VIRGINIA STATE BAR

2009–2010 Professional Guidelines

Virginia State Bar

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NOTICE

TO VIRGINIA STATE BAR MEMBERS

The Virginia State Bar *Rules of Professional Conduct*, Unauthorized Practice Rules and other regulatory materials contained herein include amendments through March 1, 2010.

A complete collection of Legal Ethics and Unauthorized Practice of Law Opinions is contained in unnumbered 1991 and 1996 Added Volumes to the *Code of Virginia*, published by the Michie Company. These volumes are supplemented with a pocket part each July.

Upon request for LEOs involving a specific issue, the bar will furnish full texts of relevant opinions at no cost. The bar reserves the right to charge for volume requests. Charges will be based upon staff time and copying costs.

Any revision to the *Rules of Professional Conduct* or to provisions governing the practice of law in Virginia, subsequent to the publication date of this volume, will be published in forthcoming issues of the *Virginia Lawyer Register* and will be available on the VSB website at http://www.vsb.org.

VIRGINIA RULES OF PROFESSIONAL CONDUCT

Table of Contents

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, 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)
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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)
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1.4 (a)	Communication	DR 6-101 (C)
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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	***
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1.8 (b)	Improper Use of Client Confidences or Secrets	DR 4-101 (B)(3)
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1.8 (d)	Literary Rights in Subject Matter of Representation	*** EC 5-4
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1.8 (f)	Nonclient Paying Lawyer's Fee	DR 5-106
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1.8 (i)	Interfamily Conflicts	***
1.8 (j)	Proprietary Interest in Client Matter	***
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1.11 (a)	Public Officials: Conflicts	DR 8-101 (A)
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1.15 (f)	Accounting Procedures	DR 9-103 (B)
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3.3 (a)(4)	False Evidence	DR 7-102 (A)(4)
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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
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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 clientlawyer 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 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 nonlawyer 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' 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.

ORGANIZATION & GOVERNMENT OF THE VSB

1. NAME.—The name of the Organization shall be the Virginia State Bar.

2. MEMBERSHIP AND REGISTRATION.—

   (a) Every person licensed by the Virginia Board of Bar Examiners or admitted by the Supreme Court of Virginia is a member of the Virginia State Bar. Such persons shall register with the Virginia State Bar within one year after licensure or admission. Attorneys who are seeking active membership in the Virginia State Bar under Virginia Supreme Court Rule 1A:5, Part I (Virginia Corporate Counsel) must complete their registration requirements with the Virginia State Bar and their admission before the Supreme Court of Virginia within six months; otherwise such attorneys will be required to initiate a new application process.

   (b) Every lawyer making application to the Virginia State Bar as a Corporate Counsel Registrant under Virginia Supreme Court Rule 1A:5 Part II, and every lawyer issued a certificate by the Virginia Board of Bar Examiners under Virginia Supreme Court Rules 1A:6 or 1A:7 must complete their registration requirements with the Virginia State Bar within six months; otherwise such attorneys will be required to initiate a new application process.

3. CLASSES OF MEMBERSHIP.—Members of the Virginia State Bar shall be divided into five classes, namely: (a) Active Members, (b) Associate Members, (c) Judicial Members, (d) Disabled and Retired Members; and (e) Emeritus Members. Each member shall submit in writing to the membership department of the Virginia State Bar an address of record which will be used for all membership and regulatory purposes, including official mailings and notices of disciplinary proceedings. If a member's address of record is not a physical address where process can be served, the member must submit in writing to the membership department an alternate address where process can be served. The alternate address is personal information and shall not be disclosed pursuant to Section 2.2-3704, *Code of Virginia*. Members have a duty promptly to notify the membership department in writing of any changes in either the address of record or any alternate address. Members, by request, may have their names and addresses removed from the Virginia State Bar's membership list when it is distributed for other than official purposes.

   (a) Active Members—Those attorneys who are admitted to practice law in this state and who are engaged in the practice of law, either full-time or part-time, salaried or non-salaried, shall be active members of the Virginia State Bar. Those attorneys who are admitted to practice law in this state, but who are not presently so engaged, may acquire active status by paying the dues prescribed for active members and satisfying any other required membership obligations. Each active member's address of record will establish the judicial circuit in which the member is entitled to vote and hold office in the Virginia State Bar.

   (b) Associate Members—Those attorneys who have been admitted to practice law in the courts of this state but who are not presently so engaged and all persons on the law faculties of any law schools of this state that have been approved by the American Bar Association may become associate members of the Virginia State Bar upon application to the secretary and payment of the required dues. Associate members shall be entitled to all the privileges of active members except that they may not practice law, vote or hold office (other than as members of committees) in the Virginia State Bar.

   (c) Judicial Members—All full-time judges of the State (including federal judges), other officers qualified but forbidden by statute to practice law, and all retired judges who are receiving retirement benefits and are prohibited from appearing as counsel in any case in any court of the Commonwealth under section 51.1-309 of the *Code of Virginia* shall constitute the Judicial Membership of the Virginia State Bar. They shall pay no dues but shall be entitled to all of the privileges of active members except that they may not vote or hold office in the Virginia State Bar, and shall comply with any statutory limitations regulating their practice of law.

   (d) Disabled and Retired Members—Any member of the Virginia State Bar upon attaining the age of 70 or on the basis of a permanent disability, may submit to the executive director of the Virginia State Bar a written request to be transferred to the disabled and retired class of membership. Members who are electing this status based on a permanent disability must submit adequate medical and/or psychological documentation with the request. Members qualifying for transfer to the disabled and retired class shall not be entitled to practice law. Further, such members shall not be eligible to vote or hold office in the Virginia State Bar. Disabled and retired members may submit a petition to the executive director in writing for reinstatement to active or associate membership and state in the petition each circumstance that has changed since the member elected disabled or retired status. Adequate medical and/or psychological documentation must be submitted with the petition showing that the member is fit and capable of practicing law. If there are any misconduct complaints or proceedings pending when the executive director receives

a petition for reinstatement, or if the member appears to suffer from a disability, the executive director shall defer consideration of the petition until the misconduct or disability issues are resolved. The Executive Committee of the Virginia State Bar shall consider and act on any such petition, taking into account the recommendation of the executive director. The Executive Committee may deny a petition for reinstatement if the member is publicly disciplined or is determined to have a disability raising a serious question as to the member's fitness or capacity to practice law. If the Executive Committee approves the petition, the member shall be returned to active or associate status upon payment of the appropriate dues, satisfaction of any other required membership obligations, and payment of any outstanding financial obligations to the bar. Medical and/or psychological information provided pursuant to this subparagraph (d) is confidential and shall not be disclosed by the bar.

(e) Emeritus Members.—Those attorneys who are admitted to practice law in the Commonwealth of Virginia may, upon request to the Virginia State Bar with the supporting materials specified in this subparagraph, become emeritus members and provide *pro bono* legal services to the poor and working poor as emeritus members subject to the terms and conditions stated in this subparagraph. They shall pay no dues, may not practice law except in the limited manner specified in this subparagraph, and may not vote or hold office in the Virginia State Bar.

(1) Definitions.

(A) Active practice of law, for the purposes of this subparagraph, means that an attorney has been engaged in the practice of law, which includes private practice, house counsel, public employment as a lawyer, or full-time teaching at an American Bar Association approved law school.

(B) Emeritus member is any person who is admitted to practice law in the Commonwealth of Virginia, who is retiring or has retired from the active practice of law, and who intends to provide *pro bono* services under this subparagraph; and

(i) Has been engaged in the active practice of law for a minimum of ten out of the fifteen years immediately preceding the application to become an emeritus member; and

(ii) Is, at the time of requesting emeritus member status, an active member in good standing of the Virginia State Bar and has not been disciplined for professional misconduct by the bar or courts of any jurisdiction within the past fifteen years; and

(iii) Signs a statement that he or she has read and will comply with the Virginia Rules of Professional Conduct and as an emeritus member submits to the continuing jurisdiction of the Virginia Supreme Court and the Virginia State Bar for disciplinary purposes; and

(iv) Agrees to neither ask for nor receive any compensation of any kind, except for out-of-pocket expenses, for the legal service to be rendered under this subparagraph.

(C) Approved legal assistance organization, for the purposes of this subparagraph, is a Virginia licensed legal aid society or other not for profit entity organized in whole or in part, to provide legal services to the poor and/or working poor in Virginia and receiving funds for that purpose from an agency or entity of the federal government or the Commonwealth of Virginia, or from the Virginia Law Foundation.

(D) Supervising attorney, for purposes of this subparagraph, is an attorney who directs and supervises an emeritus member engaged in activities permitted by this subparagraph. The supervising attorney must:

(i) Be an active member of the Virginia State Bar in good standing employed by or participating as a volunteer for an approved legal assistance organization; and

(ii) Assume personal professional responsibility for supervising the conduct of the litigation, administrative proceeding, or other legal service in which the emeritus member engages; and

(iii) Direct and assist the emeritus member in his or her preparation to the extent the supervising attorney considers it necessary.

(2) Activities.

(A) An emeritus member, in association with an approved legal assistance organization and only under the supervision of a supervising attorney, may perform only the following activities:

(i) The emeritus member may appear in any court or before an administrative tribunal or arbitrator in the Commonwealth of Virginia on behalf of a client of an approved legal assistance organization if the person on whose behalf the emeritus member is appearing has consented in writing to that appearance and a supervising attorney has given written approval for that appearance. The written consent and approval shall be filed in the record of each case and shall be brought to the attention of the presiding judge or presiding officer in any administrative or arbitration proceeding.

(ii) The emeritus member may prepare and sign pleadings and other documents to be filed in any court or with any administrative tribunal or arbitrator in this state in any matter in which the emeritus member is involved.

(iii) The emeritus attorney may render legal advice and perform other appropriate legal services, but only with the express approval of the supervising attorney.

(iv) The emeritus attorney may engage in such other preparatory activities as are necessary for any matter in which he or she is properly involved.

(B) The presiding judge, hearing officer, or arbitrator may, in his or her discretion, determine the extent of the emeritus member's participation in any proceeding.

(3) Supervision and Limitations

(A) An emeritus member must perform all activities authorized by this subparagraph under the direct supervision of a supervising attorney.

(B) Emeritus members permitted to perform services under this subparagraph are not, and shall not represent themselves to be, active members of the Virginia State Bar licensed to practice law generally in the Commonwealth of Virginia.

(C) The prohibition against compensation for the emeritus member contained in Section (1)(B)(iv) of this subparagraph shall not prevent the approved legal assistance organization from reimbursing the emeritus member for actual expenses incurred while rendering service under this subparagraph, nor shall it prevent the approved legal assistance organization from charging for its services as it may otherwise properly charge. The approved legal assistance organization shall be entitled to receive all court awarded attorney's fees for any representation rendered by an emeritus member.

(4) Certification. Permission for an emeritus member to perform services under this subparagraph shall become effective upon filing with and approval by the Virginia State Bar of:

(A) A determination by the Virginia State Bar that the emeritus member has fulfilled the requirements of such membership and has a clear disciplinary record as required by Section (1)(B) of this subparagraph; and

(B) A certification by an approved legal assistance organization stating that the emeritus member is currently associated with that approved legal assistance organization and that an attorney employed by or participating as a volunteer with that organization will assume the duties of the supervising attorney required under this subparagraph.

(5) Withdrawal of Certification.

(A) Permission to perform services under this subparagraph shall cease immediately upon the filing with the Virginia State Bar of a notice either:

(i) By the approved legal assistance organization stating that:

(a) The emeritus member has ceased to be associated with the organization, which notice must be filed within five days after such association has ceased, or

(b) That the certification of such attorney is withdrawn. An approved legal assistance organization may withdraw certification at any time and it is not necessary that the notice state the cause for such withdrawal. A copy of the notice filed with the Virginia State Bar shall be mailed by the organization to the emeritus member concerned.

(ii) By the Virginia State Bar, or the Virginia Supreme Court, at any time, stating that permission to perform service under this subparagraph is revoked. A copy of such notice shall be mailed to the emeritus member involved and to the approved legal assistance organization by which he or she has been certified. The emeritus member may apply to the Virginia State Bar or the Virginia Supreme Court for review of such revocation.

(B) If an emeritus member's certification is withdrawn, for any reason, the supervising attorney shall promptly file a notice of such action in the official file of each matter pending before any court or tribunal in which the emeritus member was involved.

(6) Discipline. In addition to any appropriate investigation or proceeding instituted, or any discipline that may be imposed by the Virginia Supreme Court or the Virginia State Bar, the emeritus member shall be subject to the following disciplinary measures:

(A) The presiding judge or hearing officer for any matter in which the emeritus member has participated may hold the emeritus member in civil contempt for any failure to abide by such tribunal's orders; and

(B) The Virginia Supreme Court, the Virginia State Bar, or the approved legal assistance organization may, at any time, with or without cause, withdraw certification under this subparagraph.

(7) Mandatory Continuing Legal Education. Emeritus members must satisfy the Mandatory Continuing Legal Education (MCLE) obligations required of active members under Part 6, § IV, Paragraph 17 of the Rules of the Supreme Court of Virginia. Failure to satisfy the MCLE requirements shall subject the emeritus members to the fees and sanctions specified in Part 6, Section IV, Paragraph 19 of the Rules the Virginia Supreme Court.

(8) Change of Membership Status. An emeritus member may petition for reinstatement to active membership under the procedure prescribed in subparagraph (d) of this rule for disabled and retired members.

4. OFFICERS.—The officers of the Virginia State Bar shall be a President, a President-elect, an Immediate Past President and a Secretary-Treasurer. The President-elect shall be elected annually for a term to commence immediately upon the adjournment of the Annual Meeting of the Virginia State Bar and to continue until adjournment of the next Annual Meeting of the Virginia State Bar, at which time he or she shall take office as President. The President shall continue in office until adjournment of the next Annual Meeting, at which time he or she shall become the Immediate Past-President until adjournment of the following Annual Meeting.

To be eligible for nomination as President-elect, the candidate must, at the time of nomination, have been an active member of the Virginia State Bar for a period of seven years and must have served on the Council for a minimum of two years within the five-year period next preceding his or her election.

The method of election of the President-elect shall be in the manner prescribed by the Bylaws of the Council.

Vacancies in the office of President or President-elect shall be filled by the Council.

The President, the President-elect and the Immediate Past President shall be *ex officio* members of the Council; the President shall preside over the Council. In the absence of the President, the President-elect shall preside.

The Secretary-Treasurer shall also bear the title of Executive Director and Chief Operating Officer. The Council shall recommend its nominee as Secretary-Treasurer to the Supreme Court of Virginia which shall approve or reject the Council's recommendation. If the Supreme Court rejects Council's recommendation, Council shall submit another recommendation to the Court for its consideration. The Secretary-Treasurer shall keep all records of the Council and the Virginia State Bar. Accounts of the Secretary-Treasurer shall be audited annually.

The Secretary-Treasurer may be removed from office by the Council with the approval of the Supreme Court or by the Supreme Court, acting *sua sponte*.

5. THE COUNCIL.—The powers of the Virginia State Bar shall be exercised by a Council composed of at least thirty-seven members in addition to the President, President-elect and Immediate Past President, as *ex officio* members, elected and appointed as follows:

   At least one active member from each of the thirty-one judicial circuits, elected for a term of three years by the members of the bar of each circuit, and nine members appointed by the Supreme Court of Virginia from the active members of the bar of the state at large. The Court shall appoint the at-large members to serve for a term of three years and, further, shall appoint in such a manner as to ensure that three members are appointed annually. A person who has served two successive full three-year terms as an elected or appointed member of Council shall not be eligible for election or appointment to a third successive term.

   For each additional judicial circuit, whenever created, there shall be a member of the Council, who shall be an active member of the bar of that circuit. An election shall be held in such circuit within sixty (60) days after the creation of such circuit or as soon thereafter as may be feasible in the manner provided at Paragraph 6. The Council at its meeting next thereafter shall determine the length of the term of the first member from that circuit so that, as nearly as possible, the terms of one-third of the members of the Council expire each year.

   Any circuit having as of the 1st day of February in any year more than 500 active members in good standing who are domiciled or principally practice their profession in such circuit shall be entitled to one additional member of the Council for each additional 500 members or major fraction thereof. In the event that the membership in a circuit as of February 1 is such that it is no longer entitled to one or more additional members, the term of such additional member[s] of the Council shall end at the expiration of the term for which the member[s] was elected. Provided, however, that the number of Council members from each circuit as of July l, 2008, shall not be reduced unless the active membership in the circuit first increases to the number which will sustain its allocation of Council members as of July l, 2008, under the above formula, and subsequently falls below that number.

   Whenever a judicial circuit shall be abolished, the term of any member of the Council from that circuit shall end forthwith.

   The President of the Young Lawyers Conference shall serve as an *ex officio* member of the Council.

   The Chair of the Conference of Local Bar Associations shall serve as an *ex officio* member of the Council.

   The Chair of the Senior Lawyers Conference shall serve as an *ex officio* member of the Council.

   The Chair of the Diversity Conference shall serve as an *ex officio* member of the Council.

6. ELECTION OF COUNCIL.—Prior to the expiration of a term of a Council member from a circuit, or when it appears that such a position has otherwise become vacant, or the circuit becomes entitled to an additional Council member under other provisions of this section, the executive director shall initiate the election process for the election of a Council member in the manner prescribed by the Bylaws of the Council.

7. MEETINGS OF THE COUNCIL.—The Council shall hold meetings at such regular times and upon such call as it may specify. A quorum at any meeting shall consist of not less than twenty members. Between meetings of the Council its duties and functions may be performed by such Executive Committee of members or officers as the Council may designate.

