GEORGE MASON AMERICAN INN OF COURT

Ethics Update

September 11, 2024

Panel:

- **Dennis J. Quinn, Carr Maloney**
- **Sarah Conkright, Carr Maloney**
- **Michael Robinson, Venable LLP**

2024 Inn of Court

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1. Everybody's talking about artificial intelligence.

a. Lawyers must pay attention to "the benefits and risks associated with relevant technology." Comment [6] to Rule 1.1. In the case of generative AI, those benefits and risks are evolving by the day as the technology, and our skills to use it, rapidly develop. Nonetheless, a lawyer's basic ethical responsibilities have not changed, and many ethics issues involving generative AI are fundamentally similar to issues lawyers face when working with other technology or other people (both lawyers and nonlawyers). These resources attempt to provide some specific guidance on how to evaluate the benefits and risks of particular uses of generative AI and how to apply ethics rules and standards to generative AI applications.

b. **Confidentiality**

i. A lawyer must be very aware of the Terms of Service and any other information about the possible use of information input into an AI model. Many free, publicly available models specifically instruct users not to input any confidential or sensitive information and any information input into such a model might be disclosed to other users or used as part of the model's training. Legal-specific products or internally-developed products that are not used or accessed by anyone outside of the firm may provide protection for confidential information, but lawyers must make reasonable efforts to assess that security and evaluate whether and under what circumstances confidential information will be protected from disclosure to third parties. It may be appropriate to consult with IT professionals or other experts before sharing confidential information with any generative AI product.

c. **Disclosure to clients**

i. There is no per se requirement to inform a client about the use of generative AI in their matter. Whether disclosure is necessary will depend on a number of factors, including the existence of any agreement with or instructions from the client on this issue, whether confidential information will be disclosed to the generative AI, and any risks to the client from the use of generative AI.

d. **Competence and supervision**

i. After a few high-profile instances of lawyers submitting court filings citing non-existent cases that were hallucinated by ChatGPT and Google Bard, many of those systems have made it more difficult to do legal research and obtain case citations. However, caution is still necessary, especially for general-purpose generative AI products; legal-specific products generally are linked to a legal research database and therefore should be more reliable with case citations. As with any legal research or drafting done by software or by a nonlawyer assistant, a lawyer has a duty to review the work done and verify that any citations are accurate (and real).

ii. Beyond generating information that is simply false, generative AI might also produce information that is not completely accurate or is biased. These issues are thought to arise because of the information in the dataset used for training the models. For example, IBM reported that researchers found bias in Midjourney, a generative AI art generator. When Midjourney was asked to create images of people in certain professions, it showed a mix of ages, but the older people were always men.

iii. Such issues are difficult to detect or address in advance because of the lack of information about how these systems work and what material they were trained on, so output must be carefully evaluated to ensure that it is accurate and that it is consistent with the interests of the lawyer's client. Work product generated by generative AI should always be critically reviewed by the lawyer exercising independent judgment about the contents.

iv. The duty of supervision extends to generative AI use by others in a law firm, and partners and other supervisory lawyers should consider whether Rule 5.1 requires adopting a policy on the use of generative AI, including education and safeguards on when use of generative AI is

appropriate. Firms should also consider systems for tracking use of generative AI within the firm – for example, when it is used, what specific prompts and other information are used, and what output is generated.

e. **Billing and fees**

i. In all instances, fees must be reasonable and adequately explained to the client under Rule 1.5. A lawyer may not charge an hourly fee more than the time spent on the case and may not bill for time saved by using generative AI. The lawyer may bill for actual time spent using generative AI in a client's matter or may wish to consider alternative fee arrangements to account for the value generated using generative AI. The lawyer may only charge the client for costs associated with generative AI if permitted by the fee agreement and by Rule 1.5; any costs passed along to the client and described to the client as costs must be actual costs and cannot be marked up. See LEO 1850.

f. **Court disclosure requirements**

i. Some courts throughout the country have imposed requirements to certify whether generative AI has been used in any document filed with the court. The content and scope of these requirements vary depending on the court, and new requirements may be added at any time. A lawyer must determine whether any disclosure requirement applies to a filing that the lawyer is making and must comply with that requirement pursuant to Rule 3.4(d).

g. **Resources from other bars**

i. **American Bar Association**

1. The ABA has established a task force that is expected to issue a report this year. The task force mission is to (1) address the impact of AI on the legal profession and the practice of law, (2) provide insights on developing and using AI in a trustworthy and responsible manner, and (3) identify ways to address AI risks, with a focus on six critical issues: AI in the legal profession; AI risk management; AI and access to justice; AI governance; AI challenges: generative AI; AI in legal education.

