 F.3d 640, 647 (2d Cir.1995); *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 in the Same Matter.*

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 uncounseled 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.

The Rule limits communications with represented persons only when the person is represented "in the matter," so communication with a represented person about a different "matter" than the one in which the person is represented is permissible even if the communication involves facts that also relate to the matter in which the person is represented. For example, when a guardian ad litem represents a child in a civil matter, criminal prosecutors may communicate with the child in a related criminal matter in which the child is the victim, even if the communication involves subject matter related to a pending or contemplated civil proceeding involving the child. LEO 1870 (2013). A lawyer who represents a client in a civil matter may likewise communicate with a defendant who is represented in a related criminal matter unless and until the lawyer has notice that the defendant is represented by counsel in the civil matter as well. *See also* New York State Bar Association Ethics Opinion 904 (concluding that criminal investigation and civil restitution claim are "two related matters rather than a single unitary matter" for purposes of Rule 4.2).

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 (1990), 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. LEO 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* LEO 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.); LEO 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."); LEO 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. The Rule Does Not Apply to Communications with Former Constituents of a Represented Organization.

Comment [7] to Rule 4.2 states: "[c]onsent of the organization's lawyer is not required for communication with a former constituent."

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).

The *Restatement* 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 (2001). *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).

9. 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).

10. 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 [7]. 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 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:

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[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.").

[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

> 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. (emphasis added).
>
> 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. (emphasis added).

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 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 a 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

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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.

> 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."

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

Comment [3] 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.

12. 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 LEO 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 the trustee to assist debtor in performance under the plan).

13. 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.

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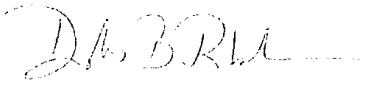

Clerk