8. ANNUAL MEETING OF THE VIRGINIA STATE BAR.—Annually, on or before July 1, there shall be held a meeting of the members of the Virginia State Bar at a time and place designated by the Council or Executive Committee and presided over by the President. All officers elected at the annual meeting or by the Council shall take office immediately upon adjournment of the annual meeting except in cases where vacancies are filled for an unexpired term. At such meeting there shall be a report from the officers and from the Council, and there shall be elected the President and President-Elect for the ensuing year.

   A quorum at such meeting shall be those members of the Virginia State Bar present and voting.

   There may be transacted also such other business as may come before the meeting.

   A special meeting of the Virginia State Bar may be called by the Council.

9. POWERS OF THE COUNCIL.—The Council shall have general charge of the administration of the affairs of the Virginia State Bar, and shall have the power:

   (a) To adopt Bylaws for the Council and the Virginia State Bar not in conflict with these rules.

   (b) To elect the officers provided for by these rules.

(c) To fill vacancies in the Council for unexpired terms if there should be a failure for sixty days to elect as provided in Section (6) and to fill vacancies in any office for unexpired terms.

(d) To appoint committees and prescribe their duties.

(e) To employ such assistants as it deems necessary and to fix their duties and compensation and the compensation of the Secretary-Treasurer.

(f) To make allocations of funds within the amounts available.

(g) To conduct such investigations and make such reports as may be directed by the Supreme Court or by the bar.

(h) To render advisory opinions as provided in Section (10).

(i) To establish an Administration and Finance Fund from which expenses related to meetings of the Council, meetings of the Executive Committee, the Annual and Midyear Meetings, and other official functions of the Virginia State Bar may be paid. The Fund shall be composed of funds appropriated to it by Council, or otherwise received. Such funds may be held, managed and invested as authorized or directed by Council. Disbursements from the fund shall be made as authorized by Council to pay the necessary expenses related to official functions of the Virginia State Bar as authorized by these Rules including, but not limited to, those expenses resulting from the exercise of the Council's powers under these Rules.

(j) The Council may, at its discretion or upon a written request of the majority of the members of the Virginia State Bar or pursuant to a resolution duly adopted at a regular or called meeting, exercise the necessary powers:

To promote reforms in judicial procedure and the judicial system that are intended to improve the quality and fairness of the system;

To recommend to the Supreme Court procedures for the disciplining, suspending and disbarring of attorneys;

To recommend to the Supreme Court the adoption of, modifications to, amendments to or the repeal of any rule of the Rules of the Supreme Court of Virginia;

To regulate the legal profession;

To improve the quality of the legal services made available to the people of Virginia;

To investigate, evaluate or endorse judicial candidates on a nonpartisan, merit basis;

To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;

To encourage higher and better education for membership in the profession; and

To encourage and promote diversity in the profession and the judiciary; and

To perform all duties imposed by law.

10. PROMULGATION OF LEGAL ETHICS AND UNAUTHORIZED PRACTICE OF LAW OPINIONS AND RULES OF COURT.

(a) *Definitions*.

(i) "*Bar*" shall mean the Virginia State Bar.

(ii) "*Committee*" shall mean the Legal Ethics Committee and the Unauthorized Practice of Law Committee, as required by the context in which it is used.

(iii) "*Council*" shall mean the Council of the Virginia State Bar.

(iv) "*Court*" shall mean the Supreme Court of Virginia.

(v) "*Member*" shall mean any active member of the Virginia State Bar.

(vi) "*Executive Director*" shall mean the Executive Director of the Virginia Stat Bar.

(vii) "*Advisory Opinion*" shall mean a written statement of the subject involved, the question presented, the Rule of Court or other precedents relied upon, the opinion reached and the reasons therefor; if dealing with a subject of general application, an advisory opinion may be stated in the form of a proposed Rule of Court or amendment thereto.

(viii) "*Ethics Counsel*" shall mean the Ethics Counsel or an Assistant Ethics counsel of the Virginia State Bar.

(ix) "*Rule*" *and* "*Rule of Court*" shall mean throughout this paragraph only those rules proposed by either the Standing Committee on Legal Ethics or the Standing Committee on the Unauthorized Practice of Law.

(x) "*Informal Staff Opinion*" shall mean advice and opinions provided to Members requesting same from Ethics Counsel.

(b) *Requests for Advisory Opinions.*

(i) A legal ethics, lawyer advertising, solicitation, or unauthorized practice of law advisory opinion of the Bar concerning contemplated or actual conduct may be requested by any member.

(ii) All requests for advisory opinions shall be in writing, addressed to the appropriate Committee, in the hypothetical, and on a form prepared by the Committee calling for such information as the Committee may request; provided, however, that a request for an opinion as to the propriety of advertising or solicitation may include the specific advertisement or solicitation in question.

(c) *Advisory Opinions of the Committees.*

(i) Upon receipt of a request for an advisory opinion, the Ethics Counsel shall review such request to determine whether the request should be referred to the Chairman of the appropriate Committee. If the Ethics Counsel or Committee determines that the request presents a previously resolved issue, the requestor shall be so informed and the request shall be considered terminated unless the requestor states in writing that the requestor has not previously presented the issue and requests that it be reconsidered.

(ii) The Committee, upon determining that the request presents a previously unresolved issue, or presents for reconsideration an issue not previously presented by the requestor, shall issue, in response to the request, a proposed advisory opinion, with notice to the requester that the opinion remains pending during the course of the public comment period outlined in subparagraph (iii). Opinions or requests for reconsideration may be by summary affirmance of a prior opinion. The Committee may in its discretion decline to render an opinion regarding any matter which is currently the subject of any disciplinary proceeding or litigation or which presents an issue beyond its purview.

(iii) Within 45 days of the issuance of a proposed advisory opinion, the Bar shall cause to be issued a press release that shall state (A) the question presented by the request for an advisory opinion; (B) the conclusion reached by the Committee; (C) a brief synopsis of the rationale for the conclusion; (D) that the advisory opinion may be inspected at the office of the Bar; (E) that at the conclusion of the comment period, the Committee will review the opinion in light of any comments received; (F) that any individual, business, or other entity may submit written comments in support of, or in opposition to, the proposed advisory opinion to the Executive Director, within thirty days of the date on which the press release was issued; and (G) the Committee may choose to adopt, modify, or rescind the opinion in response to the comments received.

(iv) In the case of an advisory unauthorized practice of law opinion in which the Committee concludes following the conclusion of the public comment period that the conduct in question constitutes or would constitute the unauthorized practice of law, the advisory opinion shall be sent to Council for approval, modification or disapproval.

(v) In the case of any other advisory opinion, the Committee may, by majority vote, publish the opinion as an informal advisory opinion of the Committee or ask Council to review the advisory opinion in accordance with the procedures set out in paragraphs (d), (e) and (f).

(vi) Any party requesting an advisory legal ethics, lawyer advertising or solicitation, or unauthorized practice of law opinion who disagrees with the result stated in the Committee's advisory opinion issued following the conclusion of the public comment period, may appeal such opinion, as a matter of right, to Council for approval, modification or disapproval.

(vii) Any such opinion expresses the judgment of the Committee and is advisory only. It shall have no legal effect and is not binding on any judicial or administrative tribunal.

(viii) Copies of opinions rendered by the Committees will be provided upon request. All such opinions will be provided without any identifying data. However, all Committee deliberations, draft opinions, memoranda, correspondence, and the like shall be confidential and privileged from discovery and/or subpoena and as such will not be provided to anyone absent Court order entered upon a showing of good cause. Without waiving the confidentiality provision stated above, the

Committees, in their discretion, may disseminate draft opinions to the Boards of Governors of Virginia State Bar Sections for written comment when those Sections have an interest in the subject matter of the proposed opinion.

(d) *Notice of Advisory Opinions to Be Considered by Council.*

(i) In any case where an advisory opinion is to be considered by Council, and no later than 45 days next preceding the date of such Council meeting at which final action with respect to such advisory opinion is to be taken, the Bar shall cause to be issued a press release which shall state (A) the question presented by the request for an advisory opinion; (B) the conclusion reached by the Committee; (C) a brief synopsis of the rationale for the conclusion; (D) that the advisory opinion may be inspected at the office of the Bar; (E) that the advisory opinion shall be considered by the Council, which will approve, disapprove or modify the advisory opinion; (F) that any individual, business or other entity may file 10 copies of written comments in support of, or in opposition to, the advisory opinion with the Executive Director, within thirty days of the date on which the press release was issued; and (G) that the decision of Council concerning the advisory opinion may be reviewed by the Court.

(ii) The press release so issued shall also be printed in that issue of the Virginia Lawyer Register next preceding the Council meeting at which final action with respect to such advisory opinion will be taken.

(e) *Provisions for Comments.*

(i) Within thirty days from the date of the press release provided for in (d) (i), any individual, business or other entity may file with the Executive Director 10 copies of written comments in support of, or in opposition to, the advisory opinion.

(ii) Within thirty days from the date of the press release provided for in (d) (i), the Attorney General of Virginia shall file with the Executive Director 10 copies of written comments which analyze any restraint on competition which may result from promulgation and implementation of the advisory opinion.

(iii) Except as specifically authorized by Council, there shall be no oral argument.

(f) *Action by Council.*

(i) Upon due consideration of all materials submitted to it, including an evaluation of the competitive effects of approving or disapproving the advisory opinion, Council shall approve, modify or disapprove the advisory opinion, by a majority vote of those present and voting.

(ii) In the case of any advisory opinion which is not transmitted to the Court for review pursuant to (f) (iii) below, if such advisory opinion is disapproved by a majority of Council present and voting, such action shall be recorded in the minutes of the meeting; if such advisory opinion is approved or modified, it shall be published as an advisory opinion of the Bar.

(iii) All advisory unauthorized practice of law opinions in which Council concludes that the proposed or actual conduct constitutes the unauthorized practice of law, and all other advisory opinions which Council, by majority vote of those present and voting, desires to transmit, shall be reviewed by the Court pursuant to the notice and review procedures hereinafter set forth.

(iv) Any such opinion expresses the judgment of Council and is advisory only. It shall have no legal effect and is not binding on any judicial or administrative tribunal.

(g) *Review by the Supreme Court of Virginia.*

(i) Within thirty days after the Council meeting at which final action with respect to such advisory opinion was taken, Bar Counsel shall file with the Clerk of the Court 9 copies of a Notice of Advisory Opinion Review; the request for an advisory opinion; all materials submitted to Council by the Bar, the Attorney General, and the public; and the advisory opinion as approved by Council.

(ii) Within ten days after the filing referred to in (g) (i), the Bar shall cause to be issued a press release which shall state (A) an advisory opinion on a stated subject has been filed with the Court; (B) the advisory opinion may be inspected at the office of the Bar; (C) the advisory opinion will be considered by the Court, which shall approve, disapprove or modify the advisory opinion; and (D)

any individual, business or other entity may submit written comments in support of, or in opposition to, the advisory opinion by filing 9 copies with the Clerk of the Court and three copies with the Executive Director of the Bar, within 45 days from the date of issuance of the press release.

(iii) Except as specifically requested or ordered by the Court, there shall be no oral argument.

(iv) Upon due consideration of all material submitted to it, including an evaluation of the competitive effects of approving or disapproving the advisory opinion, the Court shall approve, modify or disapprove the advisory opinion, with or without a written opinion by the Court. Upon modification or approval of the opinion, it shall become a decision of the Court.

(h) *Complaints of Unauthorized Practice of Law.*

(i) Any written complaint of the unauthorized practice of law addressed to the Bar or to the Committee shall be investigated by the Ethics Counsel or his staff.

(ii) Upon completion of an investigation, and not later than 180 days after the filing of the complaint, the Ethics Counsel shall report to the Committee the status of the investigation.

(iii) Upon review of all materials submitted to it, by a majority vote of those present, the Committee may

1. Dismiss the complaint due to insufficient evidence or other good cause; or

2. Dismiss the complaint with cautionary language.

(iv) After considering the evidence before it, if a majority of the Committee present finds there exists probable cause to believe the person, firm, or corporation is engaged in the unauthorized practice of law the Committee may

1. Dismiss the complaint with a letter agreement in which the Respondent agrees to cease the activity which is the subject of the complaint; or

2. Refer the complaint to the Attorney General of Virginia, a Commonwealth's Attorney or other appropriate agency for such action as authorized by law.

(i) *Subpoena Power.*

(i) Upon receiving a complaint alleging facts indicating that a person, firm or corporation is or may be unlawfully practicing law and provided that the issuance of a summons or subpoena is necessary for the investigation of such alleged practice, the Ethics Counsel may issue a summons or subpoena in the name of the Commonwealth for the attendance of any person and production of books and records at the place and time designated in the summons or subpoena. The Committee or an investigator to whom a complaint is assigned may use a summons to examine witnesses or obtain statements from persons having knowledge of the subject matter of the complaint.

(ii) Every circuit court shall have power to enforce any summons or subpoena issued by the Ethics Counsel and to adjudge disobedience thereof as contempt.

(j) *Committee Hearing.*

(i) Within 45 days after receipt of the Ethics Counsel's report, the Committee may meet to consider the matter submitted and hear any evidence or witnesses subpoenaed by the Committee.

(ii) After considering the evidence before it, if a majority of the Committee present finds there exists probable cause to believe the person, firm, or corporation is engaged in the unauthorized practice of law, the Committee may direct the Ethics Counsel to forward the results of the Bar's investigation, copies of any records, and a summary of the Committee's findings to the Attorney General of Virginia with a request that the conduct be enjoined and/or that any other remedy available under the Code of Virginia be pursued.

(k) *Modification, Amendment or Repeal of a Rule.*

(i) The Court, upon petition by the Bar, may modify, amend, or repeal any Rule first promulgated pursuant to the procedures of this paragraph.

(ii) Such a petition may be filed only pursuant to a majority vote at a Council meeting, by members there present and voting.

(l) *Informal Staff Opinions of Ethics Counsel.*

(i) Ethics Counsel shall provide informal advice and opinion to Members requesting same, based on the specific facts which Members provide to Ethics Counsel.

(ii) In no case shall Ethics Counsel be compelled to testify, via subpoena or otherwise, in any judicial or adjudicative proceeding, except on behalf of a respondent in disciplinary proceedings of the Virginia State Bar, regarding any advice and/or opinion provided to that attorney. In no case shall Ethics Counsel be subject to subpoena or otherwise compelled to testify in any judicial or adjudicative proceeding as an expert witness regarding legal ethics and/or the practice of law. Rather, in all such instances, testimony of Ethics Counsel shall be limited to the substance of any communications by and between Ethics Counsel and the Member, where such communications are an issue in the proceeding.

(iii) All communications between Ethics Counsel and any Member requesting advice or opinion shall be confidential and Ethics Counsel shall not disclose the content of any such discussion without the express written consent of the Member to whom Ethics Counsel provided such advice or opinion.

11. DUES.—Effective July 1, 2000, each active member shall pay to the Treasurer of the Virginia State Bar, annual dues of $250, and associate members shall pay annual dues of $125, on or before the 31st day of July of each fiscal year, provided that persons admitted to practice by examination or under Rule 1A:1 of the Supreme Court of Virginia shall not be liable for dues in the year of admission if admitted during the last three months of any fiscal year. Persons admitted to practice under Rule 1A:1 at any other point during any fiscal year shall pay the full amount of dues as specified above at the time they register with the Virginia State Bar. Persons admitted to practice by examination at any other point during any fiscal year shall pay one-half the amount of dues as specified above at the time they register with the Virginia State Bar.

No increase in the annual dues will be authorized by the Court whenever the total combined cash balances of the State Bar Fund and the Virginia State Bar's Administration and Finance Account shall exceed fifteen (15) percent of the total annual operating expenditures of the Virginia State Bar for the year preceding the year in which the dues increase is sought.

All monies collected hereunder shall be accounted for and paid into the State Treasury of Virginia.

Failure to comply with this Rule shall subject the member to penalties set forth in Paragraph 19 herein.

12. DISBURSEMENTS.— Disbursements shall be paid out of the State Treasury in accordance with allocations of the Council and on requisitions signed by the President, President-Elect, or Secretary-Treasurer, and upon the warrant of the State Comptroller. No member of the Council, and no member or officer of the Virginia State Bar except the Secretary-Treasurer, shall receive compensation for his or her services as such, nor shall any member of the Council or of the Virginia State Bar receive compensation for service on any Committee, but such Council member or Committeeman shall be reimbursed for his or her necessary and actual traveling and subsistence expenses incurred in the performance of his or her duties. The Council shall cause proper books of account to be kept, and have them audited annually. At each annual meeting of the Virginia State Bar, the Council shall cause to be presented a financial statement of the receipts and expenditures of the Virginia State Bar, which shall be published in the next volume of reports.

13. PROCEDURE FOR DISCIPLINING, SUSPENDING AND DISBARRING ATTORNEYS.—

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NOTE: text in parentheses is descriptive and denotes that the section has no heading

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NOTE: text in parentheses is descriptive and denotes that the section has no heading

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RULES OF THE VIRGINIA SUPREME COURT
PART SIX, SECTION IV, PARAGRAPH 13
EFFECTIVE MAY 1, 2009

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

13-1 DEFINITIONS

As used in this Paragraph, the following terms shall have the meaning herein stated unless the context clearly requires otherwise:

"Adjudication of a Crime Proceeding" means the proceeding which follows the summary Suspension of an Attorney after receipt by the Clerk of the Disciplinary System of initial notification from any court of competent jurisdiction stating that an Attorney has been found guilty of a Crime, irrespective of whether sentencing has occurred.