2. The task force also provides resources including webinars, articles, and compilations of government policy statements.

3. On July 29, 2024, the ABA issued Formal Opinion 512, titled Generative Artificial Intelligence Tools (copy attached). The opinion addresses most of the issues addressed above and includes discussions of:
    - **Competency:** a little bit of "know-how" is dangerous. If you're going to use it, understand what you are using and how to properly apply the technology.
    - **Confidentiality:** understand the risk self-learning generative tools present when inputting client information**.**
    - **Fees:** the ABA opinion gives a more detailed examination of costs and billing than other opinions.
    - **Supervisory obligations:** firms should develop specific policies addressing the use of generative AI.

ii. **State Bar of California**

1. The State Bar of California issued "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law," a document that describes itself as guiding principles rather than best practices and that demonstrates how to comply with lawyers' professional responsibility obligations while using generative AI products.

iii. **Florida Bar**

1. The Florida Bar issued an advisory ethics opinion in January 2024 also giving guidance on the use of generative AI in the practice of law, with specific discussions of appropriate billing for the use of generative AI and use of generative AI chatbots.

iv. **New Jersey Supreme Court**

1. The New Jersey Supreme Court issued preliminary guidelines on the use of artificial intelligence by New Jersey lawyers.

2. **Rule 4.2 still raises frequent questions and issues**.

The VSB issued LEO 1890 as a compendium opinion to address the frequent and disparate questions raised by the facially innocuous prohibition on lawyer communications with a represented party. The Rule continues to generate questions as to its application in various scenario.

Ethics Counsel gives the following guidance on the limits on assisting a client with communication with a represented opposing party under Rule 4.2

a. Comment 4 to Rule 4.2 provides that "parties to a matter may communicate directly with each other;" however, a lawyer is not permitted to do through their client what the lawyer could not do directly (Rule 8.4(a)). What is the line between permissible advice to a client about a communication that they are unquestionably allowed to have and impermissible use of the client as an intermediary to have a communication that the lawyer is unquestionably not allowed to have?

b. LEO 1890 concludes that 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." That general rule still leaves a great deal of nuance around what, if any, guidance the lawyer can give to the client without crossing the line into improperly scripting the communication.

c. The DC Bar issued a recent opinion, Ethics Opinion 385, interpreting their comment which includes the phrase "a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule." The ABA Model Rules contain similar language in their comments, although as stated above, Virginia does not. This language allows DC and other model rules jurisdictions to take a somewhat more aggressive stance on these issues than Virginia rules and opinions permit.

d. This paragraph from the DC opinion provides good advice even under the Virginia rules and interpretation:

    i. "The lawyer may not, however, attempt to script the communication or coach the client to handle the communications as the lawyer would. The point of encouraging the parties to speak directly to one another is to use the dynamics between them, and their own voices, to find common ground. When the lawyer's level of assistance in preparing for these communications turns the client into the lawyer's surrogate, it has gone too far."

e. The DC opinion also reminds lawyers that even when the parties engage in direct communication to attempt to resolve a matter, the lawyer cannot prepare binding legal documents, including contracts or settlement agreements, for the client to present to the opposing party. Any legal document must be sent to opposing counsel.

f. The bottom line in Virginia is that a lawyer cannot direct the client to contact a represented party and cannot direct or script any communication that the parties initiate on their own but can give general guidance about the subject of any communication if the client initiates the communication herself. See LEO 1890 (citing LEO 1755).

