

**GEORGE MASON AMERICAN INN OF COURT**

**LEGAL ETHICS UPDATES 2022**

**September 20, 2022**

**Team Members:**

**The Honorable Michael Chick**

**Jesse R. Binnall, Esquire**

**Dennis J. Quinn, Esquire**

**Louise Gitcheva, Esquire**

**Michael Robinson, Moderator**

**Megan Jones - Student Member**

**Michael Potter - Student Member**

**Nathaniel Yu - Student Member**

**Megan Dill - Student Member**

**Talia Semaan - Student Member**

## **Agenda**

- Updates
- Conflicts
- Marketing

## Conflicts

### I. Overview of Conflicts

#### a. Relevant Rules of Professional Conduct

##### i. Rule 1.7 – Conflict of Interest: General Rule

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

(1) the representation of one client will be directly adverse to another client; or

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

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

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

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

##### ii. 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 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) 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.

iii. Rule 1.9 – Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

iv. Rule 1.10 – Imputed Disqualification: General Rule

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

- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The imputed prohibition of improper transactions is governed by Rule 1.8(k).
- (e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

v. Rule 1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees

- (a) A lawyer who holds public office shall not:
- (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
  - (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or
  - (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.
- (b) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests

are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and that the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter or unless the private client and the appropriate government agency consent after consultation; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) Paragraph (d) does not disqualify other lawyers in the disqualified lawyer’s agency.

(f) As used in this Rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

b. Legal Ethics Opinions related to representing multiple clients in a matter:

- i. LEOs 357, 1683, 1661, 1422, 1796, 733, 1315, 725, 1007, 1454, 1337, 1494, 1526, 1352, 1126, 1671, 1410, 457, 669, 1588, 1153, 708, 957, 391, 223, 1524, 707, 1181, 384, 741, 418, 1333, 307, 654, 199, 1557, 289, 1013, 916, 213, 580, 1000, 1398, 1223, 359, 270, 680, 478, 1149, 1216, 569, 360, 620, 219, 1590, 553, 475, 1499, 1032, 291, 1296, 1279, 1092, 1134, 1483, 719, 346, 1091, 1731, 332, 1340, 400, 1312, 1436, 372, 1377, 1304, 1599, 1022,

414, 528, 1435, 895, 703, 616, 1547, 327, 1457, 1505, 1427, 986, 1206, 267, 849, 774, 766, 744, 656, 677, 1681, 1551, 1585, 786, 770, 1089, 1634, 191, 464, 379, 511, 640, 492, 1210, 235, 1776, 1096, 1075, 728, 518, 1508, 1426, 779, 231, 210, 299, 516, 513, 1472, 424, 1473, 1244, 263.

## II. New 2022: LEO 1894: Representing Multiple Infant Claimants by “Next Friend”

- a. LEO addresses possible conflicts of interest that can arise when lawyer represents multiple children in a tort case against a day care center in which it is alleged that multiple assaults on the children have occurred. When conflicts of interest arise, who has the capacity or authority to waive a conflict of interest?
  - b. Lawyer has been approached by two sets of parents of unrelated children to represent them in their claims against a day care center where an employee assaulted the children. The lawyer is concerned that the employee and day care may not have sufficient assets to adequately compensate all victims.
  - c. There is a possibility for a conflict of interest when representing multiple parties in a litigation because parties may disagree as to settlement offers. If there is a limited pool of money then there is a significant risk that the settlement of one of the cases will impact future settlements for other clients.
  - d. For the attorney to represent multiple clients in this situation, the attorney must first obtain informed consent from each client. This informed consent must include (1) a statement that if a conflict arises that the lawyer will withdraw from representing all clients; (2) a disclosure of information known to the lawyer include potential conflicts that can arise in such cases; and (3) the lawyer must explain any known risks, issues or problems in the multiple representations. This consent must be memorialized in writing. If the litigation is being settled by an aggregate settlement, then each client must know and agree as to how the settlement is allocated. If one or more client disagrees with the settlement, the lawyer may not participate in the aggregate settlement.
  - e. The next friend has the ability to waive the conflict but the children must also be represented by a Guardian ad litem.
- ## III. LEOs of Note for Multiple Representations on Same Matter
- a. LEO 478: Conflict of Interests/Representation of multiple Creditors
    - i. It is not improper for an attorney to represent several creditors against a single debtor, if, after full disclosure to each creditor,



all creditors consent to the multiple representation and concur as to the distribution of any funds collected should the amount be inadequate to pay fully each creditor's claim.