"Admonition" means a private sanction imposed by a Subcommittee *sua sponte*, a private or public sanction based upon an Agreed Disposition approved by a Subcommittee, or a public sanction imposed by a District Committee or the Board upon a finding that Misconduct has been established, but that no substantial harm to the Complainant or the public has occurred, and that no further disciplinary action is necessary.

"Agreed Disposition" means the disposition of a Complaint or Charge of Misconduct agreed to by Respondent and Bar Counsel and approved by a Subcommittee, District Committee, or the Board.

"Attorney" means a member of the Bar and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia.

"Bar" means the Virginia State Bar.

"Bar Counsel" means the Attorney who is appointed as such by Council and who is approved by the Attorney General pursuant to Va. Code §2.1-122(c) and such deputies, assistants, and Investigators as may be necessary to carry out the duties of the office, except where the duties must specifically be performed by the individual appointed pursuant to Va. Code §2.1-122(c).

"Bar Official" means any Bar officer or any member, employee, or counsel of Council, the Board, a District Committee, or COLD.

"Board" means the Bar Disciplinary Board.

"Certification" means the document issued by a Subcommittee or a District Committee when it has elected to certify allegations of Misconduct to the Board for its consideration, which document shall include sufficient facts to reasonably notify Bar Counsel and Respondent of the basis for such Certification and the Disciplinary Rules alleged to have been violated.

"Certification for Sanction Determination" means the document issued by a District Committee to certify to the Board that a sanction within the power of the Board is in order where the District Committee has found that Respondent failed to fulfill the terms of a Public Reprimand with Terms issued either by a Subcommittee on the basis of an Agreed Disposition or by a District Committee.

"Chair," unless otherwise specified, means the Chair, Vice Chair, or Acting Chair of a District Committee, or a Section, Panel, or Subcommittee of a District Committee, or of the Board or any Panel of the Board.

"Charge of Misconduct" means the notice given by the Bar to a Respondent, setting forth generally the Misconduct alleged to have been committed by the Respondent, and identifying the specific Disciplinary Rule(s) alleged to have been violated by the Respondent. The Charge of Misconduct shall also include the date, time, and place of the hearing.

"Circuit Court" means a court designated as such by Va. Code §17.1-500.

"Clerk of the Disciplinary System" means the employee of the Bar who, together with such assistants as may be required, provides administrative support to the disciplinary system and serves as official custodian of the Disciplinary Records.

"COLD" means the Standing Committee on Lawyer Discipline.

"Complainant" means the initiator of a Complaint.

"Complaint" means any written communication to the Bar alleging Misconduct or from which allegations of Misconduct reasonably may be inferred.

"Committee Counsel" means an Attorney District Committee member assigned to prosecute a Complaint.

"Costs" means reasonable costs paid by the Bar to outside experts or consultants; reasonable travel and out-of-pocket expenses for witnesses; Court Reporter and transcript fees; electronic and telephone conferencing and recording costs, if such procedures are

requested by Respondent; copying, mailing, and required publication costs, and an administrative charge determined by Council.

"Council" means the Council of the Bar.

"Court Reporter" means a person who is qualified to transcribe proceedings in a Circuit Court.

"CRESPA" means the Virginia Consumer Real Estate Settlement Protection Act, Va. Code, Title 6.1, Chapter 1.3, and any regulations promulgated thereunder.

"Crime" means:

1. Any offense declared to be a felony by federal or state law;
2. Any other offense, whether federal or state, involving theft, fraud, forgery, extortion, bribery, or perjury; or
3. An attempt, solicitation or conspiracy to commit any of the foregoing.

"Disbarment" has the same meaning as Revocation.

"Disciplinary Proceeding" means any proceeding governed by this Paragraph.

"Disciplinary Record" means any tangible or electronic record of:

1. Any proceeding in which the Respondent has been found guilty of Misconduct, including those proceedings in which (a) the Board's or Court's finding of Misconduct has been appealed to this Court; (b) the Respondent's License to practice law has been surrendered with charges pending or Respondent has been found guilty of a Crime; or (c) the Respondent has received a sanction pursuant to this Paragraph; and
2. Any proceeding in which a Complaint or Charge of Misconduct has been resolved by (a) a *De Minimis* Dismissal; (b) a Dismissal for Exceptional Circumstances; or (c) an Admonition; and
3. Any proceeding in which the Respondent has been found guilty of a violation of CRESPA; and
4. Any proceeding which resulted in a sanction which created a disciplinary record at the time it was imposed.

"Disciplinary Rules" means the Virginia Rules of Professional Conduct and Virginia Code of Professional Responsibility, as applicable.

"Dismissal" means the dismissal of a Complaint by Bar Counsel or the dismissal of a Charge of Misconduct by a Subcommittee, a District Committee, the Board or a Circuit Court.

"Dismissal *De Minimis*" means a finding that the Respondent has engaged in Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against a recurrence of same.

"Dismissal for Exceptional Circumstances" means a finding that the Respondent has engaged in Misconduct but there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing.

"District Committee" means one of the District Committees appointed as hereinafter provided or, where the context requires, a Panel, a Section, or a Subcommittee thereof.

"District Committee Determination" means the written decision of a District Committee or a Subcommittee of a District Committee, relating to a Complaint or Charge of Misconduct.

"Executive Committee" means the Executive Committee of the Bar.

"Executive Director" means the Executive Director of the Bar and any deputy or assistant designated by Council to act as Executive Director.

"Files" means those files maintained by the Clerk of the Disciplinary System, and office of Bar Counsel with respect to each Complaint.

"Impairment" means any physical or mental condition that materially impairs the fitness of an Attorney to practice law.

"Impairment Proceeding" means the proceeding:

1. Initiated by Bar Counsel to petition the Board to order the Respondent to undergo examination(s) and provide releases for records;
2. Initiated by Bar Counsel to determine whether an Attorney has an Impairment;
3. That follows the summary Suspension of an Attorney who may have an Impairment; or
4. That follows a request by Respondent to terminate an Impairment Suspension.

"Investigation" means any inquiry by Bar Counsel, Committee Counsel, or the Bar's designee concerning any alleged Misconduct or Crime committed by an Attorney or any Impairment of an Attorney.

"Investigative Report" means the report prepared as a result of an Investigation.

"Investigator" means a person designated by the Bar to conduct an Investigation.

"Judge" means a judge within the meaning of Va. Code §2.1-37.1, and any judge appointed or elected under the laws of any other jurisdiction.

"License" means the license to practice law granted by this Court.

"Memorandum Order" means the opinion and order of the Board entered following a Disciplinary Proceeding that shall contain a brief statement of the findings of fact; the nature of the Misconduct shown by such finding of facts; the Disciplinary Rules found to have been violated by clear and convincing evidence; the sanction imposed; the notice requirements, if any, imposed upon Respondent; the time in which Terms are required to be satisfied by Respondent, if Terms are imposed; the alternative sanction, if Respondent fails to comply with any Terms that are imposed; the name and address of the Court Reporter who served at the hearing; the names of the members of the Board that constituted the Panel; and that Costs shall be reimbursed by Respondent.

"Misconduct" means any:

1. Unlawful conduct described in Va. Code § 54.1-3935;
2. Violation of the Disciplinary Rules;
3. Conviction of a Crime;
4. Conviction of any other criminal offense or commission of a deliberately wrongful act that reflects adversely on the Attorney's honesty, trustworthiness, or fitness as an Attorney; or
5. Violation of CRESPA or any regulations adopted pursuant thereto.

"Panel" means a group of members of a Section, District Committee, or the Board hearing a disciplinary matter that constitutes the quorum required by this Paragraph.

"Paragraph" means Paragraph 13 of the Rules of this Court, Part Six, Section IV.

"Petitioner" means:

1. An Attorney seeking Reinstatement after a Revocation; or
2. An Attorney seeking termination of an Impairment Suspension; or
3. A Bar Counsel or District Committee Chair seeking an expedited hearing before the Board and alleging that an Attorney is engaging in Misconduct likely to result in injury to or loss of property of a client or other entity, or alleging an Attorney poses imminent danger to the public.

"Private Discipline" means an Admonition without Terms issued by a Subcommittee *sua sponte*, a Private Reprimand or any form of discipline which is not public.

"Private Reprimand" means a form of non-public discipline that declares privately the conduct of the Respondent improper but does not limit the Respondent's right to practice law.

"Proceeding" means the same as Disciplinary Proceeding.

"Public Reprimand" means a form of public discipline that declares publicly the conduct of the Respondent improper, but does not limit the Respondent's right to practice law.

"Receivership" means a receivership created pursuant to Va. Code § 54.1-3900.01 or § 54.1-3936.

"Reinstatement" means the restoration by this Court of an Attorney's License to practice law in the manner provided in this Paragraph.

"Reinstatement Proceeding" means the proceeding which takes place upon referral from this Court of a Petition for Reinstatement by an Attorney whose License was previously revoked.

"Respondent" means any Attorney:

1. Who is the subject of a Complaint;

2. Who is the subject of any proceeding under this Paragraph, Va. Code §§ 54.1-3900.01, 54.1-3935, 54.1-3936, or CRESPA; or

3. Who is the subject of an Adjudication of a Crime Proceeding, Proceedings upon Disbarment, Revocation or Suspension in another jurisdiction, Impairment Proceeding, or Reinstatement Proceeding.

"Revocation" means any revocation of an Attorney's License to practice law and includes a revocation of such License as the result of a voluntary surrender by an Attorney of the Attorney's License to practice law as provided in this Paragraph.

"Section" means a subgroup of a District Committee that has the same powers, authority, and duties as the District Committee.

"Subcommittee" means a subgroup of a District Committee or any Section thereof, convened for the purpose of performing the functions of a Subcommittee as described in this Paragraph.

"Summary Order" means a bench order entered by the Board Chair following a Disciplinary Proceeding that outlines in summary form the Board's findings as to the Charge of Misconduct, the sanctions to be imposed, the effective date of any sanctions imposed, and any notice requirements.

"Suspension" means the temporary suspension of an Attorney's License to practice law for either a fixed or indefinite period of time.

"Terms" shall mean those conditions imposed on the Respondent by a Subcommittee, District Committee, Board, or Circuit Court, that require the Respondent to perform certain remedial actions as a necessary condition for the imposition of an Admonition, a Private or Public Reprimand, or a Suspension pursuant to this Paragraph.

"Va. Code" means the 1950 Code of Virginia, as amended.

13-2 AUTHORITY OF THE COURTS

Nothing in this Paragraph shall be interpreted so as to eliminate, restrict or impair the jurisdiction of the courts of this Commonwealth to deal with the disciplining of Attorneys as provided by law. Every Judge shall have authority to take such action as may be necessary or appropriate to protect the interests of clients of any Attorney whose License is subject to a Suspension or Revocation. Every Circuit Court shall have power to enforce any order, summons or subpoena issued by the Board, a District Committee or Bar Counsel and to adjudge disobedience thereof as contempt.

13-3 GENERAL ADMINISTRATIVE AUTHORITY OF COUNCIL

Council shall have general administrative authority over and responsibility for the disciplinary system created pursuant to this Paragraph.

13-4 ESTABLISHMENT OF DISTRICT COMMITTEES

A. Creation of District Committees. Council shall appoint a sufficient number of District Committees to carry out the purposes of this Paragraph. District Committees shall be established in geographical areas consisting of one or more judicial circuits. In creating the District Committee areas, Council shall give due consideration to Attorney population and the community of interest among different judicial circuits within a District Committee area. Each District Committee shall consist of ten, or in the discretion of Council, 20, 30 or 40 members. Three members of a ten-member District Committee, six members of a 20-member District Committee, nine members of a 30-member District Committee, and 12 members of a 40-member District Committee shall be nonlawyers. Former members of a District Committee may serve on a District Committee Subcommittee or participate in a District Committee hearing whenever the District Committee Chair determines that such service is necessary for the orderly administration of the District Committee's work.

B. Panel Quorum. A Panel quorum shall consist of five or more persons. One person assigned to a District Committee Panel shall be a present or former nonlawyer member of a District Committee. If the scheduled nonlawyer is unable to attend, and if an alternate nonlawyer is not reasonably available, participation by a nonlawyer member shall not be required in a proceeding if a quorum is otherwise present. The action of a majority of a quorum shall be the action of the District Committee Panel.

C. Geographic Criteria. Each member of a District Committee shall be a resident of or have his or her office in the District Committee area for which such member is appointed. Members shall, to the extent practicable, be appointed from different geographical sections of their districts.

D. Term of Office. Council shall appoint members of each District Committee for such terms of service as will allow for the retirement from the District Committee, or completion of the existing terms, of one-third of the District Committee membership at the end of each fiscal year. A District Committee member's term shall be for three years, and, upon completion of such term, such member is eligible for appointment to a second successive three-year term. A member who has served two full successive terms of three years each on a District Committee shall not be eligible to serve again until one year after the expiration of the second term.

E. Qualifications of Members. Before nominating any individual for membership on a District Committee, the Council members making such recommendation shall first determine that the nominee is willing to serve on the District Committee and will conscientiously discharge the responsibility as a member of the District Committee. Council members making the nominations shall also obtain a statement from the nominees, in writing, that the nominees are willing to serve on the District Committee, if elected. In order to be considered as a potential appointee to a District Committee, each potential appointee shall execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any pending Complaints and a release allowing production of his or her Disciplinary Record and any pending Complaints from any jurisdiction for purposes of the appointment process; and an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process.

F. Persons Ineligible for Appointment. Any potential appointee shall be ineligible for appointment to a District Committee if such potential appointee has: (1) ever been convicted in any jurisdiction of a Crime; (2) ever committed any criminal act that reflects adversely on the potential appointee's honesty, trustworthiness or fitness as a member of a District Committee; (3) a Disciplinary Record in any jurisdiction consisting of a Disbarment, Revocation, Suspension imposed at any time or Public Reprimand imposed within the ten years immediately preceding the proposed appointment date; or (4) a Disciplinary Record in any jurisdiction consisting of Private Discipline, except for a *de minimis* dismissal or a dismissal for exceptional circumstances, or an Admonition imposed within the five years immediately preceding the proposed appointment date. The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

G. Interim Vacancies. Whenever a vacancy occurs on a District Committee, the Executive Committee may fill the vacancy. Bar Counsel or a majority of the members of a District Committee may request the Executive Committee to declare that a District Committee position held by any particular District Committee member has become vacant when, in the judgment of Bar Counsel or the Committee majority, such member has become, or has been for any reason, unavailable for or delinquent in the conduct of the District Committee's business. Similarly, upon request of Bar Counsel, the Executive Committee shall have the power to declare such vacancy. Before such vacancy is declared, the particular District Committee member shall be afforded notice and a reasonable opportunity to be heard.

13-5 AUTHORITY AND DUTIES OF COLD

All powers and duties of Council, with respect to the Disciplinary System, except the power to appoint District Committee members, may be exercised by COLD, subject to the direction and control of Council. Notwithstanding any rule to the contrary, any member of COLD may attend proceedings of the Subcommittees, District Committees or the Board. Service by an Attorney on COLD shall be deemed to be a professional relationship within the meaning of Disciplinary Rules 1.6, 1.7, 1.9, 1.10 and 3.7. Such service shall be deemed the holding of public office within the meaning of Disciplinary Rules 1.11 and 1.12. Consent under Disciplinary Rules 1.6, 1.7 and 1.9 shall be deemed to include Bar Counsel's consent on behalf of the Bar.

13-6 DISCIPLINARY BOARD

A. Appointment of Members. This Court shall appoint, upon recommendation of Council, 20 members of the Board, 16 of whom shall be members of the Bar and four of whom shall be nonlawyers. One Attorney member shall be designated by the Court as Chair and two Attorney members as Vice Chairs, upon recommendations of Council. Before nominating any individual for membership on the Board, the Bar's nominating committee shall first determine that the nominee is willing to serve on the Board and will conscientiously discharge the responsibilities as a member of the Board. The Bar nominating committee shall also obtain a statement from the nominees, in writing, that the nominees are willing to serve on the Board, if elected and appointed. In order to be considered as a potential appointee to the Board, each potential appointee shall execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any

pending Complaints and a release allowing production of his or her Disciplinary Record and pending Complaints from any jurisdiction for purposes of the appointment process; and (2) an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process.

B. Persons Ineligible for Appointment. Any potential appointee shall be ineligible for appointment to the Board if such potential appointee has (1) ever been convicted in any jurisdiction of a Crime; (2) ever committed any criminal act that reflects adversely on the potential appointee's honesty, trustworthiness, or fitness as a Board member; (3) a Disciplinary Record in any jurisdiction of a Disbarment, Revocation, Suspension or Public Reprimand imposed within the ten years immediately preceding the proposed appointment date; (4) a Disciplinary Record in any jurisdiction consisting of Private Discipline, except for a *de minimis* dismissal or a dismissal for exceptional circumstances, or an Admonition within the five years immediately preceding the proposed appointment date. The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

C. Term of Office. Members shall serve staggered terms of three years each. No member shall serve more than two consecutive three-year terms but shall be eligible for reappointment after the lapse of one or more years following expiration of the previous three-year term. At the expiration of the initial term of any member so appointed for less than a three-year term, such member shall be eligible for immediate reappointment to the Board for two additional consecutive three-year terms.