3. Joint Representations raise multiple issues, including the impact on assessing duties to a former client.

Rule 1.9 conflicts after a joint representation – representing one spouse in a divorce or change to estate plan when the lawyer previously prepared both spouses' estate plans

a. Satisfied clients usually return to former counsel when new matters arise. This is generally a good thing. However, potential conflicts of interest must be considered where the prior representation was part of joint representation of spouses. Frequently, an attorney will have done estate planning, bankruptcy or real estate work for a couple only to be contacted by one of the spouses when the marriage is dissolving. Each of these new representations must be analyzed regarding two rules: 1.6 governing client confidentiality and 1.9 regarding former clients. Rule 1.9(a) prohibits an attorney from representing a party adverse to a former client in a matter substantially related to the prior representation. This prohibition is often not the hindrance to accepting these new representations, as while the divorce certainly is adverse to the former client, it is not usually substantially related to the prior matter. Nevertheless, Rule 1.9(c), together with Rule 1.6, may be the source of a conflict in many of these instances. Rule 1.9(c) prohibits a lawyer from using confidential information obtained during a prior representation to the disadvantage of the former client. Attorneys must consider whether any of the information obtained during the first matter would be pertinent in the divorce. If such information was received, then under Rules 1.6 and 1.9(c), the attorney may only represent one spouse in the divorce if the other spouse consents to the use of that information against him or her.

b. When the subsequent representation is not a divorce but instead a change to one spouse's estate plan, there is almost certainly a conflict. In that situation, the lawyer will be undoing the work previously done in the joint representation and taking action that is adverse to one spouse in a substantially related matter to the original joint representation. Because the conflict arises under Rule 1.9(a), there is no need to even analyze the possibility of confidential information creating a conflict under Rule 1.9(c). The one exception to this general conflict is that if the spouses' estate plans benefited other people, rather than each other, from the outset, a change to one spouse's plan may not be adverse to the other since the other spouse never had any interest in the original estate plan. However, in many cases there will still be a conflict because the spouses jointly agreed on the plan and may have each crafted their plan to complement the other spouse's plan; in

that case, a change to one spouse's plan is still adverse to the original joint representation even if it does not directly affect the legal rights of the other spouse. Many of these conflicts can be resolved with informed consent from both spouses pursuant to Rule 1.7(b).

c. Other states and authorities take a different view of this conflict – see ABA Opinion 05-434 and South Carolina Ethics Advisory Opinion 23-04, among others. The South Carolina opinion concludes that the matters are not substantially related when the lawyer drafted wills and powers of attorney for a couple ten years ago, and now is asked by husband to change his will to remove his wife as primary beneficiary. The basis for this conclusion is that the documents prepared 10 years ago effected husband's plans at that time, and the new documents are based on new facts and the present intentions of the husband. This conclusion does not seem consistent with Virginia's comment 2 to Rule 1.9, which among other things, says that, "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Preparing joint estate documents between two spouses, and later changing the documents on behalf of one spouse to significantly alter the estate plan, is a quintessential example of changing sides in the matter and therefore is both substantially related and materially adverse.

d. The ABA opinion concludes that it is not always a conflict for a lawyer to prepare documents for one client disinheriting another current client, but even that conclusion has significant caveats. For example, the opinion says that there can be a conflict if the testator asks for advice about whether to disinherit the family member/lawyer's other client. More significantly, the opinion suggests that there can be a conflict when the lawyer has done family estate planning for multiple members of the family and the actions taken on behalf of the testator would disrupt agreed-upon family estate planning objectives. In that situation, the lawyer's duties to other family members may materially limit the lawyer's representation of the testator. The ABA opinion does not analyze the conflict that exists when a lawyer undoes work that the lawyer previously did for a client, but that is also a major consideration in the situation described by the opinion.

4. <u>The changing work environment and practice arrangements gets attention from the ABA.</u>

Office sharing and when that crosses the line into an association – ABA Formal Opinion 507

a. ABA Formal Opinion 507 addresses ethical considerations when lawyers are sharing offices, including issues involving confidentiality, conflicts, supervision, and communications/advertising.

b. Confidentiality

i. Physical and technological set-up must protect confidentiality between separate lawyers/practices; at a minimum, confidential information should not be discussed or physically placed in shared areas. Depending on the specific setting, some additional considerations identified by the ABA include: separate waiting areas, refraining from leaving client files in shared spaces, installing privacy screens on monitors and locking computers when not in use, clean desk policies, and regular training and reminders to staff of the need to protect confidentiality. If using shared filing space or shared computer or phone systems, implement appropriate security measures, staff training, and client disclosures if necessary.

ii. Sharing staff may be possible but it requires further safeguards to protect confidential information, including staff training, maintaining appropriate policies and procedures, and ongoing staff supervision under Rule 5.3. See LEO 1800 for additional information on supervising nonlawyer staff to preserve confidential information.

c. Conflicts

i. Rule 1.10 Comment 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 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.

ii. ABA opinion: Office sharing lawyers who do not protect the confidentiality of their respective clients, regularly consult with each other on matters, share staff who have access to client information, mislead the public about their identity and services, or otherwise fail to keep their practices separate, are more likely to be treated as “associated in a firm” for conflict imputation purposes.

