

VIRGINIA RULES OF PROFESSIONAL CONDUCT

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PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients or a neutral third party, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

A lawyer may perform various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, to a limited extent, as a spokesperson for each client. As third party neutral, a lawyer represents neither party, but helps the parties arrive at their own solution. As evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.” Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

These Rules follow the same format as the current American Bar Association Model Rules of Professional Conduct (“*ABA Model Rules*”), rather than the former American Bar Association Model Code of Professional Responsibility (“*ABA Model Code*”), or the former *Virginia Code* of Professional Responsibility (“*Virginia Code*”). Although interpretation of similar language in the *ABA Model Rules* by other states’ courts and bars might be helpful in understanding Virginia’s Rules, those foreign interpretations should not be binding in Virginia.

The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

These Rules apply to all lawyers, whether practicing in the private or the public sector. However, under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General and the commonwealth attorneys in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

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

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

The Preamble and this note on Scope provide general orientation. The text of each Rule and the following Terminology section are authoritative and the Comments accompanying each Rule are interpretive.

Terminology

“Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Firm” or “law firm” denotes a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization. *See* Comment, Rule 1.10.

“Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

“Partner” denotes a member of a partnership or a shareholder or member of a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.

“Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

“Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

“Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Should” when used in reference to a lawyer's action denotes an aspirational rather than a mandatory standard.

“Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

CROSS REFERENCE TABLE: VIRGINIA RULES OF PROFESSIONAL CONDUCT TO CODE OF PROFESSIONAL RESPONSIBILITY

NOTE: Please observe the symbol (***) for rules which have no direct counterpart in the Virginia Code of Professional Responsibility. While often the case, a cross-reference to a provision in the Code of Professional Responsibility does not necessarily mean that the cited provision is identical or even substantially similar to a particular rule. A citation may simply mean that a provision in the Code of Professional Responsibility applies to the same issue covered by the rule. In some instances, an area covered by a rule was addressed in an Ethical Consideration (EC), but not a Disciplinary Rule (DR), and, therefore, only the EC is cited.

Virginia Rules of Professional Conduct	Issue or Topic	Virginia Code of Professional Responsibility
1.1	Competence	DR 6-101 (A)(2)
1.2 (a)	Scope of Representation	*** EC 7-7; EC 7-8
1.2 (b)	” ” ” ”	DR 7-101 (B)(1)
1.2 (c)	” ” ” ”	DR 7-102 (A)(7); DR 7-102 (A)(6); DR 7-105 (A); EC 7-5
1.2 (d)	” ” ” ”	***
1.2 (e)	” ” ” ”	DR 2-108 (A)(1)
1.3 (a)	Diligence	DR 6-101 (B)
1.3 (b)	” ” ” ”	DR 7-101 (A)(2)
1.3 (c)	” ” ” ”	DR 7-101 (A)(3)
1.4 (a)	Communication	DR 6-101 (C)
1.4 (b)	” ” ” ”	*** EC 7-8; EC 9-2
1.4 (c)	” ” ” ”	DR 6-101 (D)
1.5 (a)	Fees	DR 2-105 (A); EC 2-20
1.5 (b)	Contingent Fees	DR 2-105 (C); EC 2-22
1.5 (c)	Fee Splitting	DR 2-105 (D)
1.5 (d)	Contingent Fees	DR 2-105 (C)
1.5 (e)	Fee Sharing	DR 2-105 (D)
1.5 (f)	” ” ” ”	***
1.6 (a)	Confidentiality	DR 4-101 (A), (B)
1.6 (b)(1)	Disclosure Required By Law or Court Order	DR 4-101 (C)(2)
1.6 (b)(2)	Disclosure to Protect Lawyer’s Legal Rights	DR 4-101 (C)(4)
1.6 (b)(3)	Disclosure of Client Fraud on Third Party	DR 4-101 (C)(3)
1.6 (b)(4)	Disclosure of Client Information for Attorney’s Death or Disability	***
1.6 (b)(5)	Disclosure of Client Information for LOMAP	***
1.6 (b)(6)	Disclosure of Client Information to Outside Auditor	*** EC 4-3
1.6 (c)(1)	Disclosure of Client’s Intent to Commit Crime	DR 4-101 (D)

1.6 (c)(2)	Disclosure of Client Fraud on Tribunal	DR 4-101 (D)
1.6 (c)(3)	Reporting Misconduct of Another Attorney	***
1.7 (a), (b)	Conflict of Interest	DR 5-105 (A), (C)
1.8 (a)	Business Transaction With Client	DR 5-104 (A)
1.8 (b)	Improper Use of Client Confidences or Secrets	DR 4-101 (B)(3)
1.8 (c)	Client Gifts to Lawyer	DR 5-104 (B)
1.8 (d)	Literary Rights in Subject Matter of Representation	*** EC 5-4
1.8 (e)	Financial Assistance to Client	DR 5-103 (B)
1.8 (f)	Nonclient Paying Lawyer's Fee	DR 5-106
1.8 (g)	Aggregate Settlements	DR 5-107
1.8 (h)	Limitation of Malpractice Liability	DR 6-102 (A)
1.8 (i)	Interfamily Conflicts	***
1.8 (j)	Proprietary Interest in Client Matter	***
1.8 (k)	Imputation of Conflicts	***
1.9 (a)	Conflict of Interest: Former Client	DR 5-105 (D)
1.9 (b)	” ” ” ”	***
1.9 (c)	” ” ” ”	***
1.10 (a)–(e)	Imputed Disqualification	*** DR 5-105 (E)
1.11 (a)	Public Officials: Conflicts	DR 8-101 (A)
1.11 (b)	” ” ” ”	DR 9-101 (B)
1.11 (c)	” ” ” ”	***
1.11 (d)	” ” ” ”	***
1.11 (e)	” ” ” ”	***
1.11 (f)	” ” ” ”	***
1.12 (a)	Former Judge, Arbitrator or Mediator	DR 9-101 (A); EC 5-20
1.12 (b)	” ” ” ”	***
1.12 (c)	” ” ” ”	***
1.12 (d)	” ” ” ”	***
1.13	Organization as a Client	*** EC 5-18; EC 5-24
1.14	Client With Impairment	*** EC 7-11; EC 7-12
1.15 (a)	Safekeeping Property	DR 9-102 (A)
1.15 (b)	” ” ” ”	***
1.15 (c)	” ” ” ”	DR 9-102 (B)
1.15 (d)	” ” ” ”	***
1.15 (e)(1)	Recordkeeping Requirements for Trust Accounts	DR 9-103
1.15 (e)(2)	Recordkeeping Requirements for Lawyers Serving as Fiduciaries	***

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1.15 (f)	Accounting Procedures	DR 9-103 (B)
1.16 (a)	Terminating or Declining Representation	DR 2-108 (A)
1.16 (b)	” ” ” ”	DR 2-108 (B)
1.16 (c)	” ” ” ”	DR 2-108 (C)
1.16 (d)	” ” ” ”	DR 2-108 (D)
1.16 (e)	Delivery of Former Client’s File	***
1.17	Sale of a Law Practice	*** EC 4-6
2.1	Lawyer as Advisor	*** EC 7-8
2.3	Lawyer as Evaluator	*** EC 5-20
2.10	Third Party Neutral	***
2.11	Mediator	***
3.1	Meritorious Claims	DR 7-102 (A)(1), (2)
3.3 (a)(1)	Candor Toward Tribunal	DR 7-102 (A)(5)
3.3 (a)(2)	” ” ” ”	DR 7-102 (A)(3)
3.3 (a)(3)	Controlling Legal Authority	*** EC 7-20
3.3 (a)(4)	False Evidence	DR 7-102 (A)(4)
3.3 (b)	” ” ” ”	***
3.3 (c)	Ex Parte Proceedings	***
3.3 (d)	Reporting Third Party Fraud on Tribunal	DR 7-102 (B)
3.4 (a)	Fairness To Opposing Party & Counsel; Obstructing Access to Evidence	DR 7-108 (A)
3.4 (b)	Secreting Witnesses	DR 7-108 (B)
3.4 (c)	Compensating Witnesses	DR 7-108 (C); EC 7-25
3.4 (d)	Disregarding Court Rules or Orders	DR 7-105 (A)
3.4 (e)	Discovery Abuse	***
3.4 (f)	Improper Trial Conduct	DR 7-105 (C)(1)-(4)
3.4 (g)	Disruptive Rule Violations	DR 7-105 (C)(5)
3.4 (h)	Discouraging Witnesses	***
3.4 (i)	Threatening Criminal or Disciplinary Action	DR 7-104
3.4 (j)	Harassing or Injuring Others	DR 7-102 (A)(1)
3.5 (a), (b), (c)	Communications With Jurors	DR 7-107 (A)-(F), ***
3.5 (d)	Influencing Judges	DR 7-109 (A)
3.5 (e)	Ex Parte Communication With Judge	DR 7-109 (B)
3.5 (f)	Disruptive Conduct Toward Tribunal	***
3.6 (a), (b)	Trial Publicity	DR 7-106
3.7 (a)	Lawyer as Witness	DR 5-101 (B); DR 5-102 (A)
3.7 (b)	” ” ” ”	DR 5-102 (B)
3.7 (c)	” ” ” ”	***

3.8 (a)	Additional Responsibilities of a Prosecutor	DR 8-102 (A)(1)
3.8 (b)	” ” ” ”	DR 8-102 (A)(1)
3.8 (c)	” ” ” ”	DR 8-102 (A)(2)
3.8 (d)	” ” ” ”	DR 8-102 (A)(3)
3.8 (e)	” ” ” ”	DR 7-106 (B)
4.1 (a)	Truthfulness in Statements to Others	DR 7-102 (A)(5)
4.1 (b)	” ” ” ”	*** DR 7-102 (A)(3); DR 7-102 (A)(7)
4.2	Ex Parte Communication With Represented Person	DR 7-103 (A)(1)
4.3 (a)	Dealing With Unrepresented Persons	DR 7-103 (B)
4.3 (b)	” ” ” ”	DR 7-103 (A)(2)
4.4	Respect for Rights of Third Persons	*** DR 7-102 (A)(1); DR 7-105 (C)(2); DR 7-107 (C); DR 7-107 (D)
5.1	Responsibilities of a Supervising Lawyer	*** DR 1-103 (A); DR 4-101 (E); DR 7-106 (B)
5.3 (a), (b)	Nonlawyer Assistants	DR 3-104 (C); DR 4-101 (E)
5.3 (c)	” ” ” ”	***
5.4 (a)	Sharing Fees With Nonlawyer	*** DR 3-102 (A)
5.4 (b)	Partnership With Nonlawyer	DR 3-103 (A)
5.4 (c)	Avoiding Influence By Non-clients	DR 5-106(B)
5.4 (d)	Professional Corporations Owned by Nonlawyers	DR 5-106 (C)
5.5 (a)(1)	Unauthorized Practice of Law	*** EC 3-9
5.5 (a)(2)	” ” ” ”	DR 3-101 (A)
5.5 (b)	Employment of Suspended or Disbarred Lawyers	DR 3-101 (B)
5.5 (c)	” ” ” ”	DR 3-101 (C)
5.6 (a), (b)	Agreements Restricting Practice of Law	DR 2-106
6.1	Voluntary Pro Bono Publico Service	*** ECs 2-26, 2-27, 2-28, 2-29, 2-30, 2-31, 2-32, 2-33, 2-34
6.2	Accepting Appointments	*** EC 2-38; EC 2-39
6.3	Membership in Legal Services Organization	***
6.5	Nonprofit Limited Legal Services	***
7.1	Communications Concerning A Lawyer's Services	DR 2-101
7.2	Advertising	DR 2-101, ***
7.3	Recommendation or Solicitation of Professional Employment	DR 2-103
7.4 (a), (b)	Communication of Fields of Practice & Certification	DR 2-104 (A), (B)

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7.4 (c)	” ” ” ”	***
7.4 (d)	” ” ” ”	***
7.5	Firm Names & Letterheads	DR 2-102
8.1	Bar Admission & Disciplinary Matters	DR 1-101
8.2	Judicial Officials	*** EC 8-6
8.3 (a)	Reporting Professional Misconduct	DR 1-103 (A)
8.3 (b)	Reporting Professional Misconduct	***
8.3 (c)	” ” ” ”	***
8.3 (d)	” ” ” ”	***
8.3 (e)	Reporting Lawyer’s Own Professional Misconduct	***
8.4 (a)	Misconduct	DR 1-102 (A)(1)
8.4 (b)	” ” ” ”	DR 1-102 (A)(3)
8.4 (c)	” ” ” ”	DR 1-102 (A)(4)
8.4 (d)	” ” ” ”	DR 9-101 (C)
8.4 (e)	” ” ” ”	EC 7-31, EC 9-1
8.5 (a)	Disciplinary Authority; Choice of Law	DR 1-102 (B)
8.5 (b)	” ” ” ”	***

CROSS REFERENCE TABLE: VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY TO VIRGINIA RULES OF PROFESSIONAL CONDUCT

Virginia Code of Professional Responsibility (DR)	Issue or Topic	Virginia Rule of Professional Conduct
DR 1-101	Bar Admissions or Renewal	Rule 8.1
DR 1-102	Misconduct	Rule 8.4
DR 1-103	Reporting Professional Misconduct	Rule 8.3
DR 2-101	Publicity and Advertising	Rule 7.1, 7.2
DR 2-102	Professional Letterheads, Offices, Notices	Rule 7.5
DR 2-103	Recommendation or Solicitation of Employment	Rule 7.3
DR 2-104	Specialists; Limitation of Practice	Rule 7.4
DR 2-105	Fees	Rule 1.5
DR 2-106	Agreements Restricting Practice of Law	Rule 5.6
DR 2-107	Acceptance of Employment	***
DR 2-108	Terminating Representation	Rule 1.16
DR 3-101	Aiding Unauthorized Practice of Law	Rule 5.5 (a)(2)
DR 3-102	Dividing Fees With a Nonlawyer	Rule 5.4 (a)
DR 3-103	Forming Partnership With a Nonlawyer	Rule 5.4 (b), (d)
DR 3-104	Supervising Nonlawyer Personnel	Rule 5.3

DR 4-101	Preservation of Confidences & Secrets of a Client	Rule 1.6
DR 5-101 (A)	Personal Interests Affecting Professional Judgment	Rule 1.7 (b)
DR 5-101 (B)	Lawyer as Witness	Rule 3.7
DR 5-102 (A), (B)	” ” ” ”	” ” ” ”
DR 5-103 (A)	Acquiring Proprietary Interest in Subject Matter of Litigation	Rule 1.8 (d), Rule 1.8 (j)
DR 5-103 (B)	Financial Assistance to Client	Rule 1.8 (e)
DR 5-104 (A)	Business Transactions with Client	Rule 1.8 (a)
DR 5-104 (B)	Preparing Instrument in Which Lawyer Receives Gift	Rule 1.8 (c)
DR 5-105	Representing Multiple Clients Whose Interests Conflict	Rule 1.7
DR 5-106	Avoiding Influence by Persons Other Than Client	Rule 1.8 (f), Rule 5.4 (c)
DR 5-107	Settling Similar Claims of Clients	Rule 1.8 (g)
DR 6-101 (A)	Competence	Rule 1.1
DR 6-101 (B)	Promptness	Rule 1.3 (a)
DR 6-101 (C)	Communication	Rule 1.4 (a), (b)
DR 6-101 (D)	” ” ” ”	Rule 1.4 (c)
DR 6-102	Limiting Liability to Client	Rule 1.8 (h)
DR 7-101 (A)	Representing Client Zealously	Rule 1.3 (b), (c)
DR 7-101 (B)	Limitations on Zealous Representation	Rule 1.2 (b), (c)
DR 7-102 (A)	Representing Client Within Bounds of Law	Rule 3.1, Rule 3.3, Rule 3.4 (j), Rule 4.4
DR 7-102 (B)	Reporting Third Party Fraud on Tribunal	Rule 3.3 (d)
DR 7-103 (A)(1)	Communication with Persons Represented by Counsel	Rule 4.2
DR 7-103 (A)(2)	Advising Unrepresented Persons	Rule 4.3
DR 7-103 (B)	Dealing with Unrepresented Persons	Rule 4.3
DR 7-104	Threatening Criminal or Disciplinary Charges	Rule 3.4 (h)
DR 7-105 (A)	Trial Conduct: Disregarding Court Rule or Order	Rule 3.4 (d)
DR 7-105 (B)	Disclosing Representation to Court	***
DR 7-105 (C)	Trial Conduct	Rule 3.4
DR 7-106	Trial Publicity	Rule 3.6
DR 7-107	Communication With or Investigation of Jurors	Rule 3.5 (a)-(c)
DR 7-108	Contact With Witnesses	Rule 3.4
DR 7-109	Contact With Officials	Rule 3.5 (d), (e)

DR 8-101	Action as Public Official	Rule 1.11 (a)
DR 8-102	Special Responsibilities of a Prosecutor	Rule 3.8
DR 9-101	Avoiding Even the Appearance of Impropriety	Rule 1.11
DR 9-102	Preserving Identity of Funds and Property of Client	Rule 1.15
DR 9-103	Record Keeping Requirements	Rule 1.15

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

- [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
- [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
- [2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.
- [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.
- [4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. *See* also Rule 6.2.

Thoroughness and Preparation

- [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

- [6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

VIRGINIA CODE COMPARISON

Rule 1.1 is substantially similar to DR 6-101(A). DR 6-101(A)(1) provided that a lawyer “shall undertake representation only in matters in which . . . [t]he lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters.” DR 6-101(A)(2) also permitted representation in matters if a lawyer “associated with another lawyer who is competent in those matters.”