D. Meetings and Quorum. The Board shall meet on reasonable notice by the Chair or a Vice Chair. A Panel of five members shall constitute a quorum, and the action of a majority of a Panel shall constitute action of the Board. One of the five persons assigned to any Panel shall be a present or former nonlawyer member. If the scheduled nonlawyer is unable to attend and an alternate nonlawyer member or former member is not reasonably available, participation by a nonlawyer shall not be required in any Proceeding if a quorum is otherwise present.

E. Roster. The Clerk of the Disciplinary System shall establish a roster of Board members sufficient to constitute a quorum for action on the matter to which they are being assigned. Former members of the Board may serve on a Panel of the Board or participate in Board matters whenever the Chair, Vice Chair or Clerk of the Disciplinary System determines that such service is necessary for the orderly administration of the Board's work.

F. Jurisdiction. The Board shall have jurisdiction to consider: (1) Appeals from Public or Private Reprimands, with or without Terms, or Admonitions, with or without Terms, imposed by District Committees or Dismissals that otherwise create a Disciplinary Record; (2) Complaints and Charges of Misconduct certified to it by a Subcommittee or a District Committee; (3) Misconduct by reason of conviction of a Crime; (4) Impairment Proceedings; (5) Revocation or Suspension in another jurisdiction; (6) Petitions from Bar Counsel or the Chair of a District Committee seeking summary Suspension upon a belief that an Attorney is engaging in Misconduct likely to result in injury to or loss of property of a client or other entity or alleging an Attorney poses imminent danger to the public; (7) Petitions for Reinstatement referred to the Board for its recommendation to this Court; (8) Violations of CRESPA or any regulations adopted pursuant thereto; (9) Failure of Respondent to make a complete transcript part of the Record, as provided in this Paragraph; (10) Failure of an Attorney to comply with an order, summons or subpoena issued in connection with a Disciplinary Proceeding; and (11) Failure of Respondent to fulfill the terms of a Public Reprimand with Terms certified to it by a District Committee for sanction determination.

G. Additional Board Powers. The Board shall have the following powers in addition to all other powers granted to the Board:

1. To sanction a Respondent for failing to comply with an order issued by the Board. This sanction can include an interim Suspension. Before imposing an interim Suspension, the Board shall issue a notice to the Respondent advising the Respondent that he or she may petition the Board within ten days after service of the notice to withhold entry of an interim Suspension order and to hold an evidentiary hearing. If ten days after service of the notice the Respondent has not petitioned the Board to withhold entry of an interim Suspension order, the Board shall enter an Order suspending the Attorney's License until such time as the Attorney remedies the failure to comply or a determination is made as to whether the Attorney has violated any Disciplinary Rules. An Attorney suspended pursuant to this subparagraph G.1. is subject to the provisions of subparagraph 13-29;

2. On its own motion or upon request by Bar Counsel or the Respondent, to summon and examine

witnesses under oath or affirmation administered by any member of the Board and to compel the attendance of witnesses and the production of documents necessary or material to any proceeding. Any summons or subpoena may be issued by any Board member or the Clerk of the Disciplinary System and shall have the force of and may be enforced as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail, return receipt requested, at the Respondent's last address of record with the Bar in the same manner as other notices served upon Respondents under this Paragraph;

3. To impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board, the Clerk of the Disciplinary System, Bar Counsel or any lawyer member of a District Committee for trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm. In the event of alleged noncompliance, Bar Counsel may file with the Board and serve on the Attorney a notice of noncompliance requesting the Board to suspend the Attorney's License. The noncompliance notice must advise the Attorney that he or she may petition the Board within 10 days of service of the notice to withhold entry of a Suspension order and to hold a hearing, at which time the Attorney shall have the burden of proving good cause for the alleged noncompliance. If 10 days after service of the notice of noncompliance the Attorney has not petitioned the Board to withhold entry of an interim Suspension order, the Board shall enter an Order suspending the Attorney's License until such time as the Attorney fully complies with the summons or subpoena or a determination is made as to whether the Attorney's noncompliance violated the Disciplinary Rules. An Attorney suspended pursuant to this subparagraph_G.3. is subject to the provisions of subparagraph 13-29;

4. To rule on the admissibility of evidence, through a panel Chair, which rulings may be overruled by a majority of the Panel; and

5. To act through its Chair or one of the Vice Chairs (an officer) on any non-dispositive pre-hearing matters and on any dispositive matters where all parties are in agreement, subject to the following qualification and exception: (1) any pre-hearing ruling on a non-dispositive matter made by an officer of the Board shall be subject to being overruled by a majority vote of the Panel which actually hears the matter; and (2) Agreed Dispositions must be approved by a Panel.

H. Agreed Disposition. Whenever Bar Counsel and Respondent are in agreement as to a Charge of Misconduct or a Certification for Sanction Determination and desire to enter into an Agreed Disposition of the Charge of Misconduct or Certification for Sanction Determination, the parties may submit a proposed Agreed Disposition to five members of the Board selected by the Chair. The five members so selected will constitute a Panel. If the proposed Agreed Disposition is accepted by a majority of the Panel so selected, the Agreed Disposition will be adopted by order of the Board. If the Agreed Disposition is not accepted by the Panel, the Charge of Misconduct or Certification for Sanction Determination will then be set for hearing before another Panel of the Board at the earliest possible date. No member of the Panel which considered the proposed Agreed Disposition shall be assigned to the Panel which hears the Charge of Misconduct or Certification for Sanction Determination.

13-7 DISTRICT COMMITTEES

A. Powers. Each District Committee and Section thereof shall have the power to:

1. Elect a Chair, Vice Chair and Secretary, and such other officers as it considers appropriate;

2. Conduct hearings and adjudicate Charges of Misconduct as provided in this Paragraph;

3. Summon and examine witnesses under oath to be administered by any member of the District Committee;

4. Issue, through any of its Attorney members or through Bar Counsel, any summons or subpoena necessary to compel the attendance of witnesses and the production of documents or evidence necessary or material to any Investigation or Disciplinary Proceeding. Any such summons or subpoena issued to a non-Attorney shall have the force of and be enforced as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail, return receipt requested, at the Respondent's last address of record with the Bar in the same manner as other notices served upon Respondents under this Paragraph;

5. Direct Bar Counsel to file a notice of noncompliance requesting the Board to suspend an Attorney's License until such time as the Attorney fully complies with a subpoena requiring production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm;

6. Rule on the admissibility of evidence and other matters relating to the conduct of a Disciplinary Proceeding;

7. Rule on motions to limit or quash any summons or subpoena;

8. Maintain order in all its proceedings through its Chair; and

9. Approve, through a Subcommittee acting by a unanimous vote, an Agreed Disposition of a Complaint or Charge of Misconduct submitted by Bar Counsel and the Respondent.

B. Creation of Subcommittees. The Chair shall appoint one or more Subcommittees of each District Committee. Where a District Committee is divided into two or more Sections, there shall be one or more Subcommittees of each Section, as determined by the respective District Committee Section Chair. Each Subcommittee shall consist of three members of that District Committee or that Section of the District Committee. Two members of a Subcommittee shall be Attorneys, one of whom shall be appointed by the District Committee or Section Chair to act as Chair of that Subcommittee, and one member of the Subcommittee shall be a non-attorney member.

C. Subcommittee Quorums. A quorum of a Subcommittee shall consist of three members, who may act in a meeting in person or through any means of communication by which all three members participating may simultaneously hear each other during the meeting.

D. District Committee Jurisdiction. A District Committee shall have jurisdiction over all Complaints referred to it.

E. Limitation on Private Discipline. Private Discipline shall be imposed only in cases of minor Misconduct, when there is little or no injury to any of the following: a client, the public, the legal system or the profession, and when there is little likelihood of repetition by the Respondent. When any Respondent has received two determinations of Private Discipline, excepting only *de minimis* Dismissals, during any ten-year period, it shall be presumed that further Private Discipline is not an appropriate disposition. Any Respondent who has received two determinations of Private Discipline within the ten-year period immediately preceding the Bar's receipt of the oldest Complaint that the Subcommittee is considering, shall receive public discipline for any violation of the Disciplinary Rules, unless there are sufficient facts and circumstances to rebut such presumption.

F. Venue. Venue shall not be jurisdictional, but venue shall lie with the District Committee, in the following order of preference, where:

1. Any portion of the alleged Misconduct occurred;

2. The Respondent resides;

3. The Respondent maintains an office;

4. The Respondent has an address on record with the Bar as the Respondent's address for membership purposes; or

5. The Complainant resides.

G. Preferred Venue. If preferred venue does not lie with any District Committee able to adjudicate the Complaint against a Respondent, such Complaint may be filed with and adjudicated by a District Committee designated by the Clerk of the Disciplinary System. In determining to which District Committee a Complaint should be referred, the Clerk of the Disciplinary System shall consider the volume of Complaints pending before the District Committee and the inconvenience imposed upon the Respondent and the witnesses by the location of the District Committee.

H. Objections to Venue. Either the Respondent or Bar Counsel may object to venue by filing a notice of objection with the Clerk of the Disciplinary System within ten days of notification of the referral of the Complaint to a District Committee. Objections to venue shall be deemed waived unless made within this ten-day time period. Upon receipt of a timely filed notice of objection, the Clerk of the Disciplinary System shall forward the notice of objection to the Chair of the Board for decision.

I. Complaints Referred to District Committee or Subcommittee. A District Committee or Subcommittee shall consider, adjudicate and dispose of Complaints referred to the District Committee pursuant to this Paragraph. Where appropriate, the District Committee or Subcommittee shall also counsel Respondents concerning their conduct. In addition, members of a District Committee, other than nonlawyer members, may participate in the Investigation of Complaints, provided that a member participating in such Investigation shall not participate in a District Committee's consideration, adjudication and disposition of such Complaint or Charge of Misconduct.

J. Service by an Attorney and Professional Relationship. Service by an Attorney on a District Committee shall be deemed to be a professional relationship within the meaning of Disciplinary Rules 1.6, 1.7, 1.9, 1.10 and 3.7. Such service shall be deemed the holding of public office within the meaning of Disciplinary Rules 1.11 and 1.12.

K. Consent by Bar Counsel. Consent under Disciplinary Rules 1.6, 1.7 and 1.9 shall be deemed to include Bar Counsel's consent on behalf of the Bar.

L. Recusal or Disqualification of District Committee Members. In the event of recusal or disqualification of so many District Committee members that the District Committee is unable to discharge its responsibilities under this Rule, the District Committee may supplement its membership with members from other District Committees to achieve a quorum. If every member of a District Committee is recused or is disqualified from considering Charges of Misconduct, the Clerk of the Disciplinary System shall assign the Charges of Misconduct to another District Committee.

13-8 BAR COUNSEL

A. Authority. Bar Counsel shall have the authority, to the extent provided in this Paragraph and subject to the general supervision of COLD, to:

1. Initiate, investigate, present or prosecute Complaints or other Proceedings before Subcommittees, District Committees, the Board and Circuit Courts. Bar Counsel may represent the Bar in matters pending in this Court. In the course of performing such functions, Bar Counsel shall act independently and exercise prosecutorial autonomy and discretion;

2. Examine criminal history record information relating to any Attorney or former Attorney from any state or federal law enforcement agency;

3. Examine financial books and records, once a Complaint has been filed, including, without limitation, any and all escrow accounts, trust accounts, estate accounts, fiduciary accounts and operating or other accounts, maintained by the Attorney, the Attorney's law firm or any other third party organization by whom the Attorney is employed or with whom the Attorney is associated;

4. Examine the accounts described in the preceding subparagraph A.3. at any time when Bar Counsel reasonably believes that such accounts may not be in compliance with the Disciplinary Rules. In every instance in which Bar Counsel initiates examination of accounts or issues any summons or subpoena in the conduct of an examination or an Investigation concerning accounts, other than on the basis of a Complaint against the Attorney, Bar Counsel shall file a written statement as part of the record setting forth the reasons supporting the belief that the accounts may not comply with the Disciplinary Rules. A copy of this written statement shall be delivered to the Attorney who is the subject of the Investigation when an examination has begun or any summons or subpoena has been issued;

5. Issue such summons for the attendance of witnesses and subpoenae for the production of documents necessary or material to any Investigation, District Committee or Board proceeding; and

6. File a notice of noncompliance requesting the Board to suspend the Attorney's License until such time as the Attorney fully complies with a subpoena issued by the Bar Counsel, a District Committee or the Board, for the production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm.

B. Acting Bar Counsel. In the event of disqualification or recusal of Bar Counsel in any Proceeding, the Charge of Misconduct shall be prosecuted by a District Committee member designated by the District Committee Chair if the Proceeding is before a District Committee, or by the Attorney General or his designee if the proceeding is before the Board or a three-judge Circuit Court.

13-9 CLERK OF THE DISCIPLINARY SYSTEM

A. Current Dockets. The Clerk of the Disciplinary System shall maintain a docket of current Attorney discipline and CRESPA matters pending before the District Committees, the Board or courts of this Commonwealth.

B. Records Retention. The Clerk of the Disciplinary System shall retain all Files with respect to any Disciplinary Record for a period of at least five years from the date of the final Order in the Disciplinary Proceeding that created that Disciplinary Record. The Clerk may destroy all other Files upon the expiration of one year after the Dismissal.

C. File Destruction. Whenever a File is destroyed, the following information shall be preserved:

1. The name and Bar identification number of Respondent;
2. The name and last known address of the Complainant;
3. The date the matter was initially received by the Bar;
4. A summary of the Complaint or Charge of Misconduct;
5. The date of the Dismissal or any sanction(s) imposed; and
6. The disposition of the matter, including the basis for Dismissal or the sanction(s) imposed.

Such summary information shall be retained for at least five years whenever the Complaint or Charge of Misconduct is dismissed with no Disciplinary Record having been created, and for at least ten years whenever a Disciplinary Record has been created, an Impairment determined, a Reinstatement Proceeding held or a finding of Misconduct involving a CRESPA violation made.

D. Preservation of Determinations and Orders. The Clerk of the Disciplinary System shall preserve a copy of all District Committee Determinations and Board or court orders in which an Attorney has been found to have engaged in Misconduct, to be impaired, to have committed a violation of CRESPA or requested Reinstatement.

E. Costs. The Clerk of the Disciplinary System shall assess Costs against the Respondent in the following cases:

1. All cases in which a final determination of Misconduct is made by a Subcommittee, District Committee, three-judge Circuit Court, the Board or this Court;
2. All cases against a Respondent who surrenders his or her License to practice law at a time when charges are pending;
3. All proceedings under this Paragraph in which there is a finding that a Respondent has been found guilty of a Crime;
4. All reciprocal cases under this Paragraph in which a final determination imposing discipline is made;
5. All Reinstatement cases under this Paragraph; and
6. All cases before the Board in which sanctions were imposed for violations of CRESPA and/or the Bar's CRESPA regulations.

F. Review of Costs Assessment. If the Respondent disagrees with the amount of Costs as calculated by the Clerk, or if the Respondent asserts that the immediate payment thereof would constitute a hardship, the Respondent may petition the Board for review within ten days of the notice assessing Costs. The Chair, upon written request of Respondent, included with his petition, may grant Respondent a hearing on the Costs issue. The decision of the Chair shall be final and non-appealable. Interest at the judgment rate shall commence on the Costs assessed 30 days after the issuance of the notice of assessment, unless otherwise prescribed by the Board. If the Respondent fails to pay the Costs and interest so assessed within 30 days of the notice of assessment or within such other time as the Board may order, then the Costs assessed and interest shall be a debt subject to collection by the Bar, and the Board shall issue an order of Suspension against the Respondent until such time as Respondent shall pay all of the Costs and accrued interest.

G. Public Notification of Sanctions. The Clerk shall issue a statement to the communications media summarizing each public Admonition, Public Reprimand, Suspension or Revocation. The Clerk shall notify the following individuals and entities of each public Admonition, Public Reprimand, Suspension or Revocation:

1. The Clerk of the Supreme Court;

2. Clerks of the Circuit and District Courts in each judicial circuit in the Commonwealth where the Attorney resides or maintains an office; and

3. Disciplinary authorities for jurisdictions, federal or state, wherein it is reasonable to expect that the Attorney may be licensed.

13-10 PROCESSING OF COMPLAINTS BY BAR COUNSEL

A. Review. Bar Counsel shall review all Complaints. If, following review of a Complaint, Bar Counsel determines that the conduct questioned or alleged does not present an issue under the Disciplinary Rules, Bar Counsel shall not open an Investigation, and the Complaint shall be dismissed.

B. No Dismissal by Complainant. No Complaint or Charge of Misconduct shall be dismissed at any stage of the process solely upon a request by a Complainant to withdraw his or her Complaint.

C. Summary Resolution. Bar Counsel shall decide whether a Complaint is appropriate for an informal or abbreviated Investigation. When a Complaint involves minor allegations of Misconduct susceptible to early resolution, Bar Counsel may assign the Complaint to a staff member, a District Committee member, or use any other means practicable to speedily investigate and resolve the allegations of Misconduct. If the Complaint is resolved through this process to the satisfaction of the Complainant, the Respondent and the Bar, Bar Counsel shall then dismiss the Complaint. Such dismissal shall not become a part of the Respondent's Disciplinary Record. If Bar Counsel chooses not to proceed under this subsection, or, having elected to proceed under this subsection, the Complaint is not resolved within 90 days from the date of filing, Bar Counsel shall proceed pursuant to the following subsections.

D. Preliminary Investigation. A preliminary Investigation may consist of obtaining a response, in writing, from the Respondent to the Complaint and sharing the response, if any, with the Complainant, so the Complainant may have an opportunity to provide additional information.