1. When representing opposing parties in the same lawsuit or transaction, depending on the nature of the office sharing arrangement and the nature of the representation, Rules 1.4 and 1.7 may require the lawyers to disclose the details of the office sharing arrangement, including their efforts to maintain confidentiality, to their clients and obtain informed consent. Shared staff should not possess/have access to information from both adverse clients.

2. Potential pitfalls range from inadvertent disclosures of information within the office to both parties arriving for meetings at the same time.

d. Consultations between office sharing lawyers – confidentiality and conflicts

i. "Occasional" consultations or assistance does not result in the lawyers being associated in a firm per Comment 1 to Rule 1.10. However, if in an occasional consultation, one lawyer intentionally or inadvertently discloses confidential information about a client, the other lawyer may have a conflict in representing a different client in a matter in which that confidential information would be relevant. The ABA analogizes this to information gained during a consultation with a prospective client and the associated conflict risks.

ii. Reminder that the lawyer seeking a consultation with another lawyer outside of the firm can protect confidentiality by discussing the situation hypothetically rather than discussing actual facts and information about the client. See Comment 5a to Rule 1.6.

e. Advertising/holding out

i. Rule 7.1 Comment 6: Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

ii. Office sharing lawyers must ensure that the public is not misled about the nature of the relationship and whether they are part of a firm. Lawyers who are office sharing should use separate business cards, letterhead, and other advertisements, and any office signs or other similar listings should accurately reflect the separate practices/firms. When it's not possible to have separate signs or entrances, lawyers must take reasonable measures to

ensure that clients are not confused about their associations with other lawyers in the same space.

5. ABA amends Rule 1.16 and client due diligence

a. In 2023, the ABA amended Rule 1.16 and its comments to address lawyers' obligations to detect and prevent involvement in unlawful activities. The amendments develop from the ABA's longstanding efforts to address lawyers' involvement in money laundering and corruption, which are in part an effort to avoid federal regulation of lawyers in this context. The ABA report discusses the attempts at federal anti-money laundering regulation, and the ABA's various responses to that, in detail.

b. The amendments have not, to my knowledge, been adopted by any state yet, but the VSB is carefully monitoring any developments.

c. The key change to Rule 1.16 adds a sentence to Rule 1.16(a), directing that "A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation." The change to 1.16(a) also adds a paragraph (a)(4), requiring the lawyer to decline or withdraw from representation if "the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct." (Analogous provisions in the Virginia RPCs are 1.2(c) and (e).)

d. New language in the comments reminds lawyers that the obligation to inquire into and assess facts and circumstances continues throughout the representation and that the lawyer must reassess if circumstances do change. The comments also explain that the obligation is informed by the risk that the client is using or will use the lawyer's services to commit or further a crime or fraud and gives examples for lawyers to consider when making that risk-based assessment, as well as resources to consult when making that assessment.

e. The best interpretation of these amendments is that they simply consolidate and clarify obligations that lawyers already have under the rules, including Rules 1.2 and 1.16. However, some commentators have argued that this represents a significant expansion of a lawyer's duties, especially because the language, while targeted at money laundering and corruption concerns, is not limited to those circumstances. The duty to inquire and assess is also not qualified with any kind of reasonableness standard, unlike many other duties under the ethics rules.

6. <u>VSB seeks amendment to address non-refundable fees</u>.

There are few "bright lines" when addressing the ethics surrounding fee arrangements. In 2023, the VSB issued LEO 1899 giving guidance on the use of flat **fee** arrangements and the use of conversion clauses when "flat fee" representations terminate before the conclusion of the matter.