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* verbatim, but added the third paragraph of the Comment to make it clear that legal representation, in which a lawyer is expected to be competent, involves not only litigation but also negotiation techniques and strategies.

In addition, the Committee added the second sentence under Maintaining Competence Comment section to note Virginia’s Mandatory Continuing Legal Education requirements.

RULE 1.2 Scope of Representation

- (a) **A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**
- (b) **A lawyer may limit the objectives of the representation if the client consents after consultation.**
- (c) **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.**
- (d) **A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.**
- (e) **When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.**

COMMENT

Scope of Representation

- [1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer’s professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer’s scope of authority in litigation.

- [2-3] *ABA Model Rule* Comments not adopted.
- [4] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

- [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means

- [6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.
- [7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.
- [8] *ABA Model Rule* Comment not adopted.

Criminal, Fraudulent and Prohibited Transactions

- [9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
- [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. *See* Rule 1.16.
- [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.
- [12] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. *See* also Rule 3.4(d).

VIRGINIA CODE COMPARISON

Paragraph (a) has no direct counterpart in the Disciplinary Rules of the *Virginia Code*. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client...." EC 7-8 stated that "[I]n the final analysis, however, the ... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client.... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the

lawyer may withdraw from the employment.” DR 7-101(A)(1) provided that a lawyer “shall not intentionally ... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law.... A lawyer does not violate this Disciplinary Rule, however, by ... avoiding offensive tactics....”

With regard to paragraph (b), DR 7-101(B)(1) provided that a lawyer may, “with the express or implied authority of his client, exercise his professional judgment to limit or vary his client’s objectives and waive or fail to assert a right or position of his client.”

With regard to paragraph (c), DR 7-102(A)(7) provided that a lawyer shall not “counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.” DR 7-102(A)(6) provided that a lawyer shall not “participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.” DR 7-105(A) provided that a lawyer shall not “advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal ... but he may take appropriate steps in good faith to test the validity of such rule or ruling.” EC 7-5 stated that a lawyer “should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.”

Paragraph (d) had no counterpart in the *Virginia Code*.

With regard to paragraph (e), DR 2-108(A)(1) provided that a lawyer shall withdraw from representation if “continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules.” DR 9-101(C) provided that “[a] lawyer shall not state or imply that he is able to influence improperly ... any tribunal, legislative body or public official.”

COMMITTEE COMMENTARY

The Committee adopted this Rule as a more succinct and useful statement regarding the scope of the relationship between a lawyer and the client. However, the Committee moved the language of paragraph (b) of the *ABA Model Rule* to the Comment section styled “Independence from Client’s Views or Activities” since it appears more appropriate as a Comment than a Rule. Subsequent paragraphs were redesignated accordingly.

The Committee added the fourth sentence in Comment [1] requiring lawyers to advise clients of dispute resolution processes that might be “appropriate.”

In Comment [7], the Committee used the verb “shall” to match the mandatory standard of the *Virginia Code* and these Rules.

The amendments effective January 1, 2004, added present paragraph (d) and redesignated former paragraph (d) as present paragraph (e).

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.**
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.**
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.**

COMMENT

- [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer’s work load should be controlled so that each matter can be handled adequately.
- [2] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client’s needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client’s interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.
- [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not

affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

- [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.
- [5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."

Paragraphs (b) and (c) adopt the language of DR 7-101(A)(2) and DR 7-101(A)(3) of the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added DR 7-101(A)(2) and DR 7-101(A)(3) from the *Virginia Code* as paragraphs (b) and (c) of this Rule in order to make it a more complete statement about fulfilling one's obligations to a client. Additionally, the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy.

The amendments effective February 28, 2006, added Comment [5].

RULE 1.4 Communication

- (a) **A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.**
- (b) **A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**
- (c) **A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.**

COMMENT

- [1] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.
- [2- 4] *ABA Model Rule* Comments not adopted.
- [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client

of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

- [6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

- [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

VIRGINIA CODE COMPARISON

Rule 1.4(a) is substantially similar to DR 6-101(C) of the *Virginia Code* which stated: "A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered."

Paragraph (b) has no direct counterpart in the *Virginia Code*. EC 7-8 stated that a lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

Paragraph (c) is identical to DR 6-101(D) of the *Virginia Code*.

COMMITTEE COMMENTARY

The *Virginia Code* had already substituted the essential notion of paragraph (a) as DR 6-101(C), thus specifically addressing a responsibility omitted from the *ABA Model Code*. The Committee believed that paragraph (b) specifically addressed a responsibility only implied in the *Virginia Code* and that adding DR 6-101(D) as paragraph (c) made the Rule a more complete statement regarding a lawyer's obligation to communicate with a client. Additionally, the Committee added a new second paragraph to the Comment to remind lawyers of their continuing duty to help clients choose the most appropriate settlement process.

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.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:
- (1) in a domestic relations matter, except in rare instances; or
 - (2) for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the client is advised of and consents to the participation of all the lawyers involved;
 - (2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
 - (3) the total fee is reasonable; and
 - (4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.
- (f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

COMMENT

Basis or Rate of Fee

- [1] *ABA Model Rule* Comment not adopted.
- [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the amount, basis, or rate of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple letter, memorandum, receipt or a copy of the lawyer's customary fee schedule may be sufficient if the basis or rate of the fee is set forth.
- [3] *ABA Model Rule* Comment not adopted.

Terms of Payment

- [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this

does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

- [5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When considering whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. In any event, a fee should not be imposed upon a client, but should be the result of an informed decision concerning reasonable alternatives.

Contingent Fees in Domestic Relations Cases

- [6] An arrangement for a contingent fee in a domestic relations matter has been previously considered appropriate only in those rare instances where:
- (a) the contingent fee is for the collection of, and is to be paid out of (i) accumulated arrearages in child or spousal support; (ii) an asset not previously viewed or contemplated as a marital asset by the parties or the court; (iii) a monetary award pursuant to equitable distribution or under a property settlement agreement;
 - (b) the parties are divorced and reconciliation is not a realistic prospect;
 - (c) the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent;
 - (d) the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis; and
 - (e) the fee arrangement is fair and reasonable under the circumstances.

Division of Fee

- [7] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.
- [8] *ABA Model Rule* Comment not adopted.

Disputes over Fees

- [9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 2-105(A) required that a "lawyer's fees ... be reasonable and adequately explained to the client." The factors involved in assessing the reasonableness of a fee listed in Rule 1.5(a) are substantially similar to those listed in EC 2-20.

Paragraph (b) emphasizes the lawyer's duty to adequately explain fees (which appears in DR 2-105(A)) but stresses the lawyer's duty to disclose fee information to the client rather than merely responding to a client's request for information (as in DR 2-105(B)).

Paragraph (c) is substantially the same as DR 2-105(C). EC 2-22 provided that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee...."

With regard to paragraph (d), DR 2-105(C) prohibited a contingent fee in a criminal case. EC 2-22 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-105(D) permitted division of fees only if: "(1) The client consents to employment of additional counsel; (2) Both attorneys expressly assume responsibility to the client; and (3) The terms of the division of the fee are disclosed to the client and the client consents thereto."

There was no counterpart to paragraph (f) in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee believes that DR 2-105 placed greater emphasis than the *ABA Model Rule* on the Full Disclosure of Fees and Fee Arrangements to Clients and therefore added language from DR 2-105(A) to paragraph (a) and from DR 2-105(D)(3) to paragraph (e). The Comment to paragraph (d)(1) reflects the Committee's conclusion that the public policy concerns which preclude contingent fee arrangements in certain domestic relations cases do not apply when property division, support matters or attorney's fee awards have been previously determined. Paragraph (e) eliminates the requirement in the *Virginia Code* that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the *Virginia Code* was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

The amendments effective January 1, 2004, added paragraph (f).

RULE 1.6 Confidentiality of Information

- (a) **A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).**
- (b) **To the extent a lawyer reasonably believes necessary, the lawyer may reveal:**
- (1) **such information to comply with law or a court order;**
 - (2) **such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;**
 - (3) **such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;**
 - (4) **such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;**
 - (5) **such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;**
 - (6) **information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.**
- (c) **A lawyer shall promptly reveal:**

- (1) **the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;**
- (2) **information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or**
- (3) **information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.**

COMMENT

- [1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.
- [2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
- [2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.
- [2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.
- [3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.
- [3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.
- [4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

- [5] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

- [5a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.
- [5b] Compliance with Rule 1.6(a) might include fulfilling duties under Rule 1.14, regarding a client with an impairment.
- [5c] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.
- [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 confined to specified lawyers.
- [6a] Lawyers involved in insurance defense work that includes submission of detailed information regarding the client's case to an auditing firm must be extremely careful to gain consent from the client after full and adequate disclosure. Client consent to provision of information to the insurance carrier does not equate with consent to provide the information to an outside auditor. The lawyer must obtain specific consent to disclose the information to that auditor. Pursuant to the lawyer's duty of loyalty to the client, the lawyer should not recommend that the client provide such consent if the disclosure to the auditor would in some way prejudice the client. *Legal Ethics Opinion #1723, approved by the Supreme Court of Virginia, September 29, 1999.*

Disclosure Adverse to Client

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

Withdrawal

- [9] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).
- [9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

- [9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

- [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.
- [10a] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

- [11] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.
- [12] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct

- [13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(3) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.
- [14] Although paragraph (c)(3) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.
- [15-17] *ABA Model Rule* Comments not adopted.

Former Client

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

VIRGINIA CODE COMPARISON

Rule 1.6 retains the two-part definition of information subject to the lawyer’s ethical duty of confidentiality. EC 4-4 added that the duty differed from the evidentiary privilege in that it existed “without regard to the nature or source of information or the fact that others share the knowledge.” However, the definition of “client information” as set forth in the *ABA Model Rules*, which includes all information “relating to” the representation, was rejected as too broad.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal “confidences” unless the client first consented after disclosure.

Paragraph (b)(1) is substantially the same as DR 4-101(C)(2).

Paragraph (b)(2) is substantially similar to DR 4-101(C)(4) which authorized disclosure by a lawyer of “[c]onfidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.”

Paragraph (b)(3) is substantially the same as DR 4-101(C)(3).

Paragraph (b)(4) had no counterpart in the *Virginia Code*.

Paragraphs (c)(1) and (c)(2) are substantially the same as DR 4-101(D).

Paragraph (c)(3) had no counterpart in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added language to this Rule from DR 4-101 to make the disclosure provisions more consistent with current Virginia policy. The Committee specifically concluded that the provisions of DR 4-101(D) of the *Virginia Code*, which required broader disclosure than the *ABA Model Rule* even permitted, should be added as paragraph (c). Additionally, to promote the integrity of the legal profession, the Committee adopted new language as paragraph (c)(3) setting forth the circumstances under which a lawyer must report the misconduct of another lawyer when such a report may require disclosure of privileged information.

The amendments effective January 1, 2004, added present paragraph (b)(4) and redesignated former paragraphs (b)(4) and (5) as present (b)(5) and (6); in paragraph (c)(3), at end of first sentence, deleted “but only if the client consents after consultation,” added the present second sentence, and deleted the former last sentence which read, “Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney.”; added Comment [5b] and [6a]; rewrote Comment [13].

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.**

COMMENT

Loyalty to a Client

- [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.
- [2] *ABA Model Rule* Comment not adopted.
- [3] The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.
- [4] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See* Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.
- [5] *ABA Model Rule* Comment not adopted.
- [6] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.
- [7] *ABA Model Rule* Comment not adopted.
- [8] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation — specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

Conflict Charged by an Opposing Party

- [9] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Lawyer's Interests

- [10] A lawyer may not allow business or personal interests to affect representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. *See* Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.

Interest of Person Paying for a Lawyer's Service

- [11-12] *ABA Model Rule* Comment not adopted.

- [13] A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See* Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.
- [14–18] *ABA Model Rule* Comment not adopted.

Consultation and Consent

- [19] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.
- [20] Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.
- [21–22] *ABA Model Rule* Comment not adopted.

Conflicts in Litigation

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

Other Conflict Situations

- [26] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the

client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

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

Special Considerations in Common Representation

- [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.
- [30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.
- [31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.
- [32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(b).
- [33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.
- [34] *ABA Model Rule Comment* not adopted.
- [35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk

that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

VIRGINIA CODE COMPARISON

This Rule is similar to DR 5-101(A) and DR 5-105(C). DR 5-101(A) provided that “[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances.” DR 5-105(C) provided that “a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.”

Rule 1.7(b) clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the lawyer must believe that he can provide competent and diligent representation, that the representation must be lawful, and the representation must not involve asserting a claim on behalf of one client against another client in the same litigation or other proceeding before a tribunal. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that “it [be] obvious that [the lawyer] can adequately represent” the client, and was implicit in EC 5-2, which stated that a lawyer “should not accept proffered employment if his personal interests or desires may affect adversely the advice to be given or services to be rendered the prospective client.”

COMMITTEE COMMENTARY

Although there are few substantive differences between this Rule and corresponding provisions in the Virginia Code, the Committee concluded that the ABA Model Rule provides a more succinct statement of a general conflicts rule.

The amendments effective June 30, 2005, substituted entirely new paragraphs (a) and (b) for the former paragraphs (a) and (b); rewrote Comments [1], [4], [6], [8], [19], [23], [24] and [26]; added Comments [29] – [33].

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 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, provided the client remains ultimately liable for such costs and expenses; 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.

COMMENT

Transactions Between Client and Lawyer

- [1] 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.
- [2-5] *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).

[10] *ABA Model Rule* Comments not adopted.

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).

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 5-104(A) provided that a lawyer “shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure . . .” EC 5-3 stated that a lawyer “should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.”

Paragraph (b) is substantially similar to DR 4-101(B)(3) which provided that a lawyer should not use “a confidence or secret of his client for the advantage of himself, or a third person, unless the client consents after full disclosure.”

Paragraph (c) is substantially similar to DR 5-104(B) which stated that a lawyer “shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee.” EC 5-5 stated that a lawyer “should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Except in those instances in which the client is related to the donee, a lawyer may not prepare an instrument by which the client gives a gift to the lawyer or to a member of his family.”

Paragraph (d) has no direct counterpart in the *Virginia Code*. EC 5-4 stated that in order to avoid “potentially differing interests” a lawyer should “scrupulously avoid [literary arrangements with a client] prior to the termination of all aspects of the matter giving rise to the employment, even though [the lawyer's] employment has previously ended.”

Paragraph (e)(1) incorporates the provisions of DR 5-103(B), including the requirement that the client remain “ultimately liable” for such advanced expenses.

Paragraph (e)(2) has no direct counterpart in the *Virginia Code*, although DR 5-103(B) allowed a lawyer to advance or guarantee expenses of litigation as long as the client remained ultimately liable.

Paragraph (f) is substantially similar to DR 5-106(A)(1) and DR 5-106(B). DR 5-106(A)(1) stated: “Except with the consent of his client after full and adequate disclosure under the circumstances, a lawyer shall not . . . [a]ccept compensation for his legal services from one other than his client.” DR 5-106(B) stated that “[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.”

Paragraph (g) is substantially similar to DR 5-107, but also covers aggregated plea agreements in criminal cases.

The first portion of Paragraph (h) is essentially the same as DR 6-102(A), but the second portion of Paragraph (h) has no counterpart in the *Virginia Code*. The new provision allows in-house lawyers to arrange for the same indemnity available to other officers and employees, as long as their employers are independently represented in making the arrangement.

Paragraph (i) has no counterpart in the *Virginia Code*.

Paragraph (j) is substantially the same as DR 5-103(A).

Paragraph (k) had no counterpart in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added “for the advantage of himself or a third person” from DR 4-101(B)(3) to paragraph (b) as a further limitation on a lawyer’s use of information relating to representation of a client.

The Committee added a further time limitation to paragraph (d)’s restriction. Borrowing language from EC 5-4, the restriction on agreements giving a lawyer literary or media rights extends through the conclusion of “all aspects of a matter giving rise to the representation.”

In Rule 1.8(e)(1), the Committee retained the requirement in DR 5-103(B) that a client must “remain ultimately liable for [litigation] expenses.” However, the Committee adopted the limited exception for indigent clients that appears in Rule 1.8(e)(2).

After lengthy debate, the Committee adopted 1.8(h), which retains the general prohibition on lawyers prospectively limiting their malpractice liability to clients (which appeared in *Virginia Code* DR 6-102). However, the Committee added a limited exception that allows in-house lawyers to arrange for the type of indemnity that other officers and employees of entities may obtain. The Committee voted to insist that the client be independently represented in agreeing to any such arrangement.

In 1.8(i), the Committee adopted the *ABA Model Rule* approach, which permits lawyers who are members of the same nuclear family to represent clients adverse to each other, as long as both clients consent after full disclosure. The *Virginia Code* was interpreted to create a non-waivable *per se* conflict of interest in these circumstances. See LEO 190 (April 1, 1985).

The amendments effective January 1, 2004, in paragraph (c), added new first and second sentences; in current third sentence, deleted “as parent, child, sibling, or spouse” between the present words “lawyer” and “any substantial,” and substituted “unless the lawyer or other recipient of the gift” for “except where the client,” substituted “client” for “donee” and added the third sentence; added paragraph (k); in Comment [1], added the last sentence.

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.