E. Disposition by Bar Counsel after Preliminary Investigation. Bar Counsel may conduct a preliminary Investigation of any Complaint to determine whether it should be referred to the District Committee. Bar Counsel shall not file a Complaint with a District Committee following a preliminary Investigation when, in Bar Counsel's judgment:

1. As a matter of law, the conduct questioned or alleged does not constitute Misconduct;

2. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged;

3. There is no credible evidence to support any allegation of Misconduct by the Respondent; or

4. The evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard.

F. Referral to District Committee. Bar Counsel shall notify the District Committee Chair that a Complaint has been referred to a District Committee for investigation. Thereafter, the Complaint shall be investigated and a report thereof made to a Subcommittee.

G. Report to Subcommittee. When submitting an Investigative Report to the Subcommittee, Bar Counsel or Committee Counsel may also send a recommendation as to the appropriate disposition of the Complaint.

13-11 LIMITED RIGHT TO DISCOVERY

There shall be no right to discovery in connection with disciplinary matters, including matters before three-judge Circuit Courts, except:

A. Issuance of such summonses and subpoenae as are authorized; and

B. Bar Counsel shall furnish to Respondent a copy of the Investigative Report considered by the Subcommittee when the Subcommittee set the Complaint for hearing before the District Committee or certified the Complaint to the Board, with the following limitations:

1. Bar Counsel shall not be required to produce any information or document obtained in confidence from any law enforcement or disciplinary agency, or any documents that are protected by the attorney-client privilege or work product doctrine, unless attached to or referenced in the Investigative Report;

2. Bar Counsel shall not be required to reveal other communications between the Investigator and Bar Counsel, or between Bar Counsel and the Subcommittee; and

3. Bar Counsel shall make a timely disclosure to the Respondent of all known evidence that tends to negate the Misconduct of the Respondent or mitigate its severity or which, upon a finding of Misconduct, would tend to support imposition of a lesser sanction than might be otherwise imposed.

13-12 SUBSTANTIAL COMPLIANCE, NOTICE AND EVIDENTIARY RULINGS

A. Substantial Compliance. Except where this Paragraph provides specific time deadlines, substantial compliance with the provisions hereof shall be sufficient, and no Charge of Misconduct shall be dismissed on the sole ground that any such provision has not been strictly complied with.

B. Time Deadlines. Where specific time deadlines are provided, such deadlines shall be jurisdictional, except when the Clerk of the Disciplinary System, Bar Counsel, a District Committee or the Board is granted specific authority herein to extend or otherwise modify any such deadline.

C. Service. Whenever any notice or other writing directed to the Respondent is required or permitted under this Rule, such notice or other writing shall be deemed effective and served when mailed by certified mail, return receipt requested, to the Respondent at the Respondent's last address on record for membership purposes with the Bar.

D. Evidentiary Rulings. In any Disciplinary Proceeding, evidentiary rulings shall be made favoring receipt into evidence of all reasonably probative evidence to satisfy the ends of justice. The weight given such evidence received shall be commensurate with its evidentiary foundation and likely reliability.

E. Rights of Counsel for Complainant or Witness. Neither counsel for the Complainant, if there is one, nor counsel for any witnesses, may examine or cross-examine any witness, introduce any evidence or present any argument.

F. Notice of Impairment Evidence. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct shall, absent good cause excusing his or her failure to do so, provide notice not less than 14 days prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention to do so.

13-13 PARTICIPATION AND DISQUALIFICATION OF COUNSEL

A. Attorney for Respondent. A Respondent may be represented by an Attorney at any time with respect to a Complaint.

B. Signature Required by Respondent. A Respondent must sign his or her written response to any Complaint, Charge of Misconduct or Certification.

C. Disqualification. An Attorney shall not represent a Respondent at any time with respect to a Complaint or Charge of Misconduct:

1. While such Attorney is a current employee or current officer of the Bar or is a member of Council, COLD, the Board, or a District Committee;

2. For 90 days after such Attorney ceases to be an employee or officer of the Bar or a member of Council, COLD, the Board, or a District Committee;

3. At any time, after such Attorney ceases to be an employee or officer of the Bar or a member of Council, COLD, the Board or a District Committee, if such Attorney was personally involved in the subject matter of the Complaint, Charge of Misconduct or any related matter while acting as such employee, officer or member;

4. At any time after such Attorney ceased to be a liaison from COLD to a District Committee before which the Disciplinary Proceeding involving such Complaint or Charge of Misconduct was pending during the time such Attorney was such liaison; or

5. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relation with any Attorney described in the preceding subparagraphs C.1. through C.4.

13-14 DISQUALIFICATION OF DISTRICT COMMITTEE MEMBER OR BOARD MEMBER

A. Personal or Financial Interest. A member or former member of a District Committee or the Board shall be disqualified from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial. The Chair shall rule on the issue of disqualification, subject to being overruled by a majority of the Panel or Subcommittee.

B. Complaint Against a Member. Upon the referral of any Complaint against a member or former member of a District Committee or the Board to a District Committee for Investigation, the member shall be recused from any service on the District Committee or the Board until the Dismissal of the Complaint without the imposition of any form of discipline.

C. Imposition of Discipline. Upon the final imposition of a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or a Revocation against a member or former member of a District Committee or the Board, the member shall automatically be terminated from membership or further service on the District Committee or Board. Upon the final imposition of any other form of Attorney discipline, COLD shall have sole discretion to determine whether the member shall be terminated from membership or further service on the District Committee or the Board.

D. Interpretation. Unless otherwise stated, all questions of interpretation under this subparagraph 13-14 shall be decided by the tribunal before which the proceeding is pending, except that COLD shall determine discretionary termination of membership or further service.

E. Ineligibility. Any member or former member of a District Committee or the Board shall be ineligible to serve in a Disciplinary Proceeding in which:

1. The District Committee or Board member or any member of his or her firm is involved in any significant way with the matter on which the District Committee or Board would act;

2. The Board member or any member of the Board member's firm was serving on the District Committee that certified the matter to the Board or has otherwise acted on the matter;

3. A Judge would be required to withdraw from consideration of, or presiding over, the matter under the Canons of Judicial Conduct adopted by this Court;

4. The District Committee or Board member previously represented the Respondent; or

5. The District Committee or Board member, upon reasonable notice to the Clerk of the Disciplinary System or to the Chair presiding over a matter, disqualifies himself or herself from participation in the matter, because such member believes that he or she is unable to participate objectively in consideration of the matter or for any other reason.

13-15 SUBCOMMITTEE ACTION

A. Referral. Following receipt of the report of Investigation and Bar Counsel's recommendation, the Subcommittee may refer the matter to Bar Counsel for further Investigation.

B. Other Actions. Once the Investigation is complete to the Subcommittee's satisfaction, it will take one of the following actions.

1. Dismiss. It shall dismiss the Complaint when:

a. As a matter of law the conduct questioned or alleged does not constitute Misconduct; or

b. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard; or

c. The Subcommittee concludes that a Dismissal *De Minimis* should be imposed; or

d. The Subcommittee concludes that a Dismissal for Exceptional Circumstances should be imposed; or

e. The action alleged to be Misconduct is protected by superseding law.

In making the determination in the preceding subparagraphs B.1.c. and B.1.d., the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of a dismissal which creates a Disciplinary Record, may request a hearing before the District Committee.

2. Impose an Admonition without Terms. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of an Admonition without Terms, may request a hearing before the District Committee.

3. Certify to the Board. Certify the Complaint to the Board pursuant to this Paragraph or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935. Certification shall be based on a reasonable belief that the Respondent has engaged or is engaging in Misconduct that, if proved, would justify a Suspension or Revocation. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.

4. Approve an Agreed Disposition. Approve an Agreed Disposition imposing one of the following conditions or sanctions:

   a. Admonition, with or without Terms; or

   b. Private Reprimand, with or without Terms; or

   c. Public Reprimand, with or without Terms.

5. Set the Complaint for Hearing before the District Committee. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.

C. Vote Required for Action. All actions taken by Subcommittees, except for approval of Agreed Dispositions, shall be by majority vote.

D. Report of the Subcommittee. All decisions of the Subcommittee shall be reported to the District Committee in a timely fashion.

E. Notice of Action of the Subcommittee. If a Subcommittee has dismissed the Complaint, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor. If a Subcommittee determines to issue an Admonition with or without Terms, or a Private or Public Reprimand with or without Terms, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the Subcommittee's determination. If a Subcommittee elects to certify a Complaint to the Board, the Subcommittee Chair shall promptly mail a copy of the Certification to the Clerk of the Disciplinary System, Bar Counsel, the Respondent and the Complainant.

F. Procedure in All Terms Cases. If a Subcommittee imposes Terms, the Subcommittee shall specify the time period within which compliance with the Terms shall be completed. If Terms have been imposed against a Respondent, that Respondent shall deliver a certification of compliance with such Terms to Bar Counsel within the time period specified by the Subcommittee. If a Subcommittee issues an Admonition with Terms, a Private Reprimand with Terms, or a Public Reprimand with Terms based on an Agreed Disposition, the Agreed Disposition shall specify the alternative disposition to be imposed if the Terms are not complied with or if the Respondent does not certify compliance with Terms to Bar Counsel. If the Respondent does not comply with the Terms imposed or does not certify compliance with Terms to Bar Counsel within the time period specified, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the Respondent to show timely compliance and timely certification by clear and convincing evidence. If the District Committee determines that the Respondent failed to comply with the Terms or failed to certify compliance within the stated time period, the alternative disposition shall be imposed. Bar Counsel shall be responsible for monitoring compliance with Terms and reporting any noncompliance to the District Committee.

G. Alternative Disposition for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification For Sanction Determination unless the Respondent has entered into an Agreed Disposition for the imposition of an alternative disposition of a specific period of Suspension of License.

13-16 DISTRICT COMMITTEE PROCEEDINGS

A. Charge of Misconduct. If the Subcommittee determines that a hearing should be held before a District Committee, Bar Counsel shall, at least 42 days prior to the date fixed for the hearing, serve upon the Respondent by certified mail the Charge of Misconduct, a copy of the Investigative Report considered by the Subcommittee and any exculpatory materials in the possession of Bar Counsel.

B. Response by Respondent Required. After the Respondent has been served with the Charge of Misconduct, the Respondent shall, within 21 days after service of the Charge of Misconduct:

1. File an answer to the Charge of Misconduct, which answer shall be deemed consent to the jurisdiction of the District Committee; or

2. File an answer to the Charge of Misconduct and a demand with the Clerk of the Disciplinary System that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the District Committee shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

C. Failure of Respondent to Respond. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the District Committee.

D. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the District Committee. Such order may establish time limits and:

1. Direct Bar Counsel and Respondent to provide to each other, with a copy to the Chair, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;

2. Encourage Bar Counsel and Respondent to confer and discuss stipulations; and

3. Direct Bar Counsel and Respondent to serve on each other, with a copy to the Chair, lists setting forth the name of each witness the party intends to call.

E. Subpoenae, Summonses and Counsel. The Respondent may be represented by counsel. The Respondent may request Bar Counsel or the Chair of the District Committee to issue summonses or subpoenae for witnesses and documents. Requests for summonses and subpoenae shall be granted, unless, in the judgment of the Chair of the District Committee, such request is unreasonable. Either Bar Counsel or Respondent may move the District Committee to quash such summonses or subpoenae.

F. Continuances. Once a District Committee has scheduled a hearing, no continuance shall be granted unless in the judgment of the Chair the continuance is necessary to prevent injustice.

G. Public Hearings. District Committee hearings, except deliberations, shall be open to the public.

H. Public Docket. The Clerk's Office shall maintain a public docket of all matters set for hearing before a District Committee or certified to the Board. For every matter before a District Committee for which a Charge of Misconduct has been mailed by the Office of the Bar Counsel, the Clerk shall place it on the docket 21 days after the date of the Charge of Misconduct. For every Complaint certified to the Board by a Subcommittee, the Clerk shall place it on the docket on receipt of the statement of the certified charges from the Subcommittee.

I. Oral Testimony and Exhibits. Oral testimony shall be taken and preserved by a Court Reporter. All exhibits or copies thereof received in evidence or marked refused by the District Committee shall be preserved in the District Committee file on the matter.

J. Opening Remarks by the Chair. After swearing the Court Reporter, who thereafter shall administer oaths or affirmations to witnesses, the Chair shall make opening remarks in the presence of the Respondent and the Complainant, if present. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.

K. Motion to Exclude Witnesses. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the District Committee.

L. Presentation of the Bar's Evidence. Bar Counsel or Committee Counsel shall present witnesses and other evidence supporting the Charge of Misconduct. Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar. District Committee members may also examine witnesses offered by Bar Counsel or Committee Counsel.

M. Presentation of the Respondent's Evidence. Respondent shall be afforded the opportunity to present witnesses and other evidence on behalf of Respondent. Bar Counsel or Committee's Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. District Committee members may also examine witnesses offered on behalf of Respondent.

N. No Participation by Other Counsel. Neither counsel for the Complainant, if there be one, nor counsel for any witness, may examine or cross-examine any witness, introduce any other evidence, or present any argument.

O. Depositions. Depositions may be taken only when witnesses are unavailable, in accordance with Rule 4:7(a)(4) of the Rules of this Court.

P. Testimony by Videoconferencing and Telephone. Testimony by videoconferencing and/or telephonic means may be utilized, if in compliance with the Rules of this Court.

Q. Admissibility of Evidence. The Chair shall rule on the admissibility of evidence, which rulings may be overruled by a majority of the remaining District Committee members participating in the hearing.

R. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all of the evidence, the District Committee on its own motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or more allegations of Misconduct contained in the Charge of Misconduct. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Committee, that allegation of Misconduct shall be dismissed.

S. Argument. The District Committee shall afford a reasonable opportunity for argument on behalf of the Respondent and Bar Counsel on the allegations of Misconduct.

T. Deliberations. The District Committee members shall deliberate in private on the allegations of Misconduct. After due deliberation and consideration, the District Committee shall vote on the allegations of Misconduct.

U. Change in District Committee Composition. When a hearing has been adjourned for any reason and any of the members initially constituting the quorum for the hearing cannot be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to any such absent member or members; or substituting another District Committee member for any absent member or members and furnishing a transcript of the prior proceedings in the matter to such substituted member or members.

V. Show Cause for Compliance with Terms. Any show cause proceeding involving the question of compliance with Terms shall be deemed a new hearing and not a continuation of the hearing that resulted in the imposition of Terms.

W. Dismissal. After due deliberation and consideration, the District Committee may dismiss the Charge of Misconduct, or any allegation thereof, as not warranting further action when in the judgment of the District Committee:

1. As a matter of law the conduct questioned or alleged does not constitute Misconduct;

2. The evidence presented shows that the Respondent did not engage in the Misconduct alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence does not reasonably support any allegation of Misconduct under a clear and convincing evidentiary standard;

3. The action alleged to be Misconduct is protected by superseding law; or

4. The District Committee is unable to reach a decision by a majority vote of those constituting the hearing panel, the Charge of Misconduct, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Charge of Misconduct, or one or more allegations thereof, under a clear and convincing evidentiary standard.

X. Sanctions. If the District Committee finds that Misconduct has been shown by clear and convincing evidence, then the District Committee shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has been the subject of any Disciplinary Proceedings in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence in aggravation or mitigation, as well as argument. In determining what disposition of the Charge of Misconduct is warranted, the District Committee shall consider the Respondent's Disciplinary Record. A District Committee may:

1. Conclude that a Dismissal *De Minimis* should be imposed;
2. Conclude that a Dismissal for Exceptional Circumstances should be imposed;
3. Conclude that an Admonition, with or without Terms, should be imposed;
4. Issue a Public Reprimand, with or without Terms; or
5. Certify the Charges of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.

Y. District Committee Determinations. If the District Committee finds that the evidence shows the Respondent engaged in Misconduct by clear and convincing evidence, then the Chair shall issue the District Committee's Determination, in writing, setting forth the following:

1. Brief findings of the facts established by the evidence;
2. The nature of the Misconduct shown by the facts so established, including the Disciplinary Rules violated by the Respondent; and
3. The sanctions imposed, if any, by the District Committee.

Z. Notices.

If the District Committee:

1. Issues a Dismissal, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor.
2. Issues a Public Reprimand, with or without Terms; an Admonition, with or without Terms; a Dismissal *De Minimis*; or a Dismissal for Exceptional Circumstances, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the District Committee's Determination.
3. Finds that the Respondent failed to comply with the Terms imposed by the District Committee, the Chair shall notify the Complainant, the Respondent and Bar Counsel of the imposition of the alternative disposition.
4. Has elected to certify the Complaint, the Chair of the District Committee shall promptly mail to the Clerk of the Disciplinary System a copy of the Certification. A copy of the Certification shall be sent to Bar Counsel, Respondent and the Complainant.

AA. District Committee Determination Finality and Public Statement. Upon the expiration of the ten-day period after service on the Respondent of a District Committee Determination, if either a notice of appeal or a notice of appeal and a written demand that further Proceedings be conducted before a three-judge Circuit Court pursuant to Va. Code § 54.1-3935 has not been filed by the Respondent, the District Committee Determination shall become final, and the Clerk of the Disciplinary System shall issue a public statement as provided for in this Paragraph for the dissemination of public disciplinary information.