- b. LEO 618: Notary/Attorney – Notarizing Affidavits or Sworn Pleadings
  - i. “It is improper for an attorney who is qualified as a notary public in Virginia to notarize affidavits or sworn pleadings for a client of the attorney/notary. DR:5-101(B), DR:5- 102(A) and LE Op. 382 contain certain prohibitions against accepting or continuing representation when an attorney may become a witness. While there are exceptions to that prohibition, an abundance of caution requires that counsel should not subject himself to the possibility of being called as a witness in regard to an affidavit or sworn pleading notarized by him acting in his capacity as an authorized notary public in Virginia.”
  - ii. DR:5-101(B), DR:5- 102(A) pertain to Rule 3.7 of the VSB Professional Guidelines. Rule 3.7 contemplates the limitations of representation when a lawyer may be a witness. For example, lawyers may still represent a client if a lawyer’s potential testimony: “(1) relates to an uncontested issue; (2) relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.” Rule 3.7(a)(1)-(3). Additionally, a lawyer may continue representation until “it is apparent that the testimony is or may be prejudicial to the client.” Rule 3.7(b). It is the lawyer’s responsibility to determine whether such a conflict exists. See Comment 6.
- c. LEO 1483: Termination of Representation – Conflict of Interest – Multiple Representation: Continued Representation, Based on Ability to Advance Costs and Fees, of Some, but Not All, Plaintiffs who have Obtained Foreign Judgments
  - i. Hypo: An attorney represents five plaintiffs where each of the five have different judgments in different amounts against a U.S. citizen and his wife, a noncitizen, located in a foreign country. Three of the plaintiffs are willing to advance with proportionate shares by hiring foreign attorneys while one is unwilling to advance any funds and the last plaintiff is unable to financially advance the funds.
  - ii. Issue: whether it is ethical for the attorney to represent the three paying plaintiffs only, and how to distribute the proceeds in the event the judgment collected is insufficient to pay all claims.

- iii. Answer: A lawyer shall take reasonable steps for the continued protection of a client's interest when representation is terminated (e.g., refunding any advance payment of fee that has not been earned or allowing employment of other counsel). *See* DR:2-108(D). A lawyer may accept or continue multiple employment where (1) the clients are given full disclosure of any potential adverse effect; and (2) it is obvious that the lawyer can adequately represent the interest of each client. *See* DR:5-105(A, B, and C).

Here, if the lawyer represents only the paying plaintiffs, a new representation is warranted. There is no need to leave of court for withdrawal by counsel because no action has been filed in court to enforce the judgment. Additionally, there is no obligation to represent the nonpaying plaintiffs, but the attorney must still protect the nonpaying client's interests under DR:2-108(D) and should advise those former clients of methods to enforce the judgment and any time limitations to bring such an action. LEO 478 further states that it is not improper to represent several creditors against a single debtor when the lawyer (1) gave full disclosure to each creditor and (2) each creditor consents to multiple representation and concurs with the distribution of any funds collected should the amount be inadequate to pay fully each creditor's claim.

- d. LEO 1499: Conflict of Interest – multiple representation: Corporate attorney defending corporation and shareholders against suit brought by shareholder/president
  - i. Hypo: There is a shareholder agreement where shareholders can buy parts of the company when one of them dies. One provision provides that shareholders agree that they will vote their share and act in a way so the corporation will have six shareholders/directors. The president and vice president and secretary are designated in the agreement. The attorney was not counsel for any party at that time the agreement was drawn or for incorporation.

Four of the six shareholder/directors have 65% of stock for the company and want to replace the president because of financial problems and other reasons. The president can now sue the shareholders in their individual capacity and may name the corporation as a defendant.

- ii. Issue: You are asked whether you can represent the four shareholders while also representing the corporation.
  - iii. Answer: Lawyers who are employed by the company “owes his allegiance to the entity and not to a stockholder, director, etc. Ethical Consideration 5-18. If differing interests are not present, the lawyer can serve the individual or representative in an individual capacity. Since the attorney was not counsel for any party at the time of the agreement or incorporation, and assuming that the attorney has not represented the president, representation of the four shareholders would not be improper under DR:5-105. However, should any conflict arise between the shareholders and the corporation, the attorney would need to redraw from representation of both the shareholders and the corporate entity per DR5-105(B) and (C) (i.e., “a lawyer must refuse to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.”).
- e. LEO 1377: Conflict of Interest – multiple representation: representing one co-defendant after obtaining adverse information from other defendant
- i. Hypo: There is a negligent entrustment of vehicle and wrongful death suit against a truck driver and the trucking company. The insurance company hires the attorney to represent the trucking company and the driver. However, the attorney has dropped the driver because there were numerous driving infractions on the driver’s record that was not disclosed to the insurance company, despite the driver claiming that it did disclose.
  - ii. Issue: What are the implications of the attorney representing the Trucking Company in light of its former representation of the Driver?
  - iii. Answer: The applicable Disciplinary Rules are “DR:4- 101(B), regarding preservation of client's confidences and secrets, and DR:5-105(D), regarding representation of one client impairing professional judgment on behalf of another client.” A lawyer is not automatically disqualified from representing Client B when Client A becomes an adverse party but may be disqualified if “the lawyer possessed confidential information which he had obtained from his first client.” Because the defense surrounds the prior traffic violations of the Driver, there are conflicting interests between the Trucking Company and the Driver. The lawyer “may not continue the representation of Trucking

Company unless he has obtained the informed consent of former client/Driver after full disclosure of the effect on the exercise of his professional judgment on behalf of the adverse client and provided that the attorney has not gained any information that could be construed to be a confidence or secret from the Driver which could result in a violation of DR:4-101(B).”