COMMENT

- [1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.
- [2] The scope of a “matter” for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The 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.
- [3] The second aspect of loyalty to a client is the lawyer’s obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved and other lawyers may be subject to imputed disqualification under Rule 1.10. If a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs 1.9 (b) and (c) concerning confidentiality have been met.

Lawyers Moving Between Firms

- [4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.
- [4a] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.
- [4b] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the *Virginia Code*. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since “impropriety” is undefined, the term “appearance of impropriety” is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple

analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

- [5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. *See* Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm; and Rule 1.11(d) for restrictions regarding a lawyer moving from private employment to public employment.

Confidentiality

- [6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.
- [6a] Application of paragraph (b) depends on a situation’s particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.
- [7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6 and 1.9.

Adverse Positions

- [8] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client.
- [9] Disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. A waiver is effective only if there is full disclosure of the circumstances, including the lawyer’s intended role in behalf of the new client.
- [10] With regard to an opposing party’s raising a question of conflict of interest, *see* Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, *see* Rule 1.10.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially the same as DR 5-105(D), although the Rule requires waiver by both a lawyer’s current and former client, rather than just the former client.

There was no direct counterpart to paragraph (b) in the *Virginia Code*. Representation by a lawyer adverse to a client of a law firm with which a lawyer was previously associated was sometimes dealt with under the rubric of Canon 9 of the *Virginia Code* which provided: “A lawyer should avoid even the appearance of impropriety.”

There was no counterpart to paragraph (c) in the *Virginia Code*. The exception in the last clause of paragraph (c)(1) permits a lawyer to use information relating to a former client that is in the “public domain,” a use that also was not prohibited by the *Virginia Code* which protected only “confidences and secrets.” Since the scope of paragraphs (a) and (b) is much broader than “confidences and secrets,” it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

COMMITTEE COMMENTARY

The Committee believed that, in an era when lawyers frequently move between firms, this Rule provided more specific guidance than the implicit provisions of the Disciplinary Rules. However, the Committee added language to paragraph (a)

requiring consent of both present and former clients. Additionally, the Committee adopted broader language in paragraph (c) precluding the use of any information “relating to or gained in the course of” the representation of a former client, rather than precluding the use only of information “relating to” the former representation.

The amendments effective January 4, 2010, in Comment [5], added the reference to Rule 1.11(d) in the last sentence.

RULE 1.10 Imputed Disqualification: General Rule

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

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 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.
- [1a] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.
- [1b] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.
- [1c] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(b) and (c); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(d)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.
- [1d] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government

would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

- [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).
- [3–4] *ABA Model Rule* Comments not adopted.
- [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the *Virginia Code*. DR 5-105(E) provided that “[i]f a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner of his or his firm may accept or continue such employment.”

COMMITTEE COMMENTARY

The *ABA Model Code* contained a broadly inclusive imputation rule, prohibiting representation by a partner, associate, or any affiliated lawyer when a lawyer would be required to decline employment under any Disciplinary Rule. See *ABA Model Code* DR 5-105(D). The *Virginia Code* limited imputation to disqualification under DR 5-105. See *Virginia Code* DR 5-105(E). The Committee concluded that the provisions of the *ABA Model Rule* struck the appropriate balance between the confidentiality needs of clients and the professional needs of lawyers.

The amendments effective January 1, 2004, in paragraph (a), added the references to Rules 1.6 and 2.10(e), deleted the references to Rules 1.8(c) and 2.2; added paragraphs (d) and (e).

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

COMMENT

- [1] This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client. A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public.
- [2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.
- [3] *ABA Model Rule* Comments not adopted.
- [4] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The private client should be informed of the lawyer's prior relationship with a public agency at the time of engagement of the lawyer's services.

- [5] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.
- [6] Paragraphs (b)(1) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.
- [7] Paragraph (b)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.
- [8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.
- [9] Paragraphs (b) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

VIRGINIA CODE COMPARISON

Paragraph (a) is identical to DR 8-101(A).

Paragraph (b) is substantially similar to DR 9-101(B), except that the latter used the terms "in which he had substantial responsibility while he was a public employee." The Rule also requires consent of both a current client and the former agency.

Paragraphs (c), (d), (e) and (f) have no counterparts in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee believed that the *ABA Model Rule* provides more complete guidance regarding lawyers' movement between the public and private sectors. However, the Committee added the language of DR 8-101(A) as paragraph (a) in order to make this Rule a more complete statement regarding the particular responsibilities of lawyers who are public officials. Additionally, to make paragraph (b) consistent with similar provisions under Rule 1.9(a) and (b), the Committee modified the paragraph to require consent to representation by both the current client and the lawyer's former government agency.

The amendments effective January 1, 2004, rewrote the rule heading.

The amendments effective January 4, 2010, added present paragraph (e) and redesignated former paragraphs (e) and (f) as present paragraphs (f) and (g); deleted Comment [10].

RULE 1.12 Former Judge Or Arbitrator

- (a) **Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge, other adjudicative officer, arbitrator or a law clerk to such a person, unless all parties to the proceeding consent after consultation.**
- (b) **A lawyer shall not negotiate for 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 as a judge, other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.**
- (c) **If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:**
 - (1) **the disqualified lawyer is timely 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 parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.**
- (d) **An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.**

COMMENT

- [1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A (2), B (2) and C of the *Virginia Code of Judicial Conduct* provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those rules correspond in meaning.
- [2] Like former judges, lawyers who have served as arbitrators, may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their consent after consultation. Other law or codes of ethics governing these roles may impose more stringent standards of personal or imputed disqualification.
- [3] Although lawyers who serve as judges and arbitrators do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing their roles. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of paragraph (c) are met.
- [4] *ABA Model Rule* Comments not adopted.
- [5] Notice, including a description of the screened lawyer’s representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially similar to DR 9-101(A), which provided that a lawyer “shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.” Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There was no counterpart in the *Virginia Code* to paragraphs (b), (c) or (d).

With regard to arbitrators and mediators, EC 5-20 stated that “a lawyer [who] has undertaken to act as an impartial arbitrator or mediator ... should not thereafter represent in the dispute any of the parties involved.” DR 9-101(A) did not permit a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) was similar in effect and could be construed to permit waiver.

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* essentially verbatim for former judges and arbitrators since it clearly provides more complete guidance to judicial officials than DR 9-101(A). However, the committee chose not to extend these provisions to mediators and other third-party neutrals, as those roles are distinguishable.

The amendments effective January 1, 2004, in paragraph (c)(1), added the word “timely” between “is” and “screened”; in paragraph (c)(2), added “parties and any” between “the” and “appropriate” and substituted “them” for “it”; added Comments [2], [3], [5].

RULE 1.13 Organization as Client

- (a) **A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.**
- (b) **If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer**

shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking for reconsideration of the matter;
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.
- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

- [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.
- [2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.
- [3] The decisions of constituents of the organization ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Substantial justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

- [4] *ABA Model Rule* Comments not adopted.
- [5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

- [6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(c) can be applicable.
- [7–8] *ABA Model Rule* Comments not adopted.

Government Agency

- [9] The duty defined in this Rule applies to government organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Government lawyers, in many situations, are asked to represent diverse client interests. The government lawyer may be authorized by the organization to represent subordinate, internal clients in the interest of the organization subject to the other Rules relating to conflicts.

Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. *See* note on Scope.

Clarifying the Lawyer's Role

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

Dual Representation

- [12] Paragraph (e) recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's representation of both is controlled by the confidentiality and conflicts provisions of these Rules.

Derivative Actions

- [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

- [14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent the individual in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with non lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5 106(B) provided that a lawyer "shall not permit a person who ... employs ... him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

COMMITTEE COMMENTARY

The Committee adopted this Rule because it directly addresses matters only implicitly addressed in Ethical Considerations of the *Virginia Code*.

The amendments effective January 1, 2004, in paragraph (b)(1), inserted the word "for".

RULE 1.14 Client With Impairment

- (a) **When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.**
- (b) **When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.**
- (c) **Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.**

COMMENT

- [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacities often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.
- [2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.

Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] *ABA Model Rule* Comments not adopted.

[4] If the client has a legal representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If there is no legal representative, the lawyer should seek such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

[5-7] *ABA Model Rule* Comments not adopted.

Disclosure of the Client's Condition

[8] Court Rules generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 7-11 stated that the "responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client.... Examples include the representation of an illiterate or an incompetent. . . ." EC 7-12 stated that "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

COMMITTEE COMMENTARY

The Committee adopted this Rule because it directly addresses matters only implicitly addressed in Ethical Considerations of the *Virginia Code*.

The amendments effective January 1, 2004, rewrote the rule.

RULE 1.15 Safekeeping Property

- (a) **All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:**
 - (1) **funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or**
 - (2) **funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.**

- (b) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- (c) A lawyer shall:
- (1) promptly notify a client of the receipt of the client's funds, securities, or other properties;
 - (2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
 - (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and
 - (4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.
- (d) Funds, securities or other properties held by a lawyer or law firm as a fiduciary shall be maintained in separate fiduciary accounts, and the lawyer or law firm shall not commingle the assets of such fiduciary accounts in a common account (including a book-entry custody account), except in the following cases:
- (1) funds may be maintained in a common escrow account subject to the provisions of Rule 1.15(a) and (c) in the following cases:
 - (i) funds that will likely be disbursed or distributed within thirty (30) days of deposit or receipt;
 - (ii) funds of \$5,000.00 or less with respect to each trust or other fiduciary relationship;
 - (iii) funds held temporarily for the purposes of paying insurance premiums or held for appropriate administration of trusts otherwise funded solely by life insurance policies; or
 - (iv) trusts established pursuant to deeds of trust to which the provisions of *Code of Virginia* Section 55-58 through 55-67 are applicable;
 - (2) funds, securities, or other properties may be maintained in a common account:
 - (i) where a common account is authorized by a will or trust instrument;
 - (ii) where authorized by applicable state or federal laws or regulations or by order of a supervising court of competent jurisdiction; or
 - (iii) where (a) a computerized or manual accounting system is established with record-keeping, accounting, clerical and administrative procedures to compute and credit or charge to each fiduciary interest its pro-rata share of common account income, expenses, receipts and disbursements and investment activities (requiring monthly balancing and reconciliation of such common accounts), (b) the fiduciary at all times shows upon its records the interests of each separate fiduciary interest in each fund, security or other property held in the common account, the totals of which assets reconcile with the totals of the common account, (c) all the assets comprising the common account are titled or held in the name of the common account, and (d) no funds or property of the lawyer or law firm or funds or property held by the lawyer or the law firm other than as a fiduciary are held in the common account.

For purposes of this Rule, the term "fiduciary" includes only personal representative, trustee, receiver, guardian, committee, custodian and attorney-in-fact.

- (e) **Record-Keeping Requirements, Required Books and Records.** As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c).

Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

- (1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:
 - (i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and

bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

- (ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;
- (iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;
- (iv) reconciliations and supporting records required under this Rule;
- (v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

- (i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;
- (ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;
- (iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) **Required Escrow Accounting Procedures.** The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(1) **Insufficient fund check reporting.**

- (i) **Clearly identified escrow accounts required.** A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;
- (ii) **Overdraft notification agreement required.** A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

- (iii) **Overdraft reports.** The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

- (a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;
- (b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;
- (c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) **Financial institution cooperation.** In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefor.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

- (v) **Lawyer cooperation.** Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;
- (vi) **Definitions.** “Lawyer” means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, pro hac vice or otherwise, in the practice of law in Virginia;

“Lawyer escrow account” or “escrow account” means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

“Client” includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

“Dishonored” shall refer to instruments which have been dishonored because of insufficient funds as defined above;

“Financial institution” and “bank” include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

“Insufficient Funds” refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank’s accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

“Law firm” includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

“Notice of Dishonor” refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

“Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

- (2) **Deposits.** All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;
- (3) **Deposit of mixed escrow and non-escrow funds other than fees and retainers.** Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;
- (4) **Periodic trial balance.** A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.
 - (i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and
 - (ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
- (5) **Reconciliations.**
 - (i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;
 - (ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;
 - (iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
- (6) **Receipts and disbursements explained.** The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

COMMENT

- [1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.
- [2] Separation of the funds of a client from those of the lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.
- [3] Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.
- [4] Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.
- [5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

- [6] For purposes of paragraph (e)(2)(ii) of this Rule, where a bank provides electronic confirmation of checks written on the trust account, the lawyer need not obtain or maintain the original canceled checks. Nothing in this Rule is intended to prohibit an attorney from using electronic checking for his trust account so long as all requirements in this Rule are fulfilled.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially the same as DR 9-102(A).

Paragraph (b) adopts the language of *ABA Model Rule 1.15(c)*.

Paragraph (c) is identical to DR 9-102(B).

Paragraph (d) is new and has no counterpart in the *Virginia Code* or *ABA Model Rules*.

Paragraph (e)(1) is substantially the same as DR 9-103(A). Paragraph (e)(2) is new, adding requirements for lawyers handling funds as fiduciaries.

Paragraph (f) is nearly identical to DR 9-103(B).

COMMITTEE COMMENTARY

The Committee chose to adopt the trust account procedures and requirements under the *Virginia Code*, with the exception of adding new requirements for lawyers handling funds as fiduciaries.

The amendments effective January 1, 2004, added Comment [6].

RULE 1.16 Declining Or Terminating Representation

- (a) **Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:**
- (1) **the representation will result in violation of the Rules of Professional Conduct or other law;**
 - (2) **the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**
 - (3) **the lawyer is discharged.**
- (b) **Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:**
- (1) **the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;**
 - (2) **the client has used the lawyer's services to perpetrate a crime or fraud;**
 - (3) **a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;**
 - (4) **the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**
 - (5) **the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or**
 - (6) **other good cause for withdrawal exists.**
- (c) **In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.**
- (d) **Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).**

- (e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

COMMENT

- [1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

- [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.
- [3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

- [4] A client has a right to discharge a lawyer at any time, with or without cause. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.
- [5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed *pro se*.
- [6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

- [7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the

client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

- [8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

- [9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Retention of Client Papers or File When Client Fails or Refuses to Pay Fees/Expenses Owed to Lawyer

- [10] Paragraph (e) eschews a "prejudice" standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files.
- [11] The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially the same as DR 2-108(A).

Paragraph (b) is substantially similar to DR 2-108(B) which provided that a lawyer "may withdraw from representing a client if: (1) Withdrawal can be effected without material prejudice to the client; or (2) The client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; or (3) The client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."

Paragraph (c) is identical to DR 2-108(C).

Paragraph (d) is based on DR 2-108(D), but does not address documents in the lawyer's files (which are handled under paragraph (e)).

Paragraph (e) is new.

COMMITTEE COMMENTARY

The provisions of DR 2-108 of the *Virginia Code* derived more from *ABA Model Rule* 1.16 than from its counterpart in the *ABA Model Code*, DR 2-110. Accordingly, the Committee generally adopted the *ABA Model Rule*, but substituted the "illegal or unjust" language from DR 2-108(B)(2) for the "criminal or fraudulent" language of the *ABA Model Rule*.

Additionally, the Committee substituted the language of DR 2-108(C) for that of paragraph (c) of the *ABA Model Rule* to make it clear that a lawyer, in circumstances involving court proceedings, has an affirmative duty to request leave of court to withdraw. The Committee recommended paragraph (e) instead of a "prejudice" standard as being more easily understood and applied by lawyers.

The amendments effective January 1, 2004, in paragraph (e), first sentence, inserted "therefore, upon termination of the representation, those items" between "client and" and "shall," inserted "within a reasonable time" between "returned" and "to the client," and inserted "or the client's new counsel" between "the client" and "upon request; in paragraph (e), third sentence, substituted "Also upon termination," for "Upon request," inserted "upon request" between "the client" and "must also," inserted "within a reasonable time" between "provided" and "copies," inserted "transcripts" before the present word "pleadings," and inserted "or collected" between "prepared" and "for the client; in paragraph (e), added the last sentence; and added Comment [11].

RULE 1.17 Sale Of Law Practice

A lawyer or a law firm may sell or purchase a law practice, partially or in its entirety, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted, except the lawyer may practice law while on staff of a public agency or legal services entity which provides legal services to the poor, or as in-house counsel to a business.
- (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
- (c) Actual written notice is given by the seller to each of the seller's clients (as defined by the terms of the proposed sale) regarding:
 - (1) the proposed sale and the identity of the purchaser;
 - (2) any proposed change in the terms of the future representation including the fee arrangement;
 - (3) the client's right to consent or to refuse to consent to the transfer of the client's matter, and that said right must be exercised within ninety (90) days of receipt of the notice;
 - (4) the client's right to retain other counsel and/or take possession of the file; and
 - (5) the fact that the client's refusal to consent to the transfer of the client's matter will be presumed if the client does not take any action or does not otherwise consent within ninety (90) days of receipt of the notice.
- (d) If a client involved in a pending matter cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.
- (e) The fees charged clients shall not be increased by reason of the sale.

COMMENT

- [1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. *See* Rules 5.4 and 5.6.

Termination of Practice by Seller

- [2] The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere does not result in a violation. Neither does the seller's return to private practice after the sale as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon leaving the office.
- [3] Comment [3] to *ABA Model Rule* 1.17 substantially appears in paragraph (a) of this Rule.
- [4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction.
- [5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

- [6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

- [7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of any lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or to make other arrangements must be made within 90 days. If nothing is heard from the client within that time, the client's refusal to consent to the sale is presumed.
- [8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interest will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.
- [9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

- [10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of work must be honored by the purchaser, unless the client consents after consultation.