BB. Enforcement of Terms. In all cases where Terms are included in the disposition, the District Committee shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The District Committee shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the District Committee. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the

Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period as determined by the District Committee, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

CC. Alternative Disposition and Procedure for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification for Sanction Determination. Upon a decision to issue a Certification for Sanction Determination, Bar Counsel shall order the transcript of the show cause hearing and file it and a true copy of the Public Reprimand with Terms determination with the Clerk of the Disciplinary System.

DD. Reconsideration of Action by the District Committee. A Charge of Misconduct dismissed by a District Committee may be reconsidered only upon:

1. A finding by a majority vote of the Panel that heard the matter originally that material evidence not known or available when the matter was originally presented has been discovered; or a unanimous vote of the Panel that heard the matter originally.

2. No action by a District Committee imposing a sanction or certifying a matter to the Board shall be reconsidered unless a majority of the Panel that heard the matter votes to reconsider the sanction.

3. No member shall vote to reconsider a District Committee action unless it appears to such member that reconsideration is necessary to prevent an injustice or warranted by specific exceptional circumstances militating against adherence to the initial action of the District Committee.

4. District Committee members may be polled on the issue of whether to reconsider an earlier District Committee action.

5. Any reconsideration of an earlier District Committee action must occur at a District Committee meeting, whether in person or by any means of communication which allows all members participating to simultaneously hear each other.

13-17 PERFECTING AN APPEAL OF A DISTRICT COMMITTEE DETERMINATION BY THE RESPONDENT

A. Notice of Appeal; Demand. Within ten days after service on the Respondent of the District Committee Determination, the Respondent may file with the Clerk of the Disciplinary System either a notice of appeal to the Board or a notice of appeal and a written demand that further Proceedings be conducted pursuant to Va. Code § 54.1-3935. In either case, the Respondent shall send copies to the District Committee Chair and to Bar Counsel. Upon such demand, further proceedings before the Board shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. If the Respondent fails to file a demand, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

B. Staying of Discipline. If the Clerk of the Disciplinary System receives a timely notice of appeal from a Public Reprimand, with or without Terms, or an Admonition, with or without Terms, the sanction shall be stayed during the pendency of the appeal.

C. Filing the Transcript and Record on Appeal. The Respondent shall certify in the notice of appeal or written demand that he or she has ordered from the Court Reporter a complete transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of the notice of appeal or written demand, Bar Counsel shall forward those portions of the record in his or her possession to the Clerk of the Disciplinary System. The transcript is a part of the record when it is received in the office of the Clerk of the Disciplinary System within 40 days after filing of the notice of appeal or written demand. The Clerk of the Disciplinary System shall retain the records until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever occurs first, and shall then dispose of the record as prescribed in the records retention policy set forth in this Paragraph. Failure of the Respondent to make the complete transcript a part of the Record as specified herein shall result in Dismissal of the appeal by the Board, whether initiated by notice of appeal or written demand, and affirmance of the sanction imposed by the District Committee. Bar Counsel shall initiate the three-judge Circuit Court process for the appeal only after receipt of the transcript by the Clerk of the Disciplinary System.

D. Appeal to a Circuit Court. An appeal to a Circuit Court pursuant to Va. Code § 54.1-3935 shall be conducted before a duly convened three-judge Circuit Court as an appeal on the record using the same procedure

prescribed for an appeal of a District Committee Determination before the Board under this Paragraph. The Clerk of the Disciplinary System shall forward the record to the clerk of the designated Circuit Court only upon receipt of the transcript as provided in the preceding subparagraph C.

E. Appeal from Agreed Sanction Prohibited. No appeal shall lie from any sanction to which the Respondent has agreed.

13-18 BOARD PROCEEDINGS UPON CERTIFICATION

A. Filing by Respondent. After a Subcommittee or District Committee certifies a matter to the Board, and the Respondent has been served with the Certification, the Respondent shall, within 21 days after service of the Certification:

1. File an answer to the Certification with the Clerk of the Disciplinary System, which answer shall be deemed consent to the jurisdiction of the Board; or file an answer to the Certification and a demand with the Clerk of the Disciplinary System that the proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand.

2. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

B. No Filing by Respondent. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

C. Notice of Hearing. The Board shall set a date, time, and place for the hearing, and shall serve notice of such hearing upon the Respondent at least 21 days prior to the date fixed for the hearing.

D. Expedited Hearings.

1. If Bar Counsel or a District Committee Chair has reasonable cause to believe that an Attorney is engaging in Misconduct which is likely to result in injury to, or loss of property of, one or more of the Attorney's clients or any other person, and that the continued practice of law by the Attorney poses an imminent danger to the public, Bar Counsel or the District Committee Chair may petition the Board to issue an order requiring the Attorney to appear before the Board for a hearing in accordance with the procedures set forth below.

2. The petition shall be under oath and shall set forth the nature of the alleged Misconduct, the factual basis for the belief that immediate action by the Board is reasonable and necessary and any other facts which may be relevant to the Board's consideration of the matter, including any prior Disciplinary Record of the Attorney.

3. Upon receipt of the petition, the Chair or Vice-Chair of the Board shall issue an order requiring the Respondent to appear before the Board not less than 14 nor more than 30 days from the date of the order for a hearing to determine whether the Misconduct has occurred and the imposition of sanctions is appropriate. The Board's order shall be served on the Respondent no fewer than ten days prior to the date set for hearing.

4. If the Respondent, at the time the petition is received by the Board, is the subject of an order then in effect by a Circuit Court pursuant to Va. Code § 54.1-3936 appointing a receiver for his accounts, the Board shall issue a further order summarily suspending the License of the Respondent until the Board enters its order following the expedited hearing.

5. At least five days prior to the date set for hearing, the Respondent shall either file an answer to the petition with the Clerk of the Disciplinary System, which answer shall be conclusively deemed consent to the jurisdiction of the Board; or file an answer and a demand with the Clerk of the Disciplinary System that proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 days nor more than 120 days from the date of the Board order. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The

hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. If any order of summary Suspension has been entered, such Suspension shall remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order disposing of the issue before it. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

E. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the Board in Misconduct cases. Such order may establish time limits and:

1. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;

2. Encourage Bar Counsel and the Respondent to confer and discuss stipulations; and

3. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, lists setting forth the name of each witness the party intends to call.

F. Continuance of a Hearing. Absent exceptional circumstances, once the Board has scheduled a hearing, no continuance shall be granted unless, in the judgment of the Chair, the continuance is necessary to prevent injustice. No continuance will be granted because of a conflict with the schedule of the Respondent or the Respondent's counsel unless such continuance is requested in writing by the Respondent or the Respondent's counsel within 14 days after mailing of a notice of hearing. Any request for a continuance shall be filed with the Clerk of the Disciplinary System.

G. Preliminary Explanation. The Chair shall state in the presence of the Respondent and the Complainant, if present, a summary of the alleged Misconduct, the nature and purpose of the hearing, the procedures to be followed during the hearing, and the dispositions available to the Board following the hearing. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.

H. Attendance at Hearing. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the Board.

I. Order of Hearing.

1. Brief opening statements by Bar Counsel and by the Respondent or the Respondent's counsel shall be permitted but are not required.

2. Bar Counsel shall present witnesses and other evidence supporting the Charge of Misconduct. The Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar. Board members may also examine witnesses offered by Bar Counsel.

3. Respondent shall be afforded the opportunity to present witnesses and other evidence. Bar Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. Board members may also examine witnesses offered on behalf of a Respondent.

4. Bar Counsel may rebut the Respondent's evidence.

5. Bar Counsel may make the initial closing argument.

6. The Respondent or the Respondent's counsel may then make a closing argument.

7. Bar Counsel may then make a rebuttal closing argument.

J. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all the evidence, the Board on its own Motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or more allegations of Misconduct contained in the Charge of Misconduct. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Board, that allegation of Misconduct shall be dismissed from the Charge of Misconduct.

K. Deliberations. As soon as practicable after the conclusion of the evidence and arguments as to the issue of Misconduct, the Board shall deliberate in private. If the Board finds by clear and convincing evidence that the Respondent has engaged in Misconduct, the Board shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has been the subject of any Disciplinary Proceeding in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence and arguments in aggravation or mitigation. The Board shall deliberate in private on the issue of sanctions. The Board may address any legal questions to the Office of the Attorney General.

L. Dismissal for Failure of the Evidence. If the Board concludes that the evidence fails to show under a clear and convincing evidentiary standard that the Respondent engaged in the Misconduct, the Board shall dismiss any Charge of Misconduct not so proven.

M. Disposition Upon a Finding of Misconduct. If the Board concludes that there has been presented clear and convincing evidence that the Respondent has engaged in Misconduct, after considering evidence and arguments in aggravation and mitigation, the Board shall impose one of the following sanctions and state the effective date of the sanction imposed:

1. Admonition, with or without Terms;

2. Public Reprimand, with or without Terms;

3. Suspension of the License of the Respondent:

   a. For a stated period not exceeding five years; provided, however, if the Suspension is for more than one year, the Respondent must apply for Reinstatement as provided in this Paragraph; or

   b. For a stated period of one year or less, with or without terms; or

4. Revocation of the Respondent's License.

N. Dismissal for Failure to Reach a Majority Decision. If the Board is unable to reach a decision by a majority vote of those constituting the hearing panel, the Charge of Misconduct, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Charge of Misconduct, or one or more allegations thereof, under a clear and convincing evidentiary standard.

O. Enforcement of Terms. In all cases where Terms are included in the disposition, the Board shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The Board shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the Board. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the Board at its next available hearing date. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period, as determined by the Board, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

P. Orders, Findings and Opinions. Upon disposition of a matter, the Board shall issue the Summary Order. Thereafter, the Board shall issue the Memorandum Order. A Board member shall prepare the Summary Order and Memorandum Order for the signature of the Chair or the Chair's designee. Dissenting opinions may be filed.

Q. Change in Composition of Board Hearing Panel. Whenever a hearing has been adjourned for any reason and one or more of the members initially constituting the quorum for the hearing are unable to be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to such absent member, or substituting another Board member for any absent member and furnishing a transcript of the prior proceedings in the matter to such substituted member(s).

R. Reconsideration of Board Action. No motion for reconsideration or modification of the Board's decision shall be considered unless it is filed with the Clerk of the Disciplinary System within 10 days after the hearing

before the Board. The moving party shall file an original and six copies of both the motion and all supporting exhibits with the Clerk of the Disciplinary System. Such motion shall be granted only to prevent manifest injustice upon the ground of:

1. Illness, injury or accident which prevented the Respondent or a witness from attending the hearing and which could not have been made known to the Board within a reasonable time prior to the hearing; or

2. Evidence which was not known to the Respondent at the time of the hearing and could not have been discovered prior to, or produced at, the hearing in the exercise of due diligence and would have clearly produced a different result if the evidence had been introduced at the hearing.

3. If such a motion is timely filed, the Clerk of the Disciplinary System shall promptly forward copies to each member of the hearing panel. The panel may deny the motion without response from Bar Counsel. No relief shall be granted without allowing Bar Counsel an opportunity to oppose the motion in writing. If no relief is granted, the Board shall enter its order disposing of the case.

13-19 BOARD PROCEEDINGS UPON APPEAL

A. Docketing An Appeal. Upon receipt of notice from the Clerk of the Disciplinary System that a Respondent has filed an appeal from a District Committee Determination the Board shall place such matter on its docket for review.

B. Notice to the Appellant. The Clerk of the Disciplinary System shall notify the appellant when the entire record of the Proceeding before the District Committee has been received or when the time for appeal has expired.

C. Record on Appeal. The record shall consist of the Charge of Misconduct, the complete transcript of the Proceeding, any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent or the Bar. Upon petition of the Respondent, for good cause shown, the Board may permit the record to be supplemented to prevent injustice, such supplement to be in such form as the Board may deem appropriate.

D. Briefing. Thereafter, briefs shall be filed in the office of the Clerk of the Disciplinary System, as follows:

1. The appellant shall file an opening brief within 40 days after the mailing of the notice to the appellant regarding the record by the Clerk of the Disciplinary System. Failure of the appellant to file an opening brief within the time specified herein shall result in the Dismissal of the appeal and affirmance of the decision by the District Committee.

2. The appellee shall file its brief within 25 days after filing of the opening brief.

3. The appellant may file a reply brief within 14 days after filing of the appellee's brief.

E. Standard of Review. In reviewing a District Committee Determination, the Board shall ascertain whether there is substantial evidence in the record upon which the District Committee could reasonably have found as it did.

F. Oral Argument. Oral argument shall be granted, unless waived by the appellant.

G. Imposition of Sanctions. Upon review of the record in its entirety, the Board may:

1. Dismiss the Charges of Misconduct upon a finding that the District Committee Determination is contrary to the law or is not supported by substantial evidence;

2. Affirm the District Committee Determination, in which instance the Board may impose the same or any lesser sanction as that imposed by the District Committee. In no case shall it increase the severity of the sanction imposed by the District Committee; or

3. Reverse the decision of the District Committee and remand the Charges of Misconduct to the District Committee for further proceedings.

13-20 BOARD PROCEEDINGS UPON CERTIFICATION FOR SANCTION DETERMINATION

A. Initiation of Proceedings. Upon receipt of the Certification for Sanction Determination from a District Committee, the Clerk of the Disciplinary System shall issue a notice of hearing on the Certification for Sanction Determination giving Respondent the date, time and place of the Proceeding and a copy of the Certification for Sanction Determination.

B. Proceedings Upon the Record. The proceeding shall be conducted upon the record which shall consist of the Public Reprimand with Terms determination issued by either a Subcommittee or a District Committee, the transcript of the District Committee show cause hearing, and the Certification for Sanction Determination.

C. Evidence. Evidence only of mitigation and aggravation with respect to compliance or certification shall be permitted in the proceeding.

D. Argument. Argument shall be conducted as in the sanction phase of a Misconduct case.

E. Sanctions. The Board may impose a sanction of Suspension or Revocation of License.

13-21 BOARD PROCEEDINGS UPON A FIRST OFFENDER PLEA

A. Action Upon Receipt of Notification. Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney has entered a plea to a Crime under a first offender statute, and that the court has found facts that would justify a finding of guilt and ordered that the Attorney be put on probation, the Board shall forthwith enter an order requiring the Attorney to appear at a specified time and place for a hearing before the Board to determine whether the Attorney's License to practice law should be revoked or suspended or, if not, whether the Attorney should be required to give notice, by certified mail, of the plea and probation ordered by the court, including the terms and duration of the probation, to all clients for whom the Attorney is currently handling matters, and to all opposing attorneys and the presiding judges in pending litigation. A copy of the written notification from the court shall be served with the order fixing the time and place of the hearing. The hearing shall be set not less than 14 or more than 30 days after the date of the Board's order.

B. Burden of Proof. At the hearing, the Attorney shall have the burden of proving why his or her License should not be suspended or revoked and why he or she should not be required to give notice of the plea and probation ordered by the court.

C. Demand for Three Judge Court. If the Attorney elects to have further proceedings conducted pursuant to Va. Code § 54.1-3935, the Attorney shall file a demand with the Clerk of the Disciplinary System not later than ten days prior to the date set for the Board hearing, and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

D. Attorney Compliance with Notice Requirements. If the Board or court suspends or revokes the Attorney's License to practice law, the Attorney must comply with the notice requirements set out in subparagraph 13-29. If the Board or court orders the Attorney to give notice of the plea and court ordered probation, the Attorney shall give such notice within 14 days after the effective date of the Board's order and furnish proof to the Bar within 60 days of the effective date of the order that such notices have been timely given. Issues concerning the adequacy of the notice shall be determined by the Board, which may suspend or revoke the Attorney for failure to comply with the above notice requirements.

13-22 BOARD PROCEEDINGS UPON A GUILTY PLEA OR AN ADJUDICATION OF A CRIME

A. Action Upon Receipt of Notification. Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney (the "Respondent") has been found guilty or convicted of a Crime by a Judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, irrespective of whether sentencing has occurred, a member of the Board shall forthwith and summarily issue an order of Suspension on behalf of the Board against the Respondent and shall forthwith cause to be served upon the Respondent: a copy of the written notification from the court; a copy of the Board member's order; and a notice fixing the time and place of a hearing to determine whether Revocation or further Suspension is appropriate.

B. Time of Hearing, Continuance and Interim Hearing. The hearing shall be set not less than 14 or more than 30 days after the date of the Board's order. Upon written request of the Respondent, the hearing may be continued until any probation ordered by a court has ended or after sentencing has occurred. Upon receipt by the

Board of a certified copy of a notice of appeal from the conviction, proceedings before the Board shall, upon request of the Respondent, be continued pending disposition of such appeal. The Board shall, upon request of the Respondent, hold an interim hearing and shall terminate such Suspension while the probation, sentencing, or appeal is pending, if the Board finds that such Suspension, if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the merits of the case.

C. Reversal of Conviction. Upon presentation to the Board of a certified copy of an order setting aside the verdict or reversing the conviction on appeal, any Suspension shall be automatically terminated and any Revocation shall be vacated, and the License shall be deemed automatically reinstated. Discharge or Dismissal of a guilty plea or termination of probation shall not result in the automatic termination of the Suspension or vacation of the Revocation. Nothing herein shall preclude further proceedings against the Respondent upon Charges of Misconduct arising from the facts leading to such conviction.

D. Action by the Board and Notice to Respondent. If the Board finds at the hearing that the Respondent has been found guilty or convicted of a Crime by a Judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, an order shall be issued, and a copy thereof served upon the Respondent in which the Board shall continue the Suspension or issue an order of Suspension against the Respondent for a stated period not in excess of five years; or issue an order of Revocation against the Respondent.