- f. LEO 1340: Conflict of Interests – Multiple representation: representing corporation and employees when corporation will be assigned a portion of the Employees’ Recovery.
- i. Hypo: An attorney is considering representing multiple clients who have differing interests in a civil suit against a third party. One of the clients is requesting an assignment against the other two clients of a portion of the settlement proceeds which would serve as consideration for an agreement where the company pays for the two other clients’ criminal legal fees and settlement with third party to avoid criminal prosecution.
  - ii. Issue: Whether the request by Corporation X for an assignment of a portion of the employee's recovery raises a conflict of interest under DR:5-105(B) and, if so, could the conflict be waived if the parties consent after full and adequate disclosure pursuant to DR:5-105(C). Secondly, you would like to know whether such an agreement between Corporation X and Employees A and B assigning a portion of the recovery of A and B's action to X is proper in light of § 8.01-26 of the Code of Virginia which prohibits the assignment of a right of action for personal injury
  - iii. Answer: There are differing interests here because the corporation wants proceeds from the settlements of the two other clients which would incentivize the two clients to find a way not to share that money. The representation becomes ethically improper when a conflict arises between all the parties during a mediation regarding the agreement. But barring conflict, the attorney can represent all the parties if the attorney can adequately represent the interests of each and exercise independent judgment on behalf of each. LEO 894 states that it is “not improper for an attorney to assist in a recovery on behalf of a corporate entity when the entity is adverse to the attorney's client in litigation and has assigned its rights against the individual from whom recovery may be made to attorney's client.”

Second, there is nothing in § 8.01-26 of the Code of Virginia which prohibits the assignment of settlement proceeds for personal injury.

IV. Hypothetical

- a. Kim Kardashian and Kanye West live next door to each other. They each bought a house constructed by the same builder. Saul Goodman represents Kim Kardashian in a lawsuit against the builder for construction defects. The builder is represented by counsel but you know that they have significant cash flow problems. In the midst of Saul Goodman's representation of Kardashian, West approaches him to represent West in litigation with the same builder. His construction defects are almost identical. Saul Goodman is concerned, of course, about the money available should he settle/receive a judgment. Additionally, Saul Goodman is concerned as West and Kardashian are getting a divorce, which is not amicable. West has a tendency to put Kardashian on blast on social media.
  - i. Can Saul Goodman represent both Kardashian and West in their claims against the builder?
  - ii. Is a divorce ever amicable enough for parties to have the same counsel?
  - iii. Does Saul Goodman need to obtain a waiver?
  - iv. Does the waiver need to include statement of all potential conflicts in this case?
  - v. Should the waiver directly address West's tendency to tweet about his legal grievances?
  - vi. Should the waiver address Kardashian discussing the litigation on her reality show?
  - vii. Even if he can, should Saul Goodman represent both in their claims against the builder?
- b. Advisory Comments to Rule 1.7 is instructive when dealing with representing multiple clients where there may be an existing adversarial relationship.

*Special Considerations in Common Representation*

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients

where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common

representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(b).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

## Marketing

### I. Marketing Overview

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

### II. "Specialization"

#### a. Rule 7.1 – Comment 4

[4] A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training, or education, or is certified by a named professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

#### b. Compare with ABA Model Rule 7.2(c)

A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

c. The Virginia prohibition was removed from the rules in 2017.

d. Explained in LEOx 1750(I) (2019) – see attachment.

i.

### III. Solicitation

#### a. Governed by Virginia Rule 7.3

(a) A solicitation is a communication initiated by or on behalf of a lawyer that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit employment from a potential client if:

(1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.

(c) Every written, recorded or electronic solicitation from a lawyer shall conspicuously include the words “ADVERTISING MATERIAL” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic solicitation, unless the recipient of the solicitation:

(1) is a lawyer; or

(2) has a familial, personal, or prior professional relationship with the lawyer; or

(3) is one who has had prior contact with the lawyer.

(4) is contacted pursuant to court-ordered notification.

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

(1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1, including online group advertising;

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

(3) pay for a law practice in accordance with Rule 1.17; and

(4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

#### b. Lead Sharing Organizations

i. LEO 1846 (2009)

ii. Rule 7.3 Comments:



- [4] Lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. However, Paragraph (d)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers, as long as the employees, agents, and vendors do not direct or control the lawyer's professional judgment in violation of Rule 5.4(c). See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them. Moreover, a lawyer may pay others for generating client leads, such as internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 5.4, and the lead generator's communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral.
- [5] Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and publicity and personal communications from lawyers may help to make this possible. A lawyer should not compensate another person for recommending him or her, for influencing a potential client to employ him or her, or to encourage future recommendations.
- [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a

similar delivery system that assists potential clients to secure legal representation. Not-for-profit lawyer referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule permits a lawyer to pay only the usual charges of a not-for-profit lawyer referral service.