Other Applicable Ethical Standards

- [11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to assure that the purchaser is qualified to assume the practice and the purchaser's obligation to undertake the representation competently (*see* Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (*see* Rule 1.7); and the obligation to protect information relating to the representation (*see* Rules 1.6 and 1.9).
- [12] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be concluded in the sale (*see* Rule 1.16).

Applicability of the Rule

- [13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer shall see to it that they are met.
- [14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

- [15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

VIRGINIA CODE COMPARISON

Ethical Consideration 4-6 states that a lawyer should not attempt to sell a law practice as a going business because, among other things, to do so would involve the disclosure of confidences and secrets.

COMMITTEE COMMENTARY

The Committee was persuaded to eliminate the prohibition of the sale of a law practice currently set forth in Ethical Consideration 4–6 by several arguments, the first being that sole practitioners and their clients are often unreasonably discriminated against when the attorney’s practice is terminated. When lawyers who are members of firms retire, the transition for the client is usually smooth because another attorney of the firm normally takes over the matter. Such a transition is usually more difficult for the clients of a sole practitioner, who must employ another attorney or firm.

Another persuasive argument is that some attorneys leaving practice, firm members and sole practitioners alike, indirectly “sell” their practices, including its good will, by utilizing various arrangements. For example, firm members sometimes receive payments from their firm pursuant to retirement agreements that have the effect of rewarding the lawyer for the value of his/her practice. Sole practitioners contemplating leaving the practice of law may sell their tangible assets at an inflated price or bring in a partner prior to retirement, then allow the partner to take over the practice pursuant to a compensation agreement. Such arrangements do not always involve significant client participation or consent.

In addition, an attorney’s practice has value that is recognized in the law. Under Virginia divorce law, for example, a professional’s practice, including its good will, may be subject to equitable distribution. (*Russell v. Russell*, 11 Va. App. 411, 399 S.E.2d 166 (1990)). Therefore, under the *Virginia Code*, an attorney in a divorce proceeding may be required to compensate his/her spouse for the value of the practice, yet be forbidden to sell it.

The Committee recommended, after considering all of these factors, that adopting a carefully crafted rule allowing such sales without resort to these alternate methods would be preferable and would assure maximum protection of clients. This recommended Rule is based on the *ABA Model Rule 1.17* with several significant changes, the chief ones relating to consent and fees.

The amendments effective January 1, 2004, paragraph (a), added the exception; deleted Comment [3].

The amendments effective January 4, 2010, paragraph (a), inserted “or in the area of practice that has been sold” following the current word “law”; added present paragraph (b) and redesignated former paragraphs (b) through (d) as present paragraphs (c) through (e); added present Comments [4] through [6].

RULE 1.18 Duties to Prospective Client

ABA Model Rule not adopted.

COUNSELOR AND THIRD-PARTY NEUTRAL

RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

COMMENT

Scope of Advice

- [1] A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
- [2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It could also ignore, to the client’s disadvantage, the relational or emotional factors driving a dispute. In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances.

- [2a] It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
- [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.
- [4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

- [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, moral or ethical consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. DR 5-106(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 stated that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations.... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.... In the final analysis, however, the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client...."

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* verbatim because it sets forth more clearly than the Disciplinary Rules the scope of a lawyer's advisory role.

RULE 2.2 Intermediary

The amendments effective January 1, 2004, this rule was deleted in its entirety.

RULE 2.3 Evaluation For Use By Third Persons

- (a) **A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.**
- (b) **A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:**
 - (1) **the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and**
 - (2) **the client consents after consultation.**
- (c) **Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.**

COMMENT

Definition

- [1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.
- [1a] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.
- [2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

- [3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

- [4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.
- [5] *ABA Model Rule* Comments not adopted.

Financial Auditors' Requests for Information

- [6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

VIRGINIA CODE COMPARISON

There was no counterpart to this Rule in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee adopted this Rule because it addressed matters not addressed in the *Virginia Code*. This Rule generally follows *ABA Model Rule 2.3*, but the Committee added paragraph (c) in recognition of the statutory requirement of confidentiality in the dispute resolution process. See *Code of Virginia* Section 8.01-576.10.

RULE 2.4 **Lawyer Serving as Third-Party Neutral**

ABA Model Rule not adopted.

RULE 2.10 **Third Party Neutral**

- (a) **A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.**
- (b) **A lawyer who serves as a third party neutral**
 - (1) **shall inform the parties of the difference between the lawyer’s role as third party neutral and the lawyer’s role as one who represents a client;**
 - (2) **shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and**
 - (3) **may encourage and assist the parties in reaching a resolution of their dispute; but**
 - (4) **may not compel or coerce the parties to make an agreement.**
- (c) **A lawyer may serve as a third party neutral only if the lawyer has not previously represented and is not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding.**
- (d) **A lawyer may serve as a third party neutral in a dispute resolution proceeding involving a client whom the lawyer has represented or is representing in a matter unrelated to the dispute resolution proceeding, provided:**
 - (1) **there is full disclosure of the prior or present representation;**
 - (2) **in light of the disclosure, the third party neutral obtains the parties’ informed consent;**
 - (3) **the third party neutral reasonably believes that a prior or present representation will not compromise or adversely affect the ability to act as a third party neutral; and**
 - (4) **there is no unauthorized disclosure of information in violation of Rule 1.6.**
- (e) **A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.**
- (f) **A lawyer shall withdraw as third party neutral if any of the requirements stated in this Rule is no longer satisfied or if any of the parties in the dispute resolution proceeding so requests. If the parties are participating pursuant to a court referral, the third party neutral shall report the withdrawal to the authority issuing the referral.**
- (g) **A lawyer who serves as a third party neutral shall not charge a fee contingent on the outcome of the dispute resolution proceeding.**
- (h) **This Rule does not apply to joint representation, which is covered by Rule 1.7.**

COMMENT

- [1] This Rule sets forth conflicts of interest and other ethical guidelines for a lawyer who serves as a third party neutral. Dispute resolution proceedings that are conducted by a third party neutral include mediation, conciliation, early neutral evaluation, non-binding arbitration and non-judicial settlement conferences.

- [2] A lawyer who serves as a third party neutral under this Rule or as a mediator under Rule 2.11 is engaged in the provision of a law-related service that may involve the application of a lawyer's particular legal expertise and skills. The standards set forth in this Rule, however, do not amount to a determination that a lawyer who serves as a third party neutral pursuant to this Rule or as a mediator pursuant to Rule 2.11 is engaged in the practice of law. The determination of whether a particular activity constitutes the practice of law is beyond the scope and purpose of these Rules.
- [3] A lawyer serving as third party neutral shall not offer any of the parties legal advice, which is a function of the lawyer who is representing a client (*See* Preamble: A Lawyer's Responsibilities). A third party neutral may, however, offer neutral evaluations, if requested by the parties. Special provisions under which a lawyer-mediator can offer certain neutral evaluations are contained in Rule 2.11.
- [4] Confidentiality of information revealed in the dispute resolution process is governed by *Code of Virginia* Sections 8.01-576.9 and 8.01-576.10.
- [5] A third party neutral as defined in these Rules does not include a lawyer providing binding arbitration services (*See Code of Virginia* Section 8.01-577 et. seq.).
- [6] The imputation of conflicts arising under paragraph (e) is addressed in Rule 1.10.

VIRGINIA CODE COMPARISON

There was no counterpart to this Rule in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee adopted this Rule, not part of the *ABA Model Rules*, to provide guidelines for lawyers who serve as neutrals and who do not represent a party to a dispute or transaction. Following adoption of Virginia Rule 2.10, the ABA adopted Model Rule 2.4 governing third-party neutrals. The Virginia and ABA Rules are substantially different.

The amendments effective January 1, 2004, in paragraph (h), substituted "joint representation" for "intermediation" and substituted "Rule 1.7" for "Rule 2.2".

RULE 2.11 Mediator

- (a) **A lawyer-mediator is a third party neutral (*See* Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.**
- (b) **Prior to agreeing to mediate and throughout the mediation process a lawyer-mediator should reasonably determine that:**
 - (1) **mediation is an appropriate process for the parties;**
 - (2) **each party is able to participate effectively within the context of the mediation process; and**
 - (3) **each party is willing to enter and participate in the process in good faith.**
- (c) **A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by legal counsel about the importance of reviewing the lawyer-mediator's legal information with legal counsel.**
- (d) **A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.**
- (e) **Prior to the mediation session a lawyer-mediator shall:**
 - (1) **consult with prospective parties about**
 - (i) **the nature of the mediation process;**
 - (ii) **the limitations on the use of evaluation, as set forth in paragraph (d) above;**

- (iii) the lawyer-mediator’s approach, style and subject matter expertise; and
 - (iv) the parties’ expectations regarding the mediation process; and
- (2) enter into a written agreement to mediate which references the choice and expectations of the parties, including whether the parties have chosen, permit or expect the use of neutral evaluation or evaluative techniques during the course of the mediation.
- (f) A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties’ choice and expectations.

COMMENT

- [1] Offering assessments, evaluations, and advice are traditional lawyering functions for the lawyer who represents a client. A lawyer-mediator, who does not represent any of the parties to the mediation, should not assume that these functions are appropriate. Although these functions are not specifically prohibited in the statutory definition of mediation, which is set forth as paragraph (a) of this Rule, an evaluative approach which interferes with the parties’ self-determination and the mediator’s impartiality would be inconsistent with this definition of mediation.
- [2] Defining mediation to exclude an evaluative approach is difficult not only because practice varies widely but because no consensus exists as to what constitutes an evaluation. Also, the effects of an evaluation on the mediation process depend upon the attitude and style of the mediator and the context in which it is offered. Thus, a question by a lawyer-mediator to a party that might be considered by some as “reality testing” and facilitative, might be viewed by others as evaluative. On the other hand, an evaluation by a facilitative mediator could help free the parties from the narrowing effects of the law and help empower them to resolve their dispute.

Informed Consent to Mediator’s Approach

- [3] The Rule focuses on the informed consent of the prospective mediation clients to the particular approach, style and subject matter expertise of the lawyer-mediator. This begins with consultation about the nature of the mediation process, the limitations on evaluation, the lawyer-mediator’s approach, style and subject matter expertise and the parties’ expectations regarding the mediation process. If the parties request an evaluative approach, the lawyer-mediator shall explain the risk that evaluation might interfere with mediator impartiality and party self-determination. Following this consultation the lawyer-mediator and the parties shall sign a written agreement to mediate which reflects the choice and expectation of the parties. The lawyer-mediator shall then conduct the mediation in a manner that is consistent with the parties’ choice and expectations. This is similar to the lawyer-client consultation about the means to be used in pursuing a client’s objectives in Rule 1.2.

Continuing Responsibility to Examine Potential Impact of Evaluation

- [4] If the parties choose a lawyer-mediator who is willing and able to offer evaluation during the mediation process and has met the requirements of paragraph (e), a lawyer-mediator has a continuing responsibility under paragraphs (b) and (d) to assess the situation and consult with the parties before offering or responding to a request for an evaluation. Consideration shall be given again as to whether mediator impartiality and party self-determination are at risk. Consideration should also be given as to whether an evaluation could detract from the willingness of the parties to work at understanding their own and each other’s situation and at considering a broader range of interests, issues and options. Also, with an evaluation the parties may miss out on opportunities to maintain or improve relationships or to create a higher quality and more satisfying result.
- [5] On the other hand, the parties may expect the lawyer-mediator to offer an evaluation in helping the parties reach agreement, especially when the most important issues are the strengths or weaknesses of legal positions, or the significance of commercial or financial risks. This is particularly useful after parties have worked at possible solutions and have built up confidence in the mediator’s impartiality or where widely divergent party evaluations are major barriers to settlement.
- [6] The presence of attorneys for the parties offers additional protection in minimizing the risk of a poor quality evaluation and of too strong an influence on the parties’ self-determination. An evaluation, coupled with a reminder to the parties that the evaluation is but one of the factors to be considered as they deliberate on the outcome, may in certain cases be the most appropriate way to assure that the parties are making fully informed decisions.

Legal Advice, Legal Information and Neutral Evaluation

- [7] A lawyer-mediator shall not offer any of the parties legal advice which is a function of the lawyer who is representing a client. However, a lawyer-mediator may offer legal information under the conditions outlined in paragraph (c). Offering legal information is an educational function which aids the parties in making informed decisions. Neutral evaluations in the mediation process consist of, for example, opining as to the strengths and weaknesses of positions, assessing the value and costs of alternatives to settlement or assessing the barriers to settlement.
- [8] The lawyer-mediator shall not, however, make decisions for any party to the mediation process nor shall the lawyer-mediator use a neutral evaluation to coerce or influence the parties to settle their dispute or to accept a particular solution to their dispute. Paragraphs (d), (e), and (f) restrict the use of evaluative techniques by the lawyer-mediator to situations where the parties have given their informed consent to the use of such techniques and where a neutral evaluation will assist, rather than interfere with the ability of the parties to reach a mutually agreeable solution to their dispute.

Mediation

- [9] While a lawyer is cautioned in Rule 1.7 regarding the special considerations in common representation, these should not deter a lawyer-mediator from accepting clients for mediation. In mediation, a lawyer-mediator represents none of the parties and should be trained to deal with strong emotions. In fact, mediation can be especially useful in a case where communication and relational breakdown have made negotiation or litigation of legal issues more difficult.

Confidentiality and Professional Responsibility Standards

- [10] Confidentiality of information revealed in the mediation process is governed by *Code of Virginia* Sections 8.01-576.9 and 8.01-576.10 and Section 8.01-581.22.

VIRGINIA CODE COMPARISON

There was no counterpart to this Rule in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee adopted this Rule, not part of the *ABA Model Rules*, to give further guidance to lawyers who serve as mediators. Although Legal Ethics Opinions [e.g., LEO 590 (May 17, 1985)] have approved of lawyers serving as mediators, different approaches to and styles of mediation ranging from pure facilitation to evaluation of positions are being offered. This Rule requires lawyer-mediators to consult with prospective parties about the lawyer-mediators' approach, style and subject matter expertise and to honor the parties' choice and expectations.

The amendments effective December 30, 2009, in Comment [9], deleted the references to Rule 2.2 that was deleted by Court order dated September 24, 2003.

ADVOCATE

RULE 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

- [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

- [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

VIRGINIA CODE COMPARISON

Rule 3.1 is similar to DR 7-102(A)(1), but with three differences. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

COMMITTEE COMMENTARY

Although Rule 3.1 is similar in substance to existing *Virginia Code* provisions, the Committee concluded that the objective standard of the *ABA Model Rule* was preferable and more closely paralleled Section 8.01-271.1 of the *Code of Virginia*, dealing with lawyer sanctions.

RULE 3.2 Expediting Litigation

ABA Model Rule not adopted.

RULE 3.3 Candor Toward The Tribunal

- (a) **A lawyer shall not knowingly:**
- (1) **make a false statement of fact or law to a tribunal;**
 - (2) **fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;**
 - (3) **fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or**
 - (4) **offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.**
- (b) **A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.**
- (c) **In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.**
- (d) **A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.**

COMMENT

- [1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.
- [2] *ABA Model Rule* Comment not adopted.

Representations by a Lawyer

- [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, Section 8.01-271.1 of the *Code of Virginia* states that a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), *see* the Comment to that Rule. *See also* the Comment to Rule 8.4(b).

Misleading Legal Argument

- [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

False Evidence

- [5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.
- [6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.
- [7-9] *ABA Model Rule* Comments not adopted.

Remedial Measures

- [10] *ABA Model Rule* Comments not adopted.
- [11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

- [12] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

- [13] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.
- [13a] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.
- [13b] The ultimate resolution of the dilemma, however, is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. *See* Rule 1.2(c).

Ex Parte Proceedings

- [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. For purposes of this Rule, *ex parte* proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear. However, a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding. If so, the lawyer must comply with a disclosure demand by the tribunal or challenge the action by available legal means. The failure to disclose information as part of a legal challenge to a demand for disclosure will not constitute a violation of this Rule.

VIRGINIA CODE COMPARISON

Paragraph (a)(1) is substantially similar to DR 7-102(A)(5), which provided that “[i]n his representation of a client, a lawyer shall not knowingly make a false statement of law or fact.”

With regard to paragraph (a)(2), DR 7-102(A)(3) provided that “[i]n his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal.”

Paragraph (a)(3) has no direct counterpart in the *Virginia Code*. EC 7-20 stated: “Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.”

With regard to paragraph (a)(4), the first sentence of this paragraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not “knowingly use perjured testimony or false evidence.” DR 4-101(D)(2), adopted here as Rule 1.6(c)(2), made it clear that the “remedial measures” referred to in the second sentence of paragraph (a)(4) could include disclosure of the fraud to the tribunal.

Paragraph (b) confers discretion on the lawyer to refuse to offer evidence that the lawyer “reasonably believes” is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer “knows” is false.

There was no counterpart in the *Virginia Code* to paragraph (c).

Paragraph (d) is identical to DR 7-102(B).

COMMITTEE COMMENTARY

The Committee generally adopted the *ABA Model Rule*, but it deleted the word “material” from paragraph (a)(1) to make it identical to DR 7-102(A)(5) and from paragraph (a)(2) because it appeared to be redundant. Additionally, the word “directly,” preceding “adverse” was deleted from paragraph (a)(3).