E. Procedure. The procedure applicable to Proceedings related to Misconduct shall apply to Proceedings relating to guilty pleas or Adjudication of a Crime. If the Respondent elects to have further Proceedings conducted pursuant to Va. Code § 54.1-3935, the Respondent shall file a demand with the Clerk of the Disciplinary System not later than ten days prior to the date set for the hearing before the Board, and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. The order of Suspension issued by the Board shall remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order disposing of the issue before it. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

13-23 BOARD PROCEEDINGS UPON IMPAIRMENT

A. Suspension for Impairment. The Board shall have the power to issue an order of Suspension to a Respondent who has an Impairment. The term of such Suspension shall be indefinite, and, except as provided below, shall be terminated only upon determination by the Board that Respondent no longer has the Impairment. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct shall, absent good cause excusing his or her failure to do so, provide notice not less than 14 days prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention to do so. A finding of Impairment may be utilized by Bar Counsel to dismiss any pending Complaints or Charges of Misconduct on the basis of the existence of exceptional circumstances militating against further proceedings, which circumstances of Impairment shall be set forth in the Dismissal.

B. Burden of Proof. Whenever the existence of an Impairment is alleged in a Proceeding under this Rule or in mitigation of Charges of Misconduct, the burden of proving such an Impairment shall rest with the party asserting its existence. The issue of the existence of an Attorney's Impairment may be raised by any person at any time, and if a District Committee or the Board, during the course of a hearing on Charges of Misconduct against a Respondent, believes that the Respondent may then have an Impairment, the District Committee or the Board may postpone the hearing and initiate an Impairment Proceeding under this Rule. In Proceedings to terminate a Suspension for Impairment, the burden of proving the termination of an Impairment shall be on the Respondent.

C. Investigation. Upon receipt of notice or evidence that an Attorney has or may have an Impairment, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the Respondent has the Impairment. As a part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection Bar Counsel may petition the Board to order the Respondent:

1. To undergo a psychiatric, physical or other medical examination by qualified physicians or other health care provider selected by the Board; and

2. To provide appropriate releases to health care providers authorizing the release of Respondent's psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Impairment proceedings.

Upon notice to the Respondent, the Board shall hold a hearing to determine whether any such examination or release is appropriate.

D. Summary Suspension. Upon receipt of a notice from the Clerk of the Disciplinary System with supporting documentary evidence that an Attorney has been adjudicated by a court of competent jurisdiction to have an Impairment, or that an Attorney has been involuntarily admitted to a hospital (as defined in Va. Code §37.1-1) for treatment of any addiction, inebriety, insanity or mental illness, any member of the Board shall summarily issue on behalf of the Board an order of Suspension against the Respondent and cause the order to be served on such Respondent.

E. Action by Board after a Hearing.

1. If Bar Counsel determines that there is reason to believe that an Attorney has an Impairment, Bar Counsel shall file a petition with the Board, and the Board shall promptly hold a hearing to determine whether such Impairment exists. A copy of the petition shall be served on the Respondent. If the Board determines that an Impairment exists, it shall enter an order of Suspension.

2. The Board shall hold a hearing upon petition of a Respondent who is subject to a Suspension for Impairment that alleges that the Impairment no longer exists. Evidence that the Respondent is no longer hospitalized shall not be conclusive to the Board's determination of the Respondent's ability to resume the practice of law.

F. Procedure. Such hearing shall be conducted substantially in accordance with the procedures established in proceedings related to Misconduct, except that the public and witnesses, other than the Complainant and the Respondent, shall be excluded throughout an Impairment Proceeding when not testifying.

G. Guardian *Ad Litem*. The notice of any hearing to determine whether the Respondent has an Impairment shall order Respondent to advise the Board whether Respondent has retained counsel for the hearing. Unless counsel for such Respondent enters an appearance with the Board within ten days of the date of the notice, the Board shall appoint a guardian *ad litem* to represent such Respondent at the hearing.

H. Examination. Following a psychiatric, physical or other medical examination, written reports of the results of such examination, along with written reports from other qualified physicians or other health care providers who have examined Respondent, may be considered as evidence by the Board. Such reports shall be filed with the Clerk of the Disciplinary System.

I. Termination of Suspension. In cases where a Suspension is based upon an adjudication of an Impairment by a court, upon receipt of documentary evidence of adjudication by a court of competent jurisdiction that the Respondent's Impairment has terminated, the Board shall promptly enter an order terminating such Suspension.

J. Enforcement. The Board shall have the power to sanction an Attorney for failure to comply with its orders and subpoenae issued in connection with an Impairment Proceeding. The sanction can include a summary Suspension in a case where it is determined that the public and/or the clients of the Attorney are in jeopardy; such action can be *sua sponte* or on motion by Bar Counsel, with appropriate notice to the Attorney and the Attorney's counsel or guardian *ad litem*.

13-24 BOARD PROCEEDINGS UPON DISBARMENT, REVOCATION OR SUSPENSION IN ANOTHER JURISDICTION

A. Initiation of Proceedings. Upon receipt of a notice from the Clerk of the Disciplinary System that another jurisdiction has suspended or revoked the License of the Respondent and that such action has become final (the "Suspension or Revocation Notice"), any Board member shall enter on behalf of the Board an order of Suspension against such Respondent to show cause why the same discipline imposed in the other jurisdiction should not be imposed by the Board. The Board shall serve upon such Respondent by certified mail: a copy of the Suspension or Revocation Notice; a copy of the Board's order; and a notice fixing the date, time and place of the hearing before the Board to determine what action should be taken in response to the Suspension or Revocation Notice and stating that the purpose of the hearing is to provide Respondent an opportunity to show cause why the same discipline that was imposed in the other jurisdiction should not be imposed by the Board.

B. Opportunity for Response. Within 14 days of the date of mailing of the Board order, via certified mail, return receipt requested, to the last address of record of the Respondent with the Bar, Respondent shall file with the

Clerk of the Disciplinary System an original and six copies of any written response and any communications or other materials, which shall be confined to allegations that:

1. The record of the proceeding in the other jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process;

2. The imposition by the Board of the same discipline upon the same proof would result in a grave injustice; or

3. The same conduct would not be grounds for disciplinary action or for the same discipline in Virginia.

C. Scheduling and Continuance of Hearing. Unless continued by the Board for good cause, the hearing shall be set not less than 21 nor more than 30 days after the date of the Board's order of Suspension.

D. Provision of Copies. The Clerk of the Disciplinary System shall furnish to the Board members designated for the hearing and make available to Respondent copies of the Suspension or Revocation Notice, the Board's order of Suspension against the Respondent, the notice of hearing, any notice of continuance of the hearing, and any response or materials filed by Respondent.

E. Hearing Procedures. Insofar as applicable, the procedures for Proceedings on Charges of Misconduct shall govern Proceedings under this subparagraph 13-24.

F. Burden of Proof. The Respondent shall have the burden of proof, by a clear and convincing evidentiary standard, and the burden of producing the Record upon which the Respondent relies to support the Respondent's contentions, and shall be limited at the hearing to proof of the specific contentions raised in any written response. Except to the extent the allegations of the written response are established, the findings in the other jurisdiction shall be conclusive of all matters for purposes of the Proceeding before the Board.

G. Action by the Board. If Respondent has not filed a timely written response, or does not appear at the hearing or if the Board, after a hearing, determines that the Respondent has failed to establish the contentions of the written response by clear and convincing evidence, the Board shall impose the same discipline as was imposed in the other jurisdiction. If the Board determines that the Respondent has established such contentions by clear and convincing evidence, the Board may dismiss the proceeding or impose a lesser discipline than was imposed in the other jurisdiction. A copy of any order imposing discipline shall be served upon the Respondent via certified mail, return receipt requested. Any such order shall be final and binding, subject only to appeal as provided in this Paragraph.

13-25 BOARD PROCEEDINGS FOR REINSTATEMENT

A. Waiver of Confidentiality. The filing by a former Attorney of a petition for reinstatement shall constitute a waiver of all confidentiality relating to the petition, and to the Complaint or Complaints that resulted in, or were pending at the time the former Attorney resigned or his or her License was revoked.

B. Readmission After Resignation. If after resigning from the Bar, a former Attorney wishes to resume practicing law in the Commonwealth of Virginia, the former Attorney must apply to the Board of Bar Examiners, satisfy the character and fitness requirements and pass the Bar examination. Before being readmitted to the Bar, the former Attorney must also satisfy any membership obligations that were delinquent when the former Attorney resigned.

C. Petition for Reinstatement After Revocation. After a Revocation, a Petitioner may petition this Court for Reinstatement, setting forth in that petition the reasons why his or her License to practice law in Virginia should be reinstated. The following requirements shall apply: the petition shall be filed under oath or affirmation with penalty of perjury; no petition may be filed sooner than five years from the effective date of the Revocation; and the Petitioner must certify in the petition that he or she has met the requirements of the following subparagraph D. This Court may deny the petition or refer it to the Board for recommendation, together with the record before the clerk of this Court. The Board may recommend approval or disapproval of the petition. Final action on the petition shall be taken by this Court.

D. Evidence Required for Reinstatement After Revocation. After a Revocation, Petitioner's License to practice law shall not be reinstated unless the Petitioner proves by clear and convincing evidence that Petitioner:

1. Within five years prior to filing the petition has attended 60 hours of continuing legal education, of which at least ten hours shall be in the area of legal ethics or professionalism;

2. Has taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher;

3. Has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of Petitioner's Misconduct;

4. Has paid the Bar all Costs that have been previously assessed against Petitioner, together with any interest due thereon at the judgment rate;

5. Has reimbursed the Bar for any sums of money it may have paid as a result of a receivership involving Petitioner's law practice; and

6. Is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

E. Bond Required for Reinstatement After Revocation. The Petitioner shall post with his or her petition for Reinstatement a $5,000 cash bond for payment of Costs resulting from the Reinstatement Proceedings.

F. Determination of Costs for Reinstatement After Revocation. At the conclusion of the Reinstatement Proceeding, the Board or the Clerk of the Disciplinary System shall determine the Costs associated with such proceeding and submit that determination to the clerk of this Court as part of the Board's findings of fact.

G. Additional Requirements After Approval of Petition. Upon approval of a petition by this Court, the Petitioner shall meet the following requirements prior to and as a condition of his or her Reinstatement:

1. Pay to the Bar any Costs assessed in connection with the Reinstatement Proceeding;

2. Take and pass the written portion of the Virginia State Bar examination;

3. If required by the Board, obtain and maintain a professional liability insurance policy issued by a company authorized to write such insurance in Virginia at the cost of the Petitioner in an amount and for such term as set by the Board; and

4. If required by the Board, obtain and maintain a blanket fidelity bond or dishonesty insurance policy issued by a company authorized to write such bonds or insurance in Virginia at the Petitioner's cost in an amount and for such term as set by the Board.

H. Reinstatement After Disciplinary Suspension for More than One Year. After a Suspension for more than one year, the License of the Attorney subject to the Suspension shall not be reinstated unless the Attorney demonstrates to the Board that he or she has:

1. Attended 12 hours of continuing legal education, of which at least two hours shall be in the area of legal ethics or professionalism, for every year or fraction thereof of the Suspension;

2. Taken the Multistate Professional Responsibility Examination since imposition of discipline and received a scaled score of 85 or higher;

3. Reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's Misconduct;

4. Paid to the Bar all Costs that have been assessed against him or her, together with any interest due thereon at the judgment rate at the time the Costs are paid; and

5. Reimbursed the Bar for any sums of money it may have paid as a result of a receivership involving Petitioner's law practice.

I. Investigation of Impairment in Reinstatement Matters. Upon receipt of notice or evidence that an individual seeking Reinstatement has or may have an Impairment, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the Impairment exists. As part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the individual:

1. To undergo at his or her expense a psychiatric, physical or other medical examination by a qualified physician or other health care provider selected by the Board; and

2. To provide appropriate releases to health care providers authorizing the release of his or her psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Reinstatement Proceedings.

The Board shall hold a hearing to determine whether such examination(s) and releases(s) are appropriate, upon notice to the individual petitioning for Reinstatement.

J. Reinstatement Hearings. The Clerk of the Disciplinary System shall advise the Petitioner in writing upon receipt of a petition for Reinstatement from the clerk of this Court and arrange a hearing date with the Petitioner and Bar Counsel.

1. Quorum. A quorum shall be five members of the Board.

2. Powers of the Board in Reinstatement Cases. The Board is empowered to hold a hearing and make its recommendation to this Court either to approve or disapprove the petition.

3. Hearing Date. The date of the hearing shall be determined by the Chair. Upon the scheduling of a hearing date, the Clerk of the Disciplinary System shall file six copies of the available transcript, exhibits, pleadings, and orders from the original Disciplinary Proceeding.

4. Investigation. Bar Counsel shall conduct such Investigation and make such inquiry as it deems appropriate. On request of Bar Counsel, the Petitioner shall promptly sign such forms and give such permission as are necessary to permit inquiry of the Petitioner's background through IRS, NCIC, NCIN and any other similar information network or system.

5. Notice. Reasonable notice of filing of the petition and the date of the hearing shall be mailed by the Clerk of the Disciplinary System to all members of the Bar of the circuit in the jurisdictions in which the Petitioner resided, and of the circuit in which the Petitioner maintained a principal office, at the time of the Revocation or Suspension. The Clerk of the Disciplinary System shall also mail the notice to the members of the District Committee who heard the original Complaint, to members of the Board who heard the original Complaint, to the members of the District Committee for the judicial circuit in which the Petitioner currently resides, to the complaining witness or witnesses on all Complaints pending against the Petitioner before the Board, a District Committee or a court at the date of the Revocation or Suspension and to such other individuals as the Clerk of the Disciplinary System deems appropriate. The Clerk of the Disciplinary System shall publish a synopsis of the petition in the Virginia Lawyer Register and in a newspaper of general circulation in the judicial circuit where the Petitioner currently resides and where the Petitioner maintained a principal office at the time of the Revocation or Suspension. The entire petition and exhibits together with the documents referred to in subparagraph 13-25.D. above, shall be available for inspection and copying by interested persons at the office of the Bar on reasonable notice and on payment of costs incurred to make the copies.

6. Bill of Particulars. On written request by Bar Counsel, a Petitioner seeking Reinstatement shall file with the Clerk of the Disciplinary System within 21 days after receipt of the request, an original and six copies of a bill of particulars setting forth the grounds for Reinstatement.

7. Hearing. On the date set for the hearing, the Petitioner shall have the right to representation by counsel, to examine and cross-examine witnesses and to present evidence. The testimony and other incidents of the hearing shall be transcribed and preserved, together with all exhibits (or copies thereof) received into evidence or refused. Bar Counsel shall appear and represent the Commonwealth and its citizens. Bar Counsel shall have the right to cross-examine, call witnesses and present evidence in opposition to the petition. Board members may examine witnesses called by either party. Legal advice to the Board, if required, shall be rendered by the Office of the Attorney General.

8. Factors to be Considered. In considering the matter prior to making a recommendation to this Court the Board may consider, but is not bound by, the factors spelled out *In the Matter of Alfred Lee Hiss*, VSB Docket No. 83-26 (Va. Sup. Ct. July 2, 1984).

9. Character Witnesses. Up to five character witnesses supporting and up to five character witnesses opposing the petition shall be heard. In addition, the Board may consider any letters submitted regarding the Petitioner's character and fitness.

10. Determination by the Board. The Board shall, within 60 days after the receipt of the transcript, forward the record and its recommendations to this Court with a copy to the Petitioner and Bar Counsel. A recommendation of approval may be conditioned upon Petitioner obtaining malpractice insurance coverage and/or a blanket fidelity bond or dishonesty insurance coverage in amount(s) set by the Board from an approved professional insurance carrier for a definite term or on an ongoing basis.

13-26 APPEAL FROM BOARD DETERMINATIONS

A. Right of Appeal. As a matter of right any Respondent may appeal to this Court from an order of Admonition, Public Reprimand, Suspension, or Disbarment imposed by the Board. An appeal shall lie once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall lie from a Summary Order.

B. Notice of Appeal. The Respondent shall file with the Clerk of the Disciplinary System a notice of appeal and assignments of error within 30 days after the Memorandum Order of the Board is served on the Respondent. This action within the time prescribed is jurisdictional.

C. Further Proceedings. Further proceedings shall be as provided in this Court's procedure for filing an appeal from a trial court and procedure following perfection of appeal. For the purposes of determining dates of filing, the date of filing the record with the clerk of this Court shall be deemed to be the date of the issuance of the certificate of the clerk of this Court under Rule 5:23. The Clerk of the Disciplinary System shall immediately notify the Respondent and his counsel, if any, by certified mail, of the date on which the record is filed.

D. Determination. This Court shall hear the case and make such determination in connection therewith as it shall deem right and proper.

E. Office of the Attorney General. In all appeals to this Court, the Office of the Attorney General, or the Bar Counsel, if so requested by the Attorney General, shall represent the interests of the Commonwealth and its citizens as appellees.

F. Stay Pending Appeal. Upon the entry by the Board of either a Summary or Memorandum Order of Suspension, this Court may, upon petition of the Respondent, stay the effect of such an order of suspension prior to or during the pendency of the appeal. Any order of Admonition or Public Reprimand shall be automatically stayed prior to or during the pendency of an appeal therefrom. No stay shall be granted in cases where the Respondent's License to practice law has been revoked by either the Summary or Memorandum Order of the Board.