The VSB has just issued for public comment a rule amendment that would formalize a bright line rule. The proposed amendment adds a new subsection g to Rule 1.5, providing that:

g. *Nonrefundable advanced legal fees are prohibited.*

The proposed amendments also add two new comments:

Nonrefundable Fee

[10] *A nonrefundable advanced legal fee compromises the client's unqualified right to terminate the lawyer-client relationship because the right to terminate the representation would be negatively affected if the client would still risk paying for services not provided. Further, retaining a nonrefundable fee after being discharged by the client before the fee is earned violates the lawyer's responsibility to refund any unearned fee upon termination of the representation. An unearned fee is per se unreasonable and therefore charging an unearned nonrefundable fee violates Rule 1.5(a). See LEO 1606.*

[11] A retainer paid to insure the lawyer's availability for future legal services and/or as consideration for the lawyer's unavailability to a potential adverse party is not an advanced legal fee and is earned when paid. The retainer must be charged solely for these purposes and not as prepayment for legal services to be rendered in the future.

Note the continued emphasis by the VSB that the term "retainer" is a term of art frequently misused and that lawyers should be addressing what is commonly referred to a "retainer" as advanced legal fees.

7. The protection and control of the attorney client privilege when representing a <u>corporate entity raises the age-old question: who is my client?</u>

The United States Supreme Court has held that in the corporate world, the control of the privilege passes with the control of a corporate entity. *Commodity Futures Trading Comm. v. Weintraub*, 471 U.S. 343 (1985). *Weintraub* arose in the context of a bankruptcy proceeding in

which the bankruptcy trustee for a former subsidiary was held to control confidential communications occurring prior to the bankruptcy filing. *Id.* However, the reasoning of the case has extended well beyond the bankruptcy setting and the rights of bankruptcy trustees assuming control of a debtor organization. And the opinion anticipated a broader application:

> New managers installed as a result of a takeover merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers . . . .

Weintraub, 471 U.S. at 349. The United States District Court for the Eastern District of Virginia has addressed the issue in the context of grand jury subpoenas and broadly held as a general principle that when control of a corporation passes, the authority to assert and waive the corporation's attorney-client privilege also passes. *In re Grand Jury Subpoenas,* 734 F. Supp. 1207, 1211 (E.D. Va. 1990), *aff'd in part and vacated in part, 902, F.2d 244 (4th Cir. 1990)*.

In a stock sale, the general rule is that control of the privilege passes to the acquiring entity. Significantly, this includes control regarding the advice and communications *on the very transaction* that passed control of the subsidiary. *Great Hale Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP,* 80 A.3d 155 (Del. Ch. 2013); *New Spring Mezzanine II v. Haze*, (E.D. Pa. 2014); *Novak v. Raytheon*, (Superior Court Mass. 2014) (surviving corporation controls pre-merger communications). Not all courts have accepted or extended the principle to apply to communications and negotiations of the transaction at issue.

Generally, a transfer of assets – as opposed to a stock sale – does not effectuate a transfer of the privilege. *See In Re Grand Jury Subpoenas*, 734 F. Supp. 1207, 1210, n.3 (E.D. Va. 1990). However, some courts have rejected bright line rules and looked to the "practical consequences" of a transaction, or the scope of rights transferred by the sale and determined that asset sales did effectuate a transfer of the control over the attorney-client privilege. *See Coffin v. Bowater, Inc.,*

No. 03-277-P-C, 2005 U.S. Dist. Lexis 9395 (D. Me. 2005); *Parus Holdings, Inc. v. Banner & Whitcoff, Ltd.,* 585 F. Supp. 2d 995, 1002-03 (N.D. Ill. 2008). Still other courts have reviewed asset sale transactions and determined that certain privileged communications were transferred as part of the sale while other communications – notably those dealing with the acquisition at issue – remain privileged. *See Orbit I Communications, Inc. v. Memorex Corp.,* 255 F.R.D. 98 (S.D.N.Y. 2008).

Courts have recognized that parties may contract around the potentially dire consequences of giving up control over the attorney-client privilege. *See, In Re Grand Jury*, 734 F. Supp. 1207 (E.D. Va. 1990); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc*. 689 F.Supp. 841 (N.D. Ill. 1988). And careful counsel should consider including contractual provisions addressing:

- the post-transaction control of communications and documents relating to the transaction;
- the contractual agreement addresses the privilege with respect to both in-house and outside counsel;
- the effect of post-transaction possession of privileged information and remedial steps if privileged communications remain under the physical control of the former subsidiary (*i.e.* on company servers or email account).