With respect to paragraph (a)(3), the Committee believed it advisable to adopt a provision requiring the disclosure of controlling adverse legal authority. While there was no corresponding provision within the Disciplinary Rules of the *Virginia Code*, there is a corresponding provision within the *ABA Model Code*, DR 7-106(B)(1). However, the Committee deleted the word “directly” from the paragraph in the belief that the limiting effect of that term could seriously dilute the paragraph’s meaning.

The Committee determined to retain the obligation to report a non-client’s fraud on the tribunal, and therefore repeated the provisions of DR 7-102(B) in paragraph (d).

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (a) **Obstruct another party’s access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party’s access to evidence. A lawyer shall not counsel or assist another person to do any such act.**
- (b) **Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.**
- (c) **Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:**
 - (1) **reasonable expenses incurred by a witness in attending or testifying;**
 - (2) **reasonable compensation to a witness for lost earnings as a result of attending or testifying;**
 - (3) **a reasonable fee for the professional services of an expert witness.**
- (d) **Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.**
- (e) **Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.**
- (f) **In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.**
- (g) **Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.**
- (h) **Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:**
 - (1) **the information is relevant in a pending civil matter;**
 - (2) **the person in a civil matter is a relative or a current or former employee or other agent of a client; and**
 - (3) **the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.**
- (i) **Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.**
- (j) **File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.**

COMMENT

- [1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
- [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.
- [3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.
- [3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. *See* also Rule 1.2(c).
- [4] Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2.
- [5] Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.
- [6] Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.
- [7] In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.
- [8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 7-108(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."

Paragraph (b) is identical to DR 7-108(B).

Paragraph (c) is substantially similar to DR 7-108(C) which provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But

a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness.” EC 7-25 stated that witnesses “should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise.”

Paragraph (d) is substantially the same as DR 7-105(A).

Paragraph (e) is new.

Paragraph (f) is substantially similar to DR 7-105(C)(1), (2), (3) and (4) which stated:

In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness. (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused, but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Paragraph (g) is identical to DR 7-105 (C)(5).

Paragraph (h) is new.

Paragraph (i) is similar to DR 7-104, although a lawyer is no longer prohibited from “participat[ing] in presenting” criminal charges and therefore may freely offer advice to the client about the client’s rights under the criminal law.

Paragraph (j) is identical to DR 7-102(A)(1).

COMMITTEE COMMENTARY

The Committee attempted to join the best of both the *Virginia Code* and *ABA Model Rule 3.4* in this Rule. For example, paragraph (a) was adopted because it appears to place a broader obligation on lawyers than DR 7-108(A), but DR 7-108(B) was added to the Rule as paragraph (b) because it states explicitly what is only implicit in paragraph (a).

Language from DR 7-108(C) was added to paragraph (c) to make it clear that certain witness compensation is permitted—something not clear from the language of the *ABA Model Rule*, although it is stated in the *ABA Model Rule’s* Comment.

The language of DR 7-105(A) was adopted as paragraph (d) in lieu of the *ABA Model Rule* language because it states more clearly what is apparently intended by the Rule. However, the Committee deleted as unnecessary the word “appropriate” preceding “steps.”

With respect to paragraph (e), the Committee saw no reason to limit the discovery request provisions to the pretrial period, as is explicitly the case in the *ABA Model Rule*.

Paragraph (f) parallels similar provisions in DR 7-105(C) and paragraph (h) covers a subject not addressed in the *Virginia Code*.

Paragraph (i) is similar to DR 7-104, although the Committee voted to delete the reference to “participate in presenting.” This deletion allows a lawyer to offer advice to the client about the client’s rights under the criminal law without violating this Rule.

The Committee determined that the existing language of DR 7-102(A)(1) should appear as paragraph (j), although the *ABA Model Rules* do not contain this section.

The amendments effective January 1, 2004, added present paragraph (g) and redesignated former paragraphs (g) through (i) as present paragraphs (h) through (j).

RULE 3.5 Impartiality And Decorum Of The Tribunal

(a) **A lawyer shall not:**

- (1) **before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law;**
- (2) **after discharge of the jury from further consideration of a case:**
 - (i) **ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service;**

- (ii) communicate with a member of that jury if the communication is prohibited by law or court order; or
- (iii) communicate with a member of that jury if the juror has made known to the lawyer a desire not to communicate; or
- (3) conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.
- (b) All restrictions imposed by paragraph (a) upon a lawyer also apply to communications with or investigations of members of the immediate family or household of a juror or a member of a venire.
- (c) A lawyer shall reveal promptly to the court improper conduct by a member of a venire or a juror, or by another toward a venireman or a juror or a member of the juror's family, of which the lawyer has knowledge.
- (d) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.
- (e) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
 - (1) in the course of official proceedings in the cause;
 - (2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer;
 - (3) orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer; or
 - (4) as otherwise authorized by law.
- (f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

COMMENT

- [1] *ABA Model Rule* Comment not adopted.
- [2] To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extra-judicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as the lawyer refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extra-judicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.
- [3] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to an adverse party proceeding *pro se*. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.
- [4] The advocate's function is to present evidence and arguments so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer must stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics. Rule 8.3(b) also requires a lawyer to report such conduct by a judge to the appropriate authority and with this duty and recourse there is no reason for a lawyer to reciprocate.

VIRGINIA CODE COMPARISON

Paragraphs (a)-(c) are substantially the same as DR 7-107(A) - 7-107(F). Paragraph (a)(2)(ii) and (iii) are new.

Paragraph (d) is identical to DR 7-109(A).

Paragraph (e) is identical to DR 7-109(B).

Paragraph (f) is new.

COMMITTEE COMMENTARY

The Committee believed that the adopted language of DR 7-107 and DR 7-109 provides better guidance to lawyers than that of paragraphs (a) and (b) of the *ABA Model Rule*. In paragraph (f) of this Rule, the Committee adopted the language of paragraph (d) of the *ABA Model Rule*, which prohibits “conduct intended to disrupt a tribunal,” because the Committee considered the general admonition against “conduct prejudicial to the administration of justice” to be vague.

The amendments effective January 1, 2004, in paragraph (a)(2), inserted the (i) designator and added subparagraphs (ii) and (iii).

RULE 3.6 Trial Publicity

- (a) **A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.**
- (b) **A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.**

COMMENT

- [1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. In a criminal matter which may be tried by a jury, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a defendant or witnesses prior to trial. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. In addition to its legitimate interest in the conduct of judicial proceedings, the public has a right to know about threats to its safety and measures aimed at assuring its security.

VIRGINIA CODE COMPARISON

Rule 3.6 is substantially the same as DR 7-106, except that paragraph (a) adopts a “substantial likelihood of material prejudice” standard rather than the “clear and present danger” standard of DR 7-106(A).

COMMITTEE COMMENTARY

The Committee believed that one lesson of *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) is that a rule, such as the *ABA Model Rule*, which sets forth a specific list of prohibited statements by lawyers in connection with a trial, is constitutionally suspect. Accordingly, the more succinct language of DR 7-106 was adopted. However, the Committee changed the standard to the arguably broader “substantial likelihood of material prejudice,” in accord with the language approved by the Supreme Court of the United States in *Gentile v. State Bar*, 501 U.S. 1030 (1991).

RULE 3.7 Lawyer As Witness

- (a) **A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:**
 - (1) **the testimony relates to an uncontested issue;**
 - (2) **the testimony 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.**
- (b) **If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.**
- (c) **A lawyer may act as advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.**

COMMENT

- [1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.
- [2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.
- [3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.
- [4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.
- [5] *ABA Model Rule* Comments not adopted.
- [6] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Where a lawyer may be called as a witness other than on behalf of the client, paragraph (b) allows the lawyer to continue representation until it becomes apparent that the testimony may be prejudicial to the client. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. *See* Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 5-101(B) prohibited a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "knows or it is obvious that he or a lawyer in his firm ought to be called as a witness" unless "(1) . . . the testimony will relate solely to an uncontested matter or to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (2) . . . the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (3) . . . refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." Similarly, DR 5-102(A) stated: "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (3)," quoted above.

Paragraph (b) is substantially the same as DR 5-102(B).

Paragraph (c) had no counterpart in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee concluded that the test in the *ABA Model Rule*, i.e., whether a lawyer “is likely to be a necessary witness,” is more instructive than that in DR 5-101(B), i.e., whether the lawyer “knows or it is obvious that he ... ought to be called as a witness.” The Committee did, however, conclude that the *ABA Model Rule* should be modified to apply not just to trials but to any “adversarial proceeding.” Additionally, the *ABA Model Rule* applies only to individual lawyers and not, in general, to an entire firm—providing a flexibility which the Committee believed is needed. Additionally, the Committee incorporated the language of DR 5-102(B) as paragraph (b) to give the Rule additional flexibility. With respect to paragraph (b), the Committee deleted the DR 5-102(B)’s reference to “a lawyer in his firm” since that situation is now addressed by paragraph (c) and the conflicts provisions of these Rules.

RULE 3.8 Additional Responsibilities Of A Prosecutor

A lawyer engaged in a prosecutorial function shall:

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

COMMENT

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.
- [1a] Paragraph (a) prohibits a prosecutor from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause. The prohibition recognizes that charges are often filed before a criminal investigation is complete.
- [1b] Paragraph (b) is intended to protect the unrepresented defendant from the overzealous prosecutor who uses tactics that are intended to coerce or induce the defendant into taking action that is against the defendant’s best interests, based on an objective analysis. For example, it would constitute a violation of the provision if a prosecutor, in order to obtain a plea of guilty to a charge or charges, falsely represented to an unrepresented defendant that the court’s usual disposition of such charges is less harsh than is actually the case, e.g., that the court usually sentences a first-time offender for the simple possession of marijuana under the deferred prosecution provisions of *Code of Virginia* Section 18.2-251 when, in fact, the court has a standard policy of not utilizing such an option.
- [2] At the same time, the prohibition does not apply to the knowing and voluntary waiver by an accused of constitutional rights such as the right to counsel and silence which are governed by controlling case law. Nor does (b) apply to an accused appearing *pro se* with the ultimate approval of the tribunal. Where an accused does appear *pro se* before a tribunal, paragraph (b) does not prohibit discussions between the prosecutor and the defendant regarding the nature of the charges and the prosecutor’s intended actions with regard to those charges. It is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if nothing in the manner of the offer suggests coercion and the tribunal ultimately finds that the defendant’s waiver of his right to counsel and his guilty plea are knowingly made and voluntary.
- [3] The qualifying language in paragraph (c), i.e., “... after a party has been charged with an offense,” is intended to exempt the rule from application during the investigative phase (including grand jury) when a witness may be requested to maintain secrecy in order to protect the integrity of the investigation and support concerns for safety. The term “encourage” in paragraph (c) is intended to prevent a prosecutor from doing indirectly what cannot be done directly. The exception in paragraph (d) also recognizes that a prosecutor may seek a protective order from

the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

- [4] Paragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence or situations (paragraph (e)) where the lawyer/prosecutor does not have knowledge or control over the *ultra vires* actions of law enforcement personnel who may be only minimally involved in a case.

VIRGINIA CODE COMPARISON

With respect to paragraphs (a), DR 8-102(A)(1) provided that a “public prosecutor or other government lawyer shall ... refrain from prosecuting a charge that [he] ... knows is not supported by probable cause.”

Paragraph (b) is derived from DR 8-102(A)(2) which prohibited prosecutors from inducing an unrepresented defendant to “surrender important procedural rights.”

The counterpart to paragraph (c) is DR 8-102(A)(3) which proscribed “discouraging” a person from giving relevant information to the defendants.

Paragraph (d) is similar to DR 8-102(A)(4), but requires actual knowledge on the part of prosecuting lawyers that they are in possession of exculpatory evidence as opposed to simply being in knowing possession of evidence that may be determined to be of such a nature, although acknowledging that such disclosure may be affected by court orders.

Paragraph (e) has no direct counterpart in *Virginia Code*, but it generally parallels DR 7-106 (B), now Rule 3.6(b), which directed that a lawyer “exercise reasonable care to prevent his employees and associates from making a [prohibited] extrajudicial statement.”

Paragraph DR 8-102(A)(5), which prohibited the subpoena of an attorney as a witness in a criminal prosecution regarding a present or past client without prior judicial approval, has been deleted in light of prevailing case law.

COMMITTEE COMMENTARY

The Committee retitled this Rule “Additional Responsibilities of a Prosecutor,” rather than “Special Responsibilities of a Prosecutor,” as in the *ABA Model Rule*, to make it clear that the Rule’s provisions are in addition to the obligations of the attorney acting in a prosecutorial role as set forth in the remaining Rules. The Committee also thought it appropriate to address the proscriptions of the Rule to any “lawyer engaged in a prosecutorial function” as opposed to just a “prosecutor in a criminal case” so as to eliminate any confusion on the part of any lawyer (such as a County Attorney or assistant Attorney General) who may be acting in the role of a prosecutor without being a member of a Commonwealth’s Attorney’s office.

The Committee believed that paragraph (a) in which actual knowledge is required is more understandable and more susceptible to ready enforcement where any more subjective standard (such as “or it is obvious”) is too vague. At the same time, the Committee wanted to strengthen the proscription set forth in the *Virginia Code* (“shall refrain”) so as to make clear that the prosecutor should not even file a charge if it is not supported by “probable cause” and should certainly not pursue a charge to trial, even if initially supported by the minimum standard of “probable cause,” if it cannot reasonably be expected to survive a motion to strike the evidence or motion for judgment of acquittal. The original *ABA Model Rule* language only proscribed “prosecuting a charge that... is not supported by probable cause.”

The Committee did not include the language of *ABA Model Rule* 3.8(b) in which the prosecutor is required to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel” because the Committee did not believe that such an obligation should formally be placed on the lawyer-prosecutor.

The Committee concluded that the language of proposed paragraph (b) more accurately focuses on the type of prosecutorial conduct that is prohibited, rather than the provision of the existing DR and *ABA Model Rule* 3.8(c) which address the waiver of important procedural rights which, in fact, can be knowingly waived as the Comment attempts to explain. In addition, the Committee felt that the example of the waiver of such a procedural right as that of a preliminary hearing as set forth in the existing DR and *ABA Model Rule* is misleading at best, since it is exceedingly rare that a defendant charged with a felony would insist on proceeding *pro se* and then agree to waive the hearing.

The Committee felt that it was appropriate to strengthen the provisions of DR 8-102(A)(3) to provide that the lawyer acting in a prosecutorial function shall not “instruct or encourage a person to withhold information from the defense” as opposed to the more subjective and less enforceable “shall not discourage.” In addition, in recognition of the reality of the

investigative stage of a matter in which a witness may be asked to “keep quiet” in order to protect the witness and the integrity of the investigation, the Committee felt it appropriate to restrict application of the prohibition to that point in the process after formal charge when the “person” becomes a “party.”

The Committee felt a change from existing DR 8-102(A)(4) concerning the disclosure of exculpatory evidence to the defense was appropriate by clarifying that it would apply only to that evidence which the prosecutor knows is exculpatory as opposed to a more subjective analysis of evidence which may be in the knowing possession of the prosecutor but which he does not have reason to believe would be exculpatory.

The Committee felt that the language of the *ABA Model Rule* which speaks in terms of “exercising reasonable care” to prevent others involved in a prosecution from making prohibited extrajudicial statements placed an unreasonable affirmative duty on the attorney acting in a prosecutorial role whereby the attorney would be held responsible for attempting to control the conduct of others.

Finally, the Committee decided to recommend deletion of DR 8-102(5) prohibiting the subpoena of an attorney as a witness in a criminal matter involving a present or former client without prior judicial approval because of prevailing case law and judicial fiat (the United States District Court for the Eastern District of Virginia) which does not require same.

RULE 3.9 Advocate in Nonadjudicative Proceedings

ABA Model Rule not adopted.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) **make a false statement of fact or law; or**
- (b) **fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.**

COMMENT

Misrepresentation

- [1] A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act or by knowingly failing to correct false statements made by the lawyer’s client or someone acting on behalf of the client.

Statements of Fact

- [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

- [3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client’s crime or fraud. The requirement of disclosure is governed by Rule 1.6.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially similar to DR 7-102(A)(5), which stated, “[I]n his representation of a client, a lawyer shall not ... [k]nowingly make a false statement of law or fact.”

With regard to paragraph (b), DR 7-102(A)(3) provided, “In his representation of a client, a lawyer shall not ... [c]onceal or knowingly fail to disclose that which he is required by law to reveal.”

COMMITTEE COMMENTARY

The Committee deleted the *ABA Model Rule’s* references to a “third person” in the belief that such language merely confused the Rule. Additionally, the Committee deleted the word “material” preceding “fact or law” from paragraph (a) to make it more closely parallel DR 7-102(A)(5). The word “material” was similarly deleted from paragraph (b) as it appears somewhat redundant. Finally, the modified Comment expands the coverage of the Rule to constructive misrepresentation—i.e., the knowing failure of a lawyer to correct a material misrepresentation by the client or by someone on behalf of the client.

RULE 4.2 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.

COMMENT

- [1–2] *ABA Model Rule* Comments not adopted.
- [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a “second opinion” or replacement counsel.
- [4] 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. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so.
- [5] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, 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.
- [6] *ABA Model Rule* Comment not adopted.
- [7] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization’s “control group” as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the “alter ego” of the organization. The “control group” test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization’s counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization’s “control group.” The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization’s “control group.” If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.
- [8] This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.