13-27 RESIGNATION

A. Application. A sworn and notarized application to resign from the practice of law shall be submitted to the Clerk of the Disciplinary System. The application shall state that the resignation is not being offered to avoid disciplinary action and that the Attorney has no knowledge of any complaint, investigation, action, or proceeding in any jurisdiction involving allegations of Misconduct by the Attorney. An application to resign will not prevent or preclude any disciplinary proceeding or action against an Attorney.

B. Procedure. The Clerk of the Disciplinary System shall submit applications for resignation to Bar Counsel, who shall investigate each application and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the application with the Clerk of the Disciplinary System, the Board shall hold a hearing on whether the application should be accepted. If Bar Counsel does not file an objection, the Board may enter an order accepting the Attorney's resignation without a hearing. A resignation shall be effective only upon entry of an order accepting it. Upon entry of an order accepting an Attorney's resignation, the former Attorney shall immediately cease the practice of law and make appropriate arrangements for the disposition of matters in the Attorney's care in conformity with the wishes of the Attorney's clients.

C. When Not Permitted. An Attorney may not resign while the Attorney is the subject of a disciplinary complaint, investigation, action, or proceeding involving allegations of Misconduct.

13-28 CONSENT TO REVOCATION

A. When Permitted. An Attorney who is the subject of a disciplinary complaint, investigation or Proceeding involving allegations of Misconduct may consent to Revocation, but only by delivering to the Clerk of the Disciplinary System an affidavit declaring the Attorney's consent to Revocation and stating that:

1. The consent is freely and voluntarily rendered, that the Attorney is not being subjected to coercion or duress, and that the Attorney is fully aware of the implications of consenting to Revocation;

2. The Attorney is aware that there is currently pending a complaint, an investigation into, or a Proceeding involving, allegations of Misconduct, the nature of which shall be specifically set forth in the affidavit;

3. The Attorney acknowledges that the material facts upon which the allegations of Misconduct are predicated are true; and

4. The Attorney submits the consent to Revocation because the Attorney knows that if disciplinary Proceedings based on the alleged Misconduct were brought or prosecuted to a conclusion, the Attorney could not successfully defend them.

B. Admissions. The admissions offered in the affidavit consenting to Revocation shall not be deemed an admission in any proceeding except one relating to the status of the Attorney as a member of the Bar.

C. Procedure. The Clerk of the Disciplinary System shall submit the affidavit to Bar Counsel, who shall investigate the affidavit and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the affidavit with the Clerk of the Disciplinary System, the Board shall hold a hearing on whether the affidavit and consent to Revocation should be accepted. If Bar Counsel does not file an objection, the Board shall enter an order revoking the Attorney's License to practice law by consent without a hearing.

D. Attorney Action Required upon Revocation. Upon entry of such an order of Revocation by consent, the revoked Attorney shall immediately cease the practice of law and shall comply with the notice requirements set forth in subparagraph 13-29.

E. Dismissal of Complaints or Charges of Misconduct. When an Attorney's License is revoked by consent, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or Charges of Misconduct then pending by notifying the Clerk of the Disciplinary System and the District Committee, Board or Court wherein the matter or matters lie.

13-29 DUTIES OF DISBARRED OR SUSPENDED RESPONDENT

After a Suspension against a Respondent is imposed by either a Summary or Memorandum Order and no stay of the Suspension has been granted by this Court, or after a Revocation against a Respondent is imposed by either a Summary Order or Memorandum Order, that Respondent shall forthwith give notice, by certified mail, of his or her Revocation or Suspension to all clients for whom he or she is currently handling matters and to all opposing Attorneys and the presiding Judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his or her care in conformity with the wishes of his or her clients. The Respondent shall give such notice within 14 days of the effective date of the Revocation or Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Revocation or Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the Revocation or Suspension that such notices have been timely given and such arrangements made for the disposition of matters. The Board shall decide all issues concerning the adequacy of the notice and arrangements required herein, and the Board may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph 13-29.

13-30 CONFIDENTIALITY OF DISCIPLINARY RECORDS AND PROCEEDINGS

A. Confidential Matters. Except as otherwise provided in this subparagraph 13-30, the following Disciplinary Proceedings, records, and information are confidential and shall not be disclosed:

1. Complaints, unless introduced at a public hearing or incorporated in a Charge of Misconduct or a Certification;

2. Investigations, except that Investigative Reports admitted as exhibits at a public hearing are public;

3. Impairment proceedings, except that final orders are public;

4. Notes, memoranda, research, and all other work product of Bar Counsel;

5. Records, communications, and information protected by Disciplinary Rule 1.6;

6. Subcommittee records and proceedings, except determinations imposing public discipline; and

7. Deliberations and working papers of District Committees, the Board or a three-judge Circuit Court.

B. Timing of Disclosure of Disciplinary Record in Sanctions Proceedings. If an Attorney has a Disciplinary Record and is subsequently found by a Subcommittee, a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code § 54.1-3935 to have engaged in Misconduct, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (i) to the Subcommittee, District Committee,

Board or three-judge Circuit Court prior to the imposition of any sanction and (ii) by the Subcommittee, District Committee, Board or three-judge Circuit Court in its findings of fact set forth in its order. The facts and circumstances giving rise to such Disciplinary Record may also be disclosed to the Board during a hearing concerning whether an affidavit and consent to Revocation should be accepted.

C. Timing of Public Access to Disciplinary Information. All records of a matter set for public hearing remain confidential until the matter is dismissed or a public sanction is imposed except:

1. A Charge of Misconduct is public when the matter is placed on the public District Committee hearing docket; and

2. A Certification is public when filed with the Clerk of the Disciplinary System.

D. Public Statements Concerning Disciplinary Information. To the extent necessary to exercise their official duties, Bar Officials have access to all confidential information; however, except for Bar Counsel, no Bar Official shall communicate with a member of the media or the public concerning a matter that is confidential under this Paragraph. If an inquiry is made about a matter that, although confidential under this Paragraph, has become a matter of public record or has become known to the public, Bar Counsel may confirm whether the Bar is conducting an Investigation or if an Investigation resulted in a determination that further proceedings were not warranted.

E. Protection of the Public. Bar Counsel may transmit confidential information to persons or agencies outside of the disciplinary system if such disclosure is necessary to protect the public or the administration of justice.

F. Disclosure to Other Jurisdictions. Bar Counsel may share information regarding an Investigation with his or her counterparts in other jurisdictions provided that such jurisdiction agrees to maintain the confidentiality of the information as provided in this Paragraph.

G. Disclosure of Criminal Activity. If Bar Counsel or a Chair of the Board or a Chair of a District Committee discovers evidence of criminal activity by an Attorney, Bar Counsel, the Chair of the Board or a Chair of a District Committee shall forward such evidence to the appropriate Commonwealth's Attorney, United States Attorney or other law enforcement agency. The Attorney concerned shall be notified whenever this information is transmitted pursuant to this subparagraph 13-30 unless Bar Counsel decides that giving such notice will prejudice a disciplinary investigation.

H. Disclosure of Information to Government Entities. By order of this Court, confidential information may be disclosed to the Joint Legislative Audit and Review Commission or other governmental entities incident to their discharge of official duties, provided the entity is required or agrees to maintain the confidentiality of the information provided.

I. Waiver of Confidentiality. Confidential information, excluding notes, memoranda, research, and all other work product of Bar Counsel, may upon written request be disclosed when and to the extent confidentiality is waived by the Respondent, by the Complainant, and, if protected by Disciplinary Rule 1.6, by Respondent's client.

J. Testimony about Disciplinary Proceedings.

1. In no case shall Bar Counsel, a member of COLD, a member of a District Committee, a member of the Board, or a Committee Counsel be subject to a subpoena or otherwise compelled to testify in any proceeding regarding any matter investigated or considered in such person's official capacity, except that an Investigator may be compelled to testify in a Disciplinary Proceeding, subject to rulings of the court or Chair.

2. In no case shall the Clerk of the Disciplinary System be subject to a subpoena or otherwise compelled to testify regarding any matter investigated or considered in the disciplinary system, or the records of any such matter, dealt with by the Clerk of the Disciplinary System in his or her official capacity, except that the Clerk of the Disciplinary System may be compelled to testify in a Disciplinary Proceeding in order to authenticate records of the Clerk of the Disciplinary System.

K. Records of the Disciplinary System. In no case shall confidential records of the attorney disciplinary system be subject to subpoena.

L. Virginia Lawyer Referral Service. Bar Counsel shall notify the Virginia Lawyer Referral Service when a Complaint involving any Attorney member of the service is referred to a District Committee for Investigation or when any Attorney member of the service is disciplined. Bar Counsel shall also notify the Virginia Lawyer

Referral Service when any Complaint involving an Attorney member of the service is dismissed following Investigation or when any Attorney member of the service complies with Terms imposed.

13-31 DISMISSAL OF COMPLAINTS AND CHARGES OF MISCONDUCT UPON REVOCATION WITHOUT CONSENT, OR UPON DEATH

When an Attorney's License is revoked without consent, or upon the death of an Attorney, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or Charges of Misconduct then pending against said Attorney by notifying the Clerk of the Disciplinary System, the Complainant(s) and the District Committee, Board or court wherein the matter(s) lies.

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13.1 SUSPENSION FOR FAILURE TO COMPLETE PROFESSIONALISM COURSE. — Each person admitted to the Virginia State Bar on or after July 1, 1988, as an active member shall complete the course of study prescribed by the Executive Committee of the Virginia State Bar and approved by the Supreme Court of Virginia on the Rules of Professional Conduct and the lawyer's broader professional obligations, and any active member who fails to complete the course shall be suspended unless a waiver is obtained for good cause shown. Such course of study shall be funded by attendance fees paid by those attending the course.

Any active member licensed after June 30, 1988, and any other member who changes his or her membership to active status shall complete the required course within twelve months of becoming an active member. Failure to comply with this Rule shall subject the active member to the penalties set forth in Paragraph 19 herein.

"Good cause shown" as used herein shall include illness, hospitalization or such other cause as may be determined by the Executive Committee, whose determination shall be final. Any determination by the Executive Committee may be reviewed by the Supreme Court on request of the member seeking a waiver.

13.2 SUSPENSION FOR FAILURE TO COMPLETE CONTINUING LEGAL EDUCATION REQUIREMENT.— Each active member of the Virginia State Bar shall complete the Continuing Legal Education requirement prescribed by Paragraph 17 of these Rules, and any active member who fails to complete the requirement shall be suspended unless a waiver is obtained for good cause shown. Any active member licensed on or after July 1, 1986, shall thereafter annually file prior to, but no later than, December 15, certifications that he or she has completed the mandatory continuing legal education programs required by Paragraph 17, or obtain a waiver for good cause shown; provided, however, the next certification deadline following July 31, 2001, shall be December 15, 2002.

Failure to comply with this Rule shall subject the active member to the penalties set forth in Paragraph 19 herein.

"Good cause shown" as used herein shall include illness, hospitalization, or such other cause as may be determined by the Continuing Legal Education Board whose determination shall be final. Any determination by the Continuing Legal Education Board may be reviewed by the Supreme Court upon request of the suspended member.

14. PROFESSIONAL CORPORATIONS, PROFESSIONAL LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS (LIMITED LIABILITIES ENTITIES). — The rules and regulations in the following provisions of this Paragraph 14 shall constitute a Code of Ethics governing the professional conduct of the practice of law through professional law corporations, professional limited liability companies and registered limited liability partnerships in Virginia.

(a) Scope.

All applications, reports and other documents required to be filed with the Virginia State Bar by this Paragraph 14 shall be signed and verified by an officer, director, partner, or manager of the applicant who is a duly licensed, active member of the Virginia State Bar or who is otherwise legally authorized to practice law in Virginia and filed at the office of the Virginia State Bar.

(b) Certificate of Registration.

An applicant for registration as a limited liability entity shall file with the Virginia State Bar an application for a Certificate of Registration, on a form furnished by the Virginia State Bar, and pay a fee of $100. The term "limited liability entity," as used in this Paragraph 14 shall include a professional law corporation, professional limited liability company, and a registered limited liability partnership.

(i) The Executive Director of the Virginia State Bar, or a person or persons designated by him, shall review such application for registration and, within 15 days after receipt of such application, approve the application and issue a Certificate of Registration provided the application conforms to the requirements of law and this Paragraph 14. If the application fails to include the information required in subparagraphs (c)(i) through (c)(v) of this Paragraph 14, the Executive Director shall refuse to approve the application and notify the applicant of the reasons therefore. A request by the Executive Director for further information to comply with the requirement of said subparagraph (c) of this Paragraph 14, or a request that the application be amended, may be deemed by the applicant to be a refusal to approve the application for purposes of initiating review under subparagraph (b)(iii) of this Paragraph 14.

(ii) The effective date of the Certificate of Registration shall be the date on which the applicant has filed with the Virginia State Bar all material required for approval of the application; provided,

however, that (1) a later effective date may be granted if requested by the applicant prior to the issuance of the Certificate of Registration, or (2) in the discretion of the Executive Director an earlier effective date may be granted if good cause appears therefore.

(iii) An applicant may request a review of a refusal to approve its application within sixty days after the date of the notice of such refusal. Such request shall be heard by the Executive Committee of the Virginia State Bar. Upon completion of review, which may include examination of all information submitted by the applicant and a hearing, the Committee shall either (1) approve the application and order the issuance of a Certificate of Registration, or (2) request further information required by subparagraph (c) of this Paragraph 14 or amendments not theretofore supplied by the applicant, or (3) refuse to approve the application in any case where the applicant fails or refuses to supply the required information or has made a material misrepresentation of fact. The Committee shall report in writing its findings of fact and the reasons for its order, whether approving or refusing to approve the application. Notice of the order and a copy of the report shall be mailed to the applicant.

(iv) Insofar as applicable, the rules of procedure of the Virginia State Bar shall apply to the procedure in (b)(iii) above. An aggrieved applicant may proceed in a court of competent jurisdiction by motion for declaratory judgment for review of matters relating to its application.

(c) Application for Certificates.

A Certificate of Registration as a limited liability entity shall be issued if the application shows:

(i) The applicant is organized and qualified under the provisions of Chapter 7 (Section 13.1-542 et seq.) of Title 13.1 of the *Code of Virginia* (the Virginia Professional Corporations Act), organized and qualified under the provisions of Chapter 13 (Section 13.1-1100 et seq.) of Title 13.1 of the *Code of Virginia* (the Virginia Professional Limited Liability Company Act), organized and qualified under the provisions of Article 9 (Section 50-73.132 et seq.) of Chapter 2.2 of Title 50 (the Virginia Registered Limited Liability Partnership Act), or organized and qualified under the laws of a jurisdiction other than the Commonwealth of Virginia to perform a professional service of the type defined in Section 13.1-543(A) of the *Code of Virginia*.

(ii) All of the applicant's shareholders, directors, officers, partners, members or managers and their names and addresses are set forth in full in the application.

(iii) Each member, manager, partner**,** employee or agent of the applicant who will practice law in Virginia, the names and addresses of whom are set forth in full in the application, whether or not a director, officer, shareholder, partner, member or manager of the applicant, is an active member of the Virginia State Bar or otherwise legally authorized to practice law in Virginia**.** Nothing in this Paragraph 14(c)(iii) shall be deemed to prohibit a non-licensed individual from serving as secretary, treasurer, office manager or business manager of any limited liability entity, provided, however, that such individual shall not be held out to be qualified or otherwise authorized to practice law or give advice on a legal or related matter to the clients of the entity. Any employee or agent of the applicant who is duly licensed to practice law in Virginia and who is not held out to the public to be so authorized shall be deemed for the purposes of these Rules to be a non-licensed individual.

(iv) A trade name may be used by a limited liability entity if it does not imply a connection with a government agency or with a public or charitable organization and is not otherwise in violation of Virginia Rules of Professional Conduct 7.1(a). The name of a lawyer holding a public office shall not be used in the name of the entity, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the entity.

(v) The applicant has advised or intends to advise the clients of any predecessor organization, and the clients of any shareholder, director, officer, member, partner, manager, employee or agent of the applicant who will practice law, of the transfer of such organization's or lawyer's practice to a limited liability entity.

(d) Ownership.

An interest in or shares of a professional law corporation or professional limited liability company may be owned only in accordance with the provisions of Chapter 7 or Chapter 13 of Title 13.1. Ownership of shares of a professional law corporation or professional limited liability company for the purpose of con-

struing this subparagraph (d) shall mean both legal and beneficial ownership. All the trustees of any voting trust which may be entered into by any shareholder shall be duly licensed or otherwise legally authorized to practice law in Virginia, and no proxy to vote any of such shares shall be valid unless granted to and voted by an individual or individuals duly licensed or otherwise legally authorized to practice law in Virginia.

(e) Control Over and Rendition of Legal Services; Letterhead.

No person not a member of the Virginia State Bar and duly licensed to practice law in Virginia shall have the right to direct or control the professional judgment of any employee of a limited liability entity or the conduct of employees of the entity with respect to the practice of law in Virginia. Any limited liability entity practicing law in a foreign jurisdiction and which enumerates its employees on its letterhead and in other permissible listings shall do so in a manner which will make clear the jurisdictional limitations on those employees and agents of the entity not licensed to practice in all listed jurisdictions.

(f) Correspondence, Pleadings and Documents.

Correspondence, pleadings and other documents, the execution of which constitutes the practice of law in Virginia, shall be executed on behalf of a limited liability entity by an employee who is an active member of the Virginia State Bar and duly licensed to practice law in Virginia. Corporate documents, the execution of which does not constitute the practice of law, may be executed on behalf of a