8. ABA Issues Formal Opinion 508 – The Ethics of Witness Preparation

a. In August 2023, the ABA issued Formal Opinion 508 to delineate what is necessary and proper when preparing a witness to testify and what is ethically prohibited.
b. Preparing a client or witness to testify in a deposition or court proceeding is a common part of legal practice. Indeed, adequately preparing a client or witness is an affirmative ethical obligation and failure to do so would amount to an ethics violation in most cases. *See e.g*., Model Rules 1.1 (Competence) & cmt. [5] (addressing the need for thoroughness and preparation) and 1.3 (Diligence).
c. Ethically Permissible Preparatory Conduct:
    i. A lawyer may remind the witness that they will be under oath, emphasize the importance of telling the truth, explain that telling the truth can include a truthful answer of "I do not recall," explain case strategy and procedure, including the nature of the testimonial process or

the purpose of the deposition, suggest proper attire, and appropriate demeanor and decorum, provide context for the witness's testimony, inquire into the witness's probable testimony and recollection, identify other testimony that is expected to be presented and explore the witness's version of events in light of that testimony, review documents or physical evidence with the witness, including using documents to refresh a witness's recollection of the facts, identify lines of questioning and potential cross-examination, suggest choice of words that might be employed to make the witness's meaning clear, tell the witness not to answer a question until it has been completely asked, emphasize the importance of remaining calm and not arguing with the questioning lawyer, tell the witness to testify only about what they know and remember and not to guess or speculate, familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information. ABA Formal Opinion 508 notes that "there is a fair amount of latitude in the types of lawyer-orchestrated preparatory activities that are recognized as permissible."

d. Unethical Pre-Testimony Coaching

    i. A lawyer violates ethical obligations by counseling a witness to give false testimony, assisting a witness in offering false testimony, advising a client or witness to disobey a court order regulating discovery or trial process, offering an unlawful inducement to a witness, or procuring a witness's absence from a proceeding.

    ii. Model Rule 3.4(b) prohibits a lawyer from advising or assisting a witness to give false testimony. This goes beyond simply instructing a witness to fabricate testimony (*e.g.,* telling a witness to "downplay" the number of times the witness and lawyer met to prepare for trial).

    iii. Compensating lay witnesses for testimony, donating money to a witness's favorite charity, or incentivizing a witness not to testify are unethical inducements.

e. Unethical Conduct During Witness Testimony

    i. At a minimum, attempting to manipulate ongoing witness testimony is likely conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d).

    ii. Classic examples of prohibited conduct include winking at a witness during his or her testimony, kicking a deponent under the table, passing notes, and whispering to a witness mid-testimony.

iii. Witness coaching also includes speaking objections or suggestive objections intended to coach the witness and impede the opposing attorney's effort to obtain discovery. The Rules of the Supreme Court of Virginia and the Federal Rules of Civil Procedure both require that objections be stated "concisely in a nonargumentative and nonsuggestive manner." *See* Va. R. Sup. Ct. 4:5(c)(2); Fed. R. Civ. P. 30(c)(2).

iv. Midcourse testimonial influence or "damage control" during a break to coach a witness is also improper.

f. Misconduct in Remote Settings

i. Remote communication platforms offer an opportunity for lawyers to surreptitiously signal or direct a witness on what to say or not say in proceedings.

ii. Texting a witness while testifying is improper. Off-camera activity by a lawyer during a remote deposition or trial to give a witness answers or to signal a witness with gestures, winks, nods, notes, etc. is also improper.

iii. ABA Formal Opinion 508 suggests systemic precautions for preventing and detecting problematic remote coaching, including skillful cross-examination, court orders directing uninterrupted testimony, motions to terminate or limit a deposition or for sanctions, inclusion of protocols in remote deposition orders, scheduling orders and discovery plans, administrative orders governing the conduct of remote depositions, remote protocols in trial plan and pretrial orders, development of guidelines and best practices for conduct in remote proceedings, and professionalism/civility codes.