- [9] Concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation. The same concerns may be involved where a “third-party” witness furnishes testimony in an investigation or proceeding, and although not a formal party, has decided to retain counsel to receive advice with respect thereto. Such concerns are equally applicable in a non-adjudicatory context, such as a commercial transaction involving a sale, a lease or some other form of contract.

VIRGINIA CODE COMPARISON

This Rule is substantially the same as DR 7-103(A)(1), except for the change of “party” to “person” to emphasize that the prohibition on certain communications with a represented person applies outside the litigation context.

COMMITTEE COMMENTARY

The Committee believed that substituting “person” for “party” more accurately reflected the intent of the Rule, as shown in the last sentence of the Comment, and was preferable to the apparent limitation of DR 7-103(A)(1) which referred to “[c]ommunicat[ion] on the subject of the representation with a party...”

The following revision to Comment [3] was made to include the language of Comment [3] from the ABA rule regarding the prohibition against communicating with a represented party even when the represented person or the lawyer initiates the contact.

The amendments effective April 13, 2007, added Comment [3].

RULE 4.3 Dealing With Unrepresented Persons

- (a) **In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.**
- (b) **A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.**

COMMENT

- [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer’s representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

VIRGINIA CODE COMPARISON

Paragraph (a) is identical to DR 7-103(B) and paragraph (b) is similar to DR 7-103(A)(2).

COMMITTEE COMMENTARY

The *Virginia Code* had deviated from the *ABA Model Code* by using the language of *ABA Model Rule 4.3(a)* as DR 7-103(B). This provision continues unchanged in Rule 4.3.

RULE 4.4 Respect For Rights Of Third Persons

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

COMMENT

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

VIRGINIA CODE COMPARISON

Rule 4.4 has no direct counterpart in the *Virginia Code*. DR 7-105(C)(2) provided that a lawyer shall not “[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.” DR 7-102(A)(1) provided that a lawyer shall not “take ... action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” DR 7-107(C) provided that “[a]fter discharge of the jury ... the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror...” DR 7-107(D) provided that a lawyer “shall not conduct ... a vexatious or harassing investigation of either a venireman or a juror.”

COMMITTEE COMMENTARY

The Committee adopted this Rule, for which there was no specific corresponding Disciplinary Rule, as a reminder that there is some limitation placed upon activities for which “zealous representation” might be offered as an excuse. For the same reason, the Committee deleted the word “substantial” from the *ABA Model Rules* provision.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 Responsibilities Of Partners And Supervisory Lawyers

- (a) **A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**
- (b) **A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.**
- (c) **A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:**
 - (1) **the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or**
 - (2) **the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

COMMENT

- [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having managerial authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. See the “partner” definition in the Terminology section at the beginning of these Rules. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers.
- [2] Paragraph (a) requires lawyers with a managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.
- [3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm’s structure and the nature of its practice. In a small firm, informal supervision and periodic review ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the

partners or those lawyers with managerial authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

- [4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See* also Rule 8.4(a).
- [5] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.
- [6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.
- [7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the *Virginia Code*. DR 1-103(A) provided that “[a] lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness to practice law in other respects, shall report such information to the appropriate professional authority...”

COMMITTEE COMMENTARY

The Committee adopted the language of *ABA Model Rule 5.1* because lawyers who practice in firms should have an affirmative obligation to assure adherence to the Rules of Professional Conduct by those with whom they professionally associate.

The amendments effective January 1, 2004, in the rule heading, substituted “Partners and Supervisory Lawyers” for “A Partner or Supervisory Lawyer”; in paragraph (a), inserted “or a lawyer who individually or together with other lawyers possesses managerial authority”; in paragraph (c)(2), inserted “or has managerial authority”; rewrote Comments [1], [3] – [5]; inserted new Comment [2].

RULE 5.2 Responsibilities of a Subordinate Lawyer

ABA Model Rule not adopted.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) **a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;**
- (b) **a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and**
- (c) **a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:**
 - (1) **the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**
 - (2) **the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

COMMENT

- [1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. 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".

VIRGINIA CODE COMPARISON

Rule 5.3(a) and (b) are similar to DR 3-104(C). The *Virginia Code* also addressed a supervising lawyer's responsibilities in DR 4-101(E) and DR 7-106(B). The *Virginia Code* did not contain any explanation of a lawyer's responsibility for a non-lawyer assistant's wrongdoing, which is addressed in Rule 5.3(c).

COMMITTEE COMMENTARY

The Committee adopted this Rule as a parallel companion to Rule 5.1 which applies similar provisions to lawyers with supervisory authority over other lawyers. The Committee inserted the phrase "or should have known" in Rule 5.3(c)(2) to reflect a negligence standard. The Committee also deemed it appropriate to add the language in the last sentence of the Comment to cover such recognized and accepted activities as those described.

The amendments effective January 1, 2004, in paragraph (a), inserted "or a lawyer who individually or together with other lawyers possesses managerial authority" following the current word "partner"; and in paragraph (c)(2), inserted "or has managerial authority" following "partner."

RULE 5.4 Professional Independence Of A Lawyer

- (a) **A lawyer or law firm shall not share legal fees with a nonlawyer, except that:**
- (1) **an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;**
 - (2) **a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;**
 - (3) **a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profitsharing arrangement; and**
 - (4) **a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client.**
- (b) **A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.**
- (c) **A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.**
- (d) **A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:**
- (1) **a nonlawyer owns any interest therein, except as provided in (a)(3) above, or except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;**
 - (2) **a nonlawyer is a corporate director or officer thereof; or**
 - (3) **a nonlawyer has the right to direct or control the professional judgment of a lawyer.**

COMMENT

- [1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment. *See also* Rule 1.8(f).

VIRGINIA CODE COMPARISON

Paragraph (a)(1) is identical to DR 3-102(A)(1).

Paragraph (a)(2) is substantially similar to DR 3-102(A)(2) which stated: "A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer."

Paragraph (a)(3) is substantially the same as DR 3-102(A)(3).

Paragraph (a)(4) had no counterpart in the *Virginia Code*.

Paragraph (b) is identical to DR 3-103(A).

Paragraph (c) is identical to DR 5-106(B).

Paragraph (d) is identical to DR 5-106(C).

COMMITTEE COMMENTARY

The *ABA Model Rule* generally paralleled various Disciplinary Rules.

The amendments effective January 1, 2004, added paragraph (a)(4).

Rule 5.5. Unauthorized Practice Of Law; Multijurisdictional Practice of Law.

- (a) **A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm, or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation.**
- (b) **A lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk, or legal assistant when that lawyer's license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.**
- (c) **A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.**
- (d) **Foreign Lawyers:**
 - (1) **"Foreign Lawyer" is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.**
 - (2) **A Foreign Lawyer shall not, except as authorized by these Rules or other law:**
 - (i) **establish an office or other systematic and continuous presence in Virginia for the practice of law, which may occur even if the Foreign Lawyer is not physically present in Virginia; or**
 - (ii) **hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.**
 - (3) **A Foreign Lawyer shall inform the client and interested third parties in writing:**
 - (i) **that the lawyer is not admitted to practice law in Virginia;**

- (ii) the jurisdiction(s) in which the lawyer is licensed to practice; and
 - (iii) the lawyer's office address in the foreign jurisdiction.
- (4) A Foreign Lawyer may, after informing the client as required in 3(i)-(iii) above, provide legal services on a temporary and occasional basis in Virginia that:
- (i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia or admitted under Part I of Rule 1A:5 of this Court and who actively participates in the matter;
 - (ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or
 - (iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law.
- (5) A foreign legal consultant practicing under Rule 1A:7 of this Court and a corporate counsel registrant practicing under Part II of Rule 1A:5 of this Court are not authorized to practice under this rule.

COMMENT

- [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (c) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.
- [1a] For purposes of paragraphs (a), (b), and (c) "Lawyer," denotes a person authorized by the Supreme Court of Virginia or its Rules to practice law in the Commonwealth of Virginia including persons admitted to practice in this state *pro hac vice*.
- [2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unauthorized persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3.
- [3] Likewise, the definition of the practice of law does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law — for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies.
- [4] Other than as authorized by law or this Rule, a Foreign Lawyer violates paragraph (d)(2)(i) if the Foreign Lawyer establishes an office or other systematic and continuous presence in Virginia for the practice of law. Presence may be systematic and continuous even if the Foreign Lawyer is not physically present here. Such "non-physical" presence includes, but is not limited to, the regular interaction with residents of Virginia for delivery of legal services in Virginia through exchange of information over the Internet or other means. Such Foreign Lawyer must not hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia. *See also*, Rules 7.1(a) and 7.5(b). Despite the foregoing general prohibition, a Foreign Lawyer may establish an office or other systematic and continuous presence in Virginia if the Foreign Lawyer's practice is limited to areas which by state or federal law do not require admission to the Virginia State Bar. Examples of lawyers admitted in another United States jurisdiction include those lawyers whose practices are limited to federal tax practice before the IRS and Tax Court, patent law before the Patent and Trademark Office, or immigration law. A Foreign Lawyer admitted to practice in a jurisdiction outside the United States may be authorized to practice under Rule 1A:7 as a foreign legal consultant and may likewise establish an office or other systematic and continued presence in Virginia.

- [5] Paragraphs (d)(4)(i),(ii) and (iii) identify circumstances in which a Foreign Lawyer may provide legal services on a temporary basis in Virginia that do not create an unreasonable risk to the interests of their clients, the public, or the courts. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. Except as authorized by this rule or other law, a Foreign Lawyer may not establish an office or other systematic and continuous presence in Virginia without being admitted to practice generally here.
- [6] There is no single test to determine whether a Foreign Lawyer's services are provided on a "temporary basis" in Virginia, and may therefore be permissible under paragraph (d)(4). Services may be "temporary" even though the Foreign Lawyer provides services in Virginia on a recurring basis, or for an extended period of time, as when the Foreign Lawyer is representing a client in a single lengthy negotiation or litigation. "Temporary" refers to the duration of the Foreign lawyer's presence and provision of services, while "occasional" refers to the frequency with which the Foreign lawyer comes into Virginia to provide legal services.
- [7] Paragraph (d)(1) requires that the Foreign Lawyer be authorized to practice in the jurisdiction in which the Foreign Lawyer is admitted and excludes a Foreign Lawyer who, while technically admitted, is not authorized to practice because, for example, the Foreign Lawyer is on inactive status.
- [8] Paragraph (d)(4)(i) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice Virginia. For this paragraph to apply, however, the lawyer admitted to practice in Virginia must actively participate in and share responsibility for the representation of the client.
- [9] Foreign Lawyers not admitted to practice generally in this jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Under paragraph (d)(4)(ii), a Foreign Lawyer does not violate this Rule when the Foreign Lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of Virginia requires a Foreign Lawyer to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the Foreign Lawyer to obtain that authority.
- [10] Paragraph (d)(4)(ii) also provides that a Foreign Lawyer rendering services in Virginia on a temporary basis does not violate this Rule when the Foreign Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Foreign Lawyer is authorized to practice law or in which the Foreign Lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Foreign Lawyer may engage in conduct temporarily in Virginia in connection with pending litigation in another jurisdiction in which the Foreign Lawyer is or reasonably expects to be authorized to appear, including taking depositions in Virginia.
- [11] *ABA Model Rule* Comment not adopted.
- [12] Paragraph (d)(4)(iii) permits a Foreign Lawyer to perform services on a temporary basis in Virginia if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. The Foreign Lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.
- [13] Paragraph (d)(4)(iv) permits a Foreign Lawyer to provide certain legal services on a temporary basis in Virginia that arise out of or are reasonably related to that lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted but are not within paragraphs (d)(4)(ii) or (d)(4)(iii). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (d)(4)(iv) applies to a Foreign Lawyer admitted to practice only in a foreign nation.
- [14] Paragraphs (d)(4)(ii), (d)(4)(iii), and (d)(4)(iv) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors evidence such a relationship. The Foreign Lawyer's client may have been previously represented by the Foreign Lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the Foreign Lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the Foreign Lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Foreign Lawyer in assessing the relative merits of each. In addition, the services may draw on the Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

- [14a] Paragraph (d)(4)(iv) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction in which the Foreign Lawyer is admitted to practice.
- [15–18] *ABA Model Rule* Comments not adopted.
- [19] A Foreign Lawyer who practices law in Virginia pursuant to this Rule is subject to the disciplinary authority of Virginia. See Rule 8.5(a).
- [20] *ABA Model Rule* Comment not adopted.
- [21] Paragraph (d)(4) does not authorize communications advertising legal services to prospective clients in Virginia by Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Foreign Lawyers may communicate the availability of their services to prospective clients in Virginia is governed by Rules 7.1 to 7.5.

PRIOR RULE COMPARISON

Neither former Rule 5.5 nor any other of the Virginia Rules of Professional Conduct provided any criteria for practice in Virginia by a foreign lawyer (non-Virginia or non-U.S.). Such practice was controlled by Part 6, §I (C) of the Rules of the Virginia Supreme Court which defined “non-lawyer” and set out the parameters for temporary practice in Virginia by a “foreign lawyer,” defined only as admitted to practice and in good standing in any state in the U.S. There was no provision for practice by a foreign, non-U.S. lawyer. Enforcement of Part 6, §I (C) fell within the authority of the Virginia State Bar’s Standing Committee on the Unauthorized Practice of Law. Rule 5.5 allows for temporary and occasional practice in Virginia by both non-Virginia and non-U.S. lawyers and places enforcement within the Virginia State Bar’s disciplinary system.

COMMITTEE COMMENTARY

The Committee adopted this Rule in light of the recommendation of the American Bar Association (ABA) that the states adopt more specific rules governing multi-jurisdictional practice. This rule adopts language similar to ABA Model Rule 5.5 allowing for circumstances of temporary and occasional practice by lawyers licensed in other U.S. jurisdictions, but expands such practice to include lawyers licensed in non-U.S. jurisdictions. Paragraphs (a) and (b) are identical to paragraphs (b) and (c) in former Virginia Rule 5.5.

The amendments effective March 1, 2009, rewrote the Rule and Commentary thereto.

RULE 5.6 Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

- (a) **a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or**
- (b) **an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy, except where such a restriction is approved by a tribunal or a governmental entity.**

COMMENT

- [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.
- [2] Paragraph (b) prohibits lawyers from agreeing to a restriction on their right to practice, unless approved by a tribunal (in such situations as the settlement of mass tort cases) or a governmental entity. However, the lawyer must fully disclose the extent of any restriction to any future client and refer the client to another lawyer if requested to do so.

VIRGINIA CODE COMPARISON

This Rule is similar to DR 2-106, although it specifically permits a restriction if it is approved by a tribunal or a governmental entity.

COMMITTEE COMMENTARY

After a lengthy debate about the merits of settlements and the public policy favoring clients' unrestricted choice of legal representation, the Committee decided to generally prohibit provisions in settlement agreements that restricted a lawyer's right to practice, but added an exception if a tribunal or a governmental entity approves the restriction. The Comment emphasizes that lawyers whose right to practice has been restricted by a court-approved settlement should advise all future clients of the restriction and refer them to other counsel, if necessary.

Originally, Rule 5.6(b) prohibited only *broad* restrictions on an attorney's right to practice in settlement agreements. However, in line with the recommendations of the Boyd-Graves Conference Report of August 2004, the prohibition in Rule 5.6(b) is now expanded to reach *all* restrictions on the right to practice in settlement agreements, other than those within the exception afforded for settlement agreements approved by a tribunal or governmental entity. The current more expansive prohibition is in line with both the ABA's Model Rule 5.6 and with provisions in other jurisdictions.

The amendments effective January 1, 2004, in Comment [1], first sentence, substituted "lawyers" for "partners or associates".

The amendments effective September 1, 2006, in paragraph (b), deleted the word "broad" between "which a" and "restriction"; in Comment [2], first sentence, deleted the word "broad" between "agreeing to a" and "restriction"; in Committee Commentary, first sentence, deleted the word "broadly" between "agreements that" and "restricted" and added the last paragraph.

RULE 5.7 Responsibilities Regarding Law-related Services

ABA Model Rule not adopted.

PUBLIC SERVICE

RULE 6.1 Voluntary Pro Bono Publico Service

- (a) **A lawyer should render at least two percent per year of the lawyer's professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.**
- (b) **A law firm or other group of lawyers may satisfy their responsibility collectively under this Rule.**
- (c) **Direct financial support of programs that provide direct delivery of legal services to meet the needs described in (a) above is an alternative method for fulfilling a lawyer's responsibility under this Rule.**

COMMENT

- [1] Every lawyer, regardless of professional prominence or professional work load, has a personal responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Council for the Virginia State Bar urges all Virginia lawyers to contribute a minimum of two percent of their professional time annually to pro bono services. Pro bono legal services consist of any professional services for which the lawyer would ordinarily be compensated, including dispute resolution as a mediator or third party neutral.
- [2] Pro bono services in poverty law consist of free or nominal fee professional services for people who do not have the financial resources to compensate a lawyer. Private attorneys participating in legal aid referral programs are typical examples of "poverty law." Legal services for persons whose incomes exceed legal aid guidelines, but who nevertheless have insufficient resources to compensate counsel, would also qualify as "poverty law," provided the free or nominal fee nature of any such legal work is established in advance.
- [3] Pro bono publico legal services in civil rights law consists of free or nominal fee professional services to assert or protect rights of individuals in which society has an interest. Professional services for victims of discrimination based on race, sex, age or handicap would be typical examples of "civil rights law," provided the free or nominal fee nature of any such legal work is established in advance.
- [4] Free or nominal fee provision of legal services to religious, charitable or civic groups in efforts such as setting up a shelter for the homeless, operating a hotline for battered spouses or providing public service information would be examples of "public interest law."

- [5] Training and mentoring lawyers who have volunteered to take legal aid referrals or helping recruit lawyers for pro bono referral programs would be examples of “volunteer activities designed to increase the availability of pro bono legal services.”
- [6] Service in any of the categories described is not pro bono publico if provided on a contingent fee basis. Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free or nominal fee legal services is essential. Accordingly, services for which fees go uncollected would not qualify.

Collective Fulfillment of Pro Bono Publico Service

- [7] Although every lawyer has an individual responsibility to provide pro bono publico services, some legal matters require the application of considerably greater effort and resources than a lawyer, acting alone, could reasonably provide on a pro bono basis. In fulfilling their obligation under this Rule, a group of two or more lawyers may pool their resources to ensure that individuals in need of such assistance, who would otherwise be unable to afford to compensate counsel, receive needed legal services. The designation of one or more lawyers to work on pro bono publico matters may be attributed to other lawyers within the firm or group who support the representation.
- [8] *ABA Model Rule* Comment not adopted.

Financial Support in Lieu of Direct Pro Bono Publico Services

- [9] The provision of free or nominally priced legal services to those unable to pay continues to be the obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Not only do these needs far exceed the capacity of the collective bar, the nature of legal practice for many lawyers places constraints on their ability to render pro bono publico legal services. For example, some lawyers (e.g., some government lawyers) are prohibited by the terms of their employment from engaging in any outside practice. Other lawyers lack the experience and access to resources necessary to provide competent legal assistance.
- [10] To provide legal services beyond those available through the pro bono efforts of individual lawyers, the legal profession and government have established additional programs to provide such services. Lawyers who are unable to fulfill their pro bono publico obligation through direct, legal representation should support programs that provide legal services for the purposes described in (a) through financial contributions in proportion to their professional income.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 2-27 stated that the “basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer... Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged.” EC 8-9 stated that “[t]he advancement of our legal system is of vital importance in maintaining the rule of law ... [and] lawyers should encourage, and should aid in making, needed changes and improvements.” EC 8-3 stated that “[t]hose persons unable to pay for legal services should be provided needed services.”

COMMITTEE COMMENTARY

The subject matter of this Rule was not specifically addressed in the Disciplinary Rules of the *Virginia Code*. The Committee drafted language different from that of the *ABA Model Rule* to bring the Rule in line with Ethical Considerations approved by the Supreme Court of Virginia on June 17, 1994 (specifically EC 2-28 and 2-29). The Committee then adopted the new versions of EC 2-27 and EC 2-30, EC 2-31, and EC 2-32 as the Rule’s Comment for paragraph (a). Paragraphs (b) and (c) permit greater flexibility in the manner in which lawyers fulfill their pro bono obligations.

RULE 6.2 Accepting Appointments

A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) **representing the client is likely to result in violation of the Rules of Professional Conduct or other law;**
- (b) **representing the client is likely to result in an unreasonable financial burden on the lawyer; or**

- (c) **the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.**

COMMENT

- [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. *See* Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

- [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, *see* Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.
- [3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

VIRGINIA CODE COMPARISON

There was no counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 2-38 stated that when a lawyer is "appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-39 stated that "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

COMMITTEE COMMENTARY

The Committee adopted this Rule as an appropriate companion to Rule 6.1 because it emphasizes the responsibility of lawyers to increase the availability of legal services by accepting court appointed clients.

RULE 6.3 Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) **if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or**
- (b) **where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.**

COMMENT

- [1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the

lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

- [2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

VIRGINIA CODE COMPARISON

There was no counterpart to this Rule in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee adopted this Rule to recognize and address the potential tension between private clients and participation by their lawyers in legal services organizations — which was not addressed by the *Virginia Code*.

RULE 6.4 Law Reform Activities Affecting Client Interests

ABA Model Rule not adopted.

RULE 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs

- (a) **A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:**
 - (1) **is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and**
 - (2) **is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.**
- (b) **Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.**

COMMENT

- [1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or *pro se* counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. *See, e.g.,* Rules 1.7, 1.9 and 1.10.
- [2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. *See* Rule 1.2(b). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.
- [3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.
- [4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By

virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

- [5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

VIRGINIA CODE COMPARISON

This Rule had no counterpart in the *Virginia Code*.

COMMITTEE COMMENTARY

The committee adopted this specific conflicts of interest rule in recognition of the distinctive nature of services provided in this context.

Effective date – This rule and commentary thereto became effective January 1, 2004.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 Communications Concerning A Lawyer's Services

- (a) **A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:**
- (1) **contains false or misleading information; or**
 - (2) **states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or**
 - (3) **compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or**
 - (4) **is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.**
- (b) **Public communication means all communication other than "in-person" communication as defined by Rule 7.3.**

COMMENT

- [1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.
- [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.
- [2a] The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system, with particular reference to legal problems that frequently arise. Preparation of communications and professional articles for lay publications, participation in seminars, lectures, and civic programs, and other forms of permitted communications by lawyers to the public should be motivated by a desire to increase the public's awareness of legal needs and its ability to select the most appropriate counsel, rather than for the sole purpose of obtaining publicity for particular lawyers.
- [2b] These Rules recognize the value of giving assistance in the lawyer selection process while avoiding falsity, deception, and misrepresentation. All such communications should be evaluated with regard to their effect on the reasonably prudent layperson. The non-lawyer is best served if communications about legal problems and lawyers contain no

misleading information or emotional appeals, and emphasize the necessity of an individualized evaluation of the situation before conclusions as to legal needs and probable expenses can be made. The attorney client relationship should result from a free and informed choice by the layperson. Unwarranted promises of benefits, over persuasion, vexatious or harassing conduct are improper.

- [3] An unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.

VIRGINIA CODE COMPARISON

Rule 7.1 incorporates the provisions of DR 2-101 of the *Virginia Code* as they apply to all of a lawyer's communications.

COMMITTEE COMMENTARY

As originally adopted, Rule 7.1 addressed both lawyer communications and lawyer advertising without any distinction. As amended, Rule 7.1 applies to all lawyer communications, including lawyer advertising, whereas Rule 7.2 specifically applies to lawyer advertising. The amendment now clarifies, for example, that Rule 7.2(e) applies only to lawyer advertising.

Rule 7.2(d) was amended to include both written and e-mail communications. Subparagraph (a)(3) was added to Rule 7.2 to prohibit "advertising specific or cumulative case results," which incorporates the Committee's longstanding opinion found in LEO 1750.

The amendments effective November 1, 2002, rewrote the Rule and commentary thereto.

RULE 7.2 Advertising

- (a) **Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:**
- (1) **contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement; or**
 - (2) **contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization; or**
 - (3) **advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and upper-case letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.**
- (b) **A recording of the actual electronic media advertisement shall be approved by the lawyer prior to its broadcast and retained by the lawyer for a period of one year following the last broadcast date, along with a record of when and where it was used, which recording and date shall be provided to the Standing Committee on Legal Ethics upon its request.**
- (c) **A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:**
- (1) **pay the reasonable costs of advertisements or communications permitted by this Rule;**
 - (2) **pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and**
 - (3) **pay for a law practice in accordance with Rule 1.17.**

- (d) A written or e-mail communication that bears the lawyer's or firm's name and the purpose of which in whole or in part is an initial contact to promote employment for a fee, sent to a prospective non-lawyer client who is not:
- (1) a close friend, relative, current client, former client; or
 - (2) one who has initiated contact with the attorney; or
 - (3) one who is similarly situated with a current client of the attorney with respect to a specific matter being handled by the attorney, to the extent that the prospective client's rights may be reasonably expected to be materially affected by the outcome of the matter;

shall be identified by conspicuous display of the statement in upper case letters "ADVERTISING MATERIAL."

The required statement shall be displayed in the lower left hand corner of the address portion of the communication in type size at least equal to the largest type used on the communication and also on the front of the first page of the communication in type size at least equal to the largest type used on the page. Further, in the case of e-mail advertising or solicitation, the header shall also display the statement, in uppercase letters, "ADVERTISING MATERIAL."

Further, any such written communication shall not be sent by registered mail or other forms of restricted delivery, nor shall such written communication be sent to any person who has made known to the lawyer a desire not to receive communications from the lawyer. Lawyers who advertise or solicit by e-mail shall include instructions of how the recipient of such communications may notify the sender that they wish not to receive such communications in the future.

This paragraph does not apply to any communication which is directed to be sent by a court or tribunal, or otherwise required by law.

- (e) Advertising made pursuant to this Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content or, in the alternative, a law firm may file with the Virginia State Bar a current written statement identifying the responsible attorney for the law firm's advertising and its office address, and the firm shall promptly notify the Virginia State Bar in writing of any change in status.

COMMENT

- [1] The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. To achieve these objectives, advertising must not be false, fraudulent, misleading or deceptive. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit.
- [1a] Advertisements and personal communications which are not misleading or deceptive will make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Due to fee information that may frequently be incomplete and misleading to a layperson, a lawyer should exercise great care that fee information is complete and accurate. Due to the individuality of each legal problem, statements regarding average, minimum or estimated fees may be deceiving, as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. It would be misleading to advertise a set fee for a specific type of case without adhering to the stated fee in charging clients. Advertisements or other claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly likely to be deceptive. An advertisement that truthfully reports a lawyer's achievement on behalf of clients or former clients may be misleading nonetheless, if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client. Whether a particular disclaimer is sufficient will depend on its content and the manner in which it is displayed in the context of the advertisement. Only factual assertions, and not opinions, should be made in such communications. Commercial publicity and personal communications addressed to undertaking any legal action should always indicate the provisions of such undertaking and should disclose the impossibility of assuring any particular result. Not only must communication be truthful but its meaning must be capable of being understood by the reasonably prudent layperson.

- [1b] The regulation of advertising and personal communications by lawyers is rooted in the public interest. Advertising through which a lawyer seeks business by use of extravagant, self laudatory statements, or appeals to fears and emotions could mislead laypersons. Furthermore, public and personal communications that produce unrealistic expectations in particular cases may bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such statements regarding professional services. The attorney client relationship, being personal and unique, should not be established as the result of pressures and deceptions. All lawyers should remain vigilant to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine public confidence in the legal system. Only unambiguous information relevant to a layperson's decision regarding legal rights or selection of counsel is appropriate in communications.
- [2] Advertisements and public communications should be formulated to convey information that is useful to a layperson in making an appropriate selection. Self laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, such as: name, including name of law firm, and names of professional associates; addresses; telephone numbers; credit card acceptability; languages spoken and written; and office hours; (2) biographical information; (3) description of the practice but only by using designations and definitions authorized by Rule 7.4; and (4) fee information.

VIRGINIA CODE COMPARISON

Rule 7.2 is similar to DR 2-101 of the *Virginia Code* except for those provisions included in Rule 7.1. In addition, Rule 7.2 (a)(3) includes the specific prohibition against advertising specific and cumulative case results. Paragraph (d) also now includes the provisions that all written or e-mail communication must display the words "advertising materials."

Paragraph(e), which is contained in *ABA Model Rule 7.2*, is intended to provide accountability if any issue regarding a particular communication should arise.

COMMITTEE COMMENTARY

The Committee decided to split the originally adopted Rule 7.1 into two rules and create Rule 7.2.

Rule 7.1 applies to all communications from a lawyer including advertising that is covered under Rule 7.2. Rule 7.2 was specifically segregated due to the unique issues created by the inclusion of paragraph (e) and the fact that the committee determined these specifics were meant to apply to advertising but not generically to all communications. The committee expanded paragraph (c) to include all written and e-mail communication.

Paragraph (a)(3) is a new provision that specifically prohibits "advertising specific or cumulative case results without an appropriate disclaimer," which has no direct counterpart in *Virginia Code*, but incorporates the longstanding opinion of the committee, as previously outlined in its written opinions.

Effective date—This Rule and commentary thereto became effective November 1, 2002.

The amendments effective June 30, 2005, in paragraph (e), added the language beginning with "or in alternative..." and ending with "change in status."

The amendments effective January 22, 2010, in paragraph (b), changed the designation from the Standing Committee on "Lawyer Advertising" to "Legal Ethics."

RULE 7.3 Direct Contact With Prospective Clients And Recommendation Of Professional Employment

- (a) **A lawyer shall not, by in-person communication, solicit employment as a private practitioner for the lawyer, a partner, or associate or any other lawyer affiliated with the lawyer or the firm from a non-lawyer who has not sought advice regarding employment of a lawyer if:**
- (1) **such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or**
 - (2) **such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.**

Inperson communication means facetoface communication and telephonic communication.

- (b) **A lawyer shall not assist in, cooperate with, or offer any qualified legal services plan or assist in or cooperate with any insurer providing legal services insurance as authorized by law to promote the use of services or**

those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the firm if that assistance, cooperation or offer, and the communications of the organization, are not in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.

- (c) A lawyer shall not assist a nonprofit organization which provides without charge legal services to others as a form of political or associational expression to promote the use of services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the firm if:
 - (1) the assistance or the communications of the organization on the lawyer's behalf are false, fraudulent, misleading, or deceptive; or
 - (2) the assistance or the communications of the organization on the lawyer's behalf involve the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct, taking into account the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.
- (d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.
- (e) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of any person's conduct which is prohibited under this Rule.
- (f) Notwithstanding any other provisions of this Rule, a lawyer shall not initiate in-person solicitation of professional employment for compensation in a personal injury or wrongful death claim of a prospective client with whom the lawyer has no family or prior professional relationship. In-person solicitation means face-to-face communication and telephone communication.

COMMENT

Direct Contact between Lawyers and Laypersons

- [1] Whether a lawyer acts properly in volunteering advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper whenever it is motivated by a desire to protect one who does not recognize that the person may have legal problems or who is ignorant of legal rights or obligations. It is improper if the advice is false, fraudulent, deceptive, or misleading. It is also improper, if given in person, when the advice is offered under circumstances which present a substantial potential for coercion, duress, or overreaching, which hold out unwarranted promises of benefits, taking into account the mental, physical, or emotional condition of the layperson and the circumstances surrounding the advice; or when the advice is given to a layperson who does not have a prior relationship to the lawyer, or who is relatively unsophisticated or inexperienced regarding legal services.
- [2] In-person communications between a lawyer and a layperson regarding legal problems and the selection of a lawyer should likewise be motivated by a desire to inform the layperson of the availability of competent, independent legal counsel. Since in-person communication provides the opportunity for a two-way exchange of information regarding legal problems and lawyers, the lawyer should encourage questions and respond willingly, candidly, and truthfully. Only personal communications which are not false, fraudulent, deceptive or misleading can provide useful information. However, the in-person character of such communications—in face-to-face settings and by telephone—can give rise to overreaching on the part of the lawyer or a feeling of being pressured for a response on the part of the layperson. Such communication is improper if it has the potential of involving coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct. In determining whether such a potential exists, a lawyer should be aware of whether the layperson's physical, mental or emotional state makes it possible for the person to make a reasoned judgment regarding the selection of a lawyer. The lawyer should also take into account such other factors as the age, education, and experience of the layperson and any preexisting relationships (family, friendship, business or other) between the lawyer and the layperson.

- [3] In-person communications regarding legal problems and the selection of a lawyer are also improper if the recipient, by virtue of inexperience or lack of sophistication about legal services, is not capable of making an informed decision during the course of the conversation. The experience and sophistication of the layperson regarding legal services and the employment of a lawyer has an important bearing on whether a lawyer should volunteer through personal contact advice that the person should obtain the service of a lawyer. There is a greater danger of the lawyer's overreaching or the layperson's feeling pressured to employ the lawyer in cases of relatively inexperienced or unsophisticated persons than in other cases. For example, a young couple considering the purchase of their first home may not have the experience or sophistication to evaluate in a personal conversation the reasons they need a lawyer. On the other hand, a business executive may be quite familiar with and capable of evaluating in the same context the need and choice of a lawyer.
- [4] Also, close friends, relatives, clients and former clients, and other persons who have established personal business or professional relationships with a lawyer or the lawyer's firm are deemed to be informed about the need and services of the lawyer. It is therefore proper for the lawyer to volunteer advice to such persons concerning the engagement of a lawyer and then accept employment. Of course, the advice should not be false or misleading, and should be given in circumstances which do not have the potential for overreaching.
- [5] The in-person solicitation of personal injury and wrongful death claims is fraught with special perils, as noted by the Supreme Court of the United States in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). The potential for overreaching is very great when a lawyer, a professional trained in the art of persuasion, personally solicits an injured or distressed layperson. The injured person's plight not only makes that person more vulnerable to influence, but is also more likely to make the overtures of an uninvited lawyer more obtrusive and distressing as an invasion of the individual's privacy. Accordingly, a different rule prevails. Lawyers may not solicit these types of claims by face-to-face or telephone communication, in the absence of a family or prior professional relationship, unless the contact is completely free of any motivation for financial gain.

Lawyer Recommendations

- [6] 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, for influencing a prospective client to employ him, or to encourage future recommendations except that the lawyer may pay for advertisements and other public communications, for participation in legal referral services, or for lawful prepaid legal services plans or legal services insurance. A lawyer may accept compensation from a nonprofit organization furnishing legal services without charge to laypersons in furtherance of political or associational expression.
- [7] The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

VIRGINIA CODE COMPARISON

Rule 7.3 is substantially similar to DR 2-103 of the *Virginia Code*.

COMMITTEE COMMENTARY

As with Rule 7.1, and for similar reasons, the Committee believed it prudent simply to adopt, verbatim, DR 2-103 as Rule 7.3 and to incorporate select Ethical Considerations from Canon 2 as the Comments.

The amendments effective November 1, 2002, added “and 7.2” following “Rule 7.1” once in subparagraph (b) and twice in subparagraph (d).

RULE 7.4 Communication Of Fields Of Practice And Certification

Lawyers may state, announce or hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of this Rule, Rule 7.1,

Rule 7.2, and Rule 7.3, as appropriate. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows:

- (a) **A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation;**
- (b) **A lawyer engaged in Admiralty practice may use as a designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation;**
- (c) **A lawyer who has been certified by the Supreme Court of Virginia as a specialist in some capacity may use the designation of being so certified, e.g., “certified mediator” or a substantially similar designation;**
- (d) **A lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.**

COMMENT

- [1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a “specialist,” practices a “specialty,” or “specializes in” particular fields, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 and 7.2 to public communications concerning a lawyer’s services.
- [2] However, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of long established policy of the Patent and Trademark Office as reflected in paragraph (a). Paragraph (b) recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.
- [3] Because Virginia has no procedure for approving organizations granting certifications of other specialties, lawyers communicating the fact that they have been certified as specialists in a field of law by a named organization (other than the Supreme Court of Virginia as provided in paragraph (c)) must clearly disclose that there is no procedure in Virginia for approving certifying organizations (paragraph (d)).

VIRGINIA CODE COMPARISON

Rule 7.4(a) and (b) are substantially the same as DR 2-104(A). Paragraph (c) is new, and paragraph (d) follows one of the two options in *ABA Model Rule 7.4(c)*.

COMMITTEE COMMENTARY

The Committee maintained the current DR 2-104(A) approach in the first two paragraphs of this Rule.

Because national organizations are increasingly certifying specialists in different areas of the law, the Committee determined to permit Virginia lawyers to describe such certifications. However, Virginia has no procedure for state approval of such certifications. For this reason, the Committee adopted the alternative *ABA Model Rule 7.4(c)* that requires lawyers communicating certified specializations to make the additional clear disclosure that Virginia has no procedure for approving certifying organizations. This additional disclosure balances Virginia clients’ interest in receiving additional information about lawyers and the need to avoid misleading clients by implying some government-approved certification. At the same time, it was deemed that any certification process implemented by the Supreme Court of Virginia (under (d)) would obviously be reliable, so as to eliminate the necessity for any disclaimer.

The amendments effective November 1, 2002, added “Rule 7.2” following “Rule 7.1” once in the first paragraph and once in Comment [1].

RULE 7.5 Firm Names And Letterheads

- (a) **A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, website, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive. A trade name may be used by a lawyer in private practice if it does not imply a connection with a**

government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1 and 7.2.

- (b) A law firm shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations of those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

- [1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the Supreme Court of the United States has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a retired or deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.
- [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests partnership in the practice of law.

VIRGINIA CODE COMPARISON

Paragraphs (a) and (c) are substantially similar to DR 2-102(A) and (B).

Paragraph (b) is identical to DR 2-102(D).

Paragraph (d) is substantially similar to DR 2-102(C), which stated that “a lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.”

COMMITTEE COMMENTARY

As with Rule 7.4, there was no substantive difference between *ABA Model Rule 7.5* and the corresponding Disciplinary Rule. Accordingly, the Committee modified the language of the *ABA Model Rule* where necessary to bring *ABA Model Rule 7.5* more in line with DR 2-102.

The amendments effective November 1, 2002, in subparagraph (a), the first sentence, inserted the word “website” and in last sentence, inserted “and 7.2” following “Rule 7.1”; in Comment [1], added the present second sentence.

The amendments effective June 30, 2005, in Comment [1], the fifth sentence, inserted “retired or,” deleted the last sentence which stated “However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm,” and added the present seventh and eighth sentences.

RULE 7.6 Political Contributions to Obtain Legal Engagements or Appointments by Judges

ABA Model Rule not adopted.

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer already admitted to the bar, in connection with a bar admission application, any certification required to be filed as a condition of maintaining or renewing a license to practice law, or in connection with a disciplinary matter, shall not:

- (a) **knowingly make a false statement of material fact;**
- (b) **fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter;**
- (c) **fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or**
- (d) **obstruct a lawful investigation by an admissions or disciplinary authority.**

COMMENT

- [1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a materially false statement in connection with an application for admission or a certification necessary for license renewal, it may be the basis for disciplinary action once that person has been admitted to the Bar. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any material misstatement, of which the person involved becomes aware, that could lead to a misunderstanding on the part of the admissions or disciplinary authority.
- [2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution, corresponding provisions of state constitutions, or other lawfully recognized matters of privilege. A person relying on such a provision in response to a question should openly assert the basis for nondisclosure.
- [3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the attorney-client relationship.
- [4] The Rule also prohibits the obstruction of either an admissions or disciplinary inquiry. "Obstruction" is used in the ordinary sense and includes, among other intentional acts, purposeful delay, attempts to improperly influence others who are requested to provide information, and the falsification or destruction of relevant documentation.

VIRGINIA CODE COMPARISON

Rule 8.1 is broader than DR 1-101 of the *Virginia Code*. DR 1-101(A) provided that a lawyer is "subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his or another's application for admission to the bar." DR 1-101(B) provided that a lawyer is "subject to discipline if he has made a materially false statement in any certification required to be filed as a condition of maintaining or renewing his license to practice law."

COMMITTEE COMMENTARY

The Committee preferred the broader coverage of the *ABA Model Rule* to that of DR 1-101 and made it even broader by adding language to the opening sentence covering required certifications and license renewal. Additionally, the Committee added paragraph (c) to impose an affirmative duty of cooperation with lawful demands for information, and added paragraph (d) to make it a separate violation to obstruct any investigation by a disciplinary or admissions authority.

The amendments effective September 26, 2002, in introductory paragraph, inserted "or" after present words "to practice law" to read "or in connection with a disciplinary matter..."

The amendments effective January 1, 2004, in introductory paragraph, inserted "already admitted to the bar," and deleted "in connection with" between present words "application" and "any certification."

RULE 8.2 Judicial Officials

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

COMMENT

- [1] False statements by a lawyer concerning the qualifications or integrity of a judge can unfairly undermine public confidence in the administration of justice. To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

VIRGINIA CODE COMPARISON

There was no direct counterpart to Rule 8.2 in the *Virginia Code*. EC 8-6 stated: “While a lawyer as a citizen has a right to criticize [judges and other judicial officers], he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.”

COMMITTEE COMMENTARY

The Committee adopted this Rule because it addressed a subject not explicitly addressed by the *Virginia Code*. However, the Committee deleted *ABA Model Rule* language which brought candidates for judicial office under the protection of this Rule and which required such candidates to abide by applicable provisions of the *Virginia Code* — concluding that such requirements and protections were neither necessary nor advisable for lawyers who are being considered for judicial office. While the dignity of courts and the attendant requirement that judicial officials be treated with respect acts as a restraint on lawyer criticism of those officials, the Committee concluded that to extend this Rule to those being considered for judicial office might have a chilling effect on free discussion of judicial candidates’ qualifications.

RULE 8.3 Reporting Misconduct

- (a) **A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.**
- (b) **A lawyer having reliable information that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.**
- (c) **If a lawyer serving as a third party neutral receives reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties’ written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.**
- (d) **This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer’s assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.**
- (e) **A lawyer shall inform the Virginia State Bar if:**
 - (1) **the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction;**
 - (2) **the lawyer has been convicted of a felony in a state, U.S. territory, District of Columbia, or federal court;**
 - (3) **the lawyer has been convicted of either a crime involving theft, fraud, extortion, bribery or perjury, or an attempt, solicitation or conspiracy to commit any of the foregoing offenses, in a state, U.S. territory, District of Columbia, or federal court.**

COMMENT

- [1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.
- [2] A report about misconduct is not required where it would involve violation of Rule 1.6. *See* Rule 1.6(c)(3).
- [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.
- [3a] In court-related dispute resolution proceedings, a third party neutral cannot disclose any information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the proceeding. Mediation sessions are covered by another statute, which is less restrictive, covering “any communication made in or in connection with the mediation which relates to the controversy being mediated.” Thus a lawyer serving as a mediator or third party neutral may not be able to discharge his or her obligation to report the misconduct of another lawyer if the reporting lawyer’s information is based on information protected as confidential under the statutes. However, both statutes permit the parties to agree in writing to waive confidentiality.
- [3b] The Rule requires a third party neutral lawyer to attempt to obtain the parties’ written consent to waive confidentiality as to professional misconduct, so as to permit the lawyer to reveal information regarding another lawyer’s misconduct which the lawyer would otherwise be required to report.
- [4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer or judge whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.
- [5] Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer in the course of that lawyer’s participation in or cooperation with an approved lawyers or judges assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The duty to report, therefore, does not apply to a lawyer who is participating in or cooperating with an approved lawyer assistance program such as the Virginia Bar Association’s Committee on Substance Abuse and who learns of the confidences and secrets of another lawyer who is the object of a particular assistance effort when such information is obtained for the purpose of fulfilling the recognized objectives of the program. Such confidences and secrets are to be protected to the same extent as the confidences and secrets of a lawyer’s client in order to promote the purposes of the assistance program. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to personal use.
- [6] The duty of a lawyer to self-report a criminal conviction or professional discipline under paragraph (e) of this rule is triggered only after the conviction or decision has become final. Whether an offense is a felony shall be governed by the state, U.S. territory, District of Columbia or federal law under which the conviction is obtained. Thus, it is possible that an offense in another jurisdiction may be a misdemeanor crime for which there is no duty to self-report, even though under Virginia law the offense is a felony.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially similar to DR 1-103(A) when coupled with the reference to Rule 1.6 in paragraph (d). DR 1-103(A) stated: “A lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness to practice law in other respects, shall report such information to the appropriate professional authority, except as provided in DR 4-101.”

Paragraph (c) has no counterpart in the *Virginia Code*.

With respect to paragraph (d), DR 1-103(B) effectively excluded from the disclosure requirements of DR 1-103(A) “any information gained in the performance of ... duties” by “a lawyer who is a member of The Virginia Bar Association’s Committee on Substance Abuse and/or who is a trained intervenor for the Committee.”

COMMITTEE COMMENTARY

These attorney misconduct reporting requirements do not differ substantially from those of the corresponding Disciplinary Rule, DR 1-103. Although paragraph (b), requiring the reporting of judicial misconduct, and paragraph (c), requiring reporting of lawyer misconduct by a third party neutral, have no counterpart in the *Virginia Code*, the Committee believed them to be appropriate additions. With respect to both paragraphs (a) and (b) and (c), the Committee believed that the phrase “reliable information” indicated more clearly than the *ABA Model Rule’s* “knowledge” the sort of information which should support a report of attorney misconduct.

The amendments effective September 26, 2002, in the rule heading, deleted “Professional” before “Misconduct,” in paragraph (a), substituted “to practice law” for “as a lawyer”; added paragraph (e); and added Comment [6].

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) **violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- (b) **commit a criminal or deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law;**
- (c) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;**
- (d) **state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or**
- (e) **knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.**

COMMENT

- [1] *ABA Model Rule* Comment not adopted.
- [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.
- [3] *ABA Model Rule* Comment not adopted.
- [4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law. *See* also Rule 3.1, Rule 3.4(d).
- [5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

VIRGINIA CODE COMPARISON

With regard to paragraphs (a) through (c), DR 1-102(A) provided that a lawyer shall not:

- “(1) Violate a Disciplinary Rule or knowingly aid another to do so.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Commit a crime or other deliberately wrongful act that reflects adversely on the lawyer’s fitness to practice law.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer’s fitness to practice law.”

Paragraph (d) is substantially the same as DR 9-101(C).

There was no direct counterpart to paragraph (e) in the Disciplinary Rules of the *Virginia Code*. EC 7-31 stated in part that “[a] lawyer ... is never justified in making a gift or a loan to a [judicial officer] under circumstances which might give the appearance that the gift or loan is made to influence official action.” EC 9-1 stated that a lawyer “should promote public confidence in our [legal] system and in the legal profession.”

COMMITTEE COMMENTARY

Much of this Rule parallels provisions of the Disciplinary Rules of the *Virginia Code*. Paragraph (e), however, sets forth a prohibition not in the *Virginia Code*, and the Committee believed it is an appropriate addition.

The amendments effective March 25, 2003, in paragraph (b), substituted “fitness to practice law” for “fitness as a lawyer”; in paragraph (c), deleted “professional” after present words “engage in” and added “which reflects adversely on the lawyer’s fitness to practice law”; added the last sentence to Comment [5].

RULE 8.5 Disciplinary Authority; Choice Of Law

- (a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of Virginia, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia. By doing so, such lawyer consents to the appointment of the Clerk of the Supreme Court of Virginia as his or her agent for purposes of notices of any disciplinary action by the Virginia State Bar. A lawyer may be subject for the same conduct to the disciplinary authority of Virginia and any other jurisdiction where the lawyer is admitted.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:
 - (1) for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred; and
 - (3) notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply.

COMMENT

Disciplinary Authority

- [1] In the past, a jurisdiction’s authority to discipline a lawyer has been based upon whether the lawyer is admitted in that jurisdiction. Subparagraph (a) is a significant change in that a lawyer not admitted in Virginia is nonetheless subject to the disciplinary authority of Virginia for conduct occurring in the course of providing, holding himself out as providing, or offering to provide legal services in Virginia. Subparagraph (a) adopts the scope of jurisdiction recommended by the ABA Model Rules for Lawyer Disciplinary Enforcement, as amended in 1996, by extending Virginia’s disciplinary authority to any lawyer who commits misconduct within Virginia.

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints the Clerk of the Supreme Court of Virginia to receive service of process in this jurisdiction.

Choice of Law

[2–7] *ABA Model Rule* Comments not adopted.

[8] Subparagraph (b) seeks to resolve conflicts that may arise when a lawyer is subject to the rules of more than one jurisdiction. The rules of one jurisdiction may prohibit the questioned conduct while the rules of another jurisdiction may permit it. A lawyer admitted in only one jurisdiction may also be subject to the rules of another jurisdiction in which he is not admitted to practice for conduct occurring in the course of providing, holding himself out as providing, or offering to provide legal services in the non-admitting jurisdiction. Also, a lawyer admitted in one jurisdiction may be subject to the rules of another jurisdiction if he appears before a court, agency, or other tribunal in that jurisdiction.

[9] If the lawyer appears before a court, agency, or other tribunal in another jurisdiction, subparagraph (b)(1) applies the law of the jurisdiction in which the court, agency, or other tribunal sits. In some instances, the court, agency, or other tribunal may have its own lawyer conduct rules and disciplinary authority. For example, the United States Patent and Trademark Office (“PTO”), through the Office of Enrollment and Discipline, enforces its own rules of conduct and disciplines practitioners under its own procedures. A lawyer admitted in Virginia who engages in misconduct in connection with practice before the PTO is subject to the PTO rules, and in the event of a conflict between the rules of Virginia and the PTO rules with respect to the questioned conduct, the latter would control.

[10] As to other conduct, if jurisdictions have conflicting rules regarding the questioned conduct, subparagraph (b)(2) resolves the conflict by choosing the rules of the jurisdiction where the conduct occurred. The physical presence of the lawyer is not dispositive in determining where the questioned conduct occurred. Determining where the lawyer's conduct occurred in the context of transactional work may require the appropriate disciplinary tribunal to consider other factors, including the residence and place of business of any client, third person, or public institution such as a court, tribunal, public body, or administrative agency, the interests of which are materially affected by the lawyer's actions.

PRIOR RULE COMPARISON

Virginia Rule 8.5 made no provision for disciplinary authority over a lawyer not admitted to practice in Virginia. Rather, a non-lawyer who committed misconduct in Virginia was subject to Virginia's unauthorized practice of law rules and the authority of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law.

Under former Rule 8.5 (b)(2), if a lawyer was subject to the rules of more than one jurisdiction, the rules of the jurisdiction in which the lawyer principally practiced applied unless the conduct had its predominant effect in another jurisdiction in which the lawyer was admitted to practice. The former rule, however, did not provide clear guidance if the lawyer's conduct occurred in a jurisdiction where the lawyer was not admitted.

COMMITTEE COMMENTARY

The Committee adopted this Rule in light of the ABA recommendation that the states adopt more specific rules governing multi-jurisdictional practice. Like ABA Model Rule 8.5 (a), this rule states that for conduct occurring in the course of providing, holding oneself out as providing, or offering to provide legal services in Virginia the Virginia State Bar may exercise disciplinary authority over a lawyer not admitted in Virginia. Consistent with ABA Model Rule 8.5, the Virginia rule adopts choice of law rules for circumstances in which the lawyer is subject to the professional conduct rules of more than one jurisdiction and they conflict. The Virginia rule adopts verbatim ABA Model Rule 8.5 (b)(1), applying the rules of the jurisdiction in which the court, agency, or other tribunal sits. The Committee, however, did not adopt the “predominant effect” test used in ABA Model Rule 8.5 (b)(2), favoring instead the application of the rules of the jurisdiction in which the lawyer's conduct occurred. Virginia Rule 8.5 (b)(3) is new. The Committee did not adopt *ABA Model Rule* Comments 2-7.

The amendments effective March 1, 2009, rewrote the Rule and Commentary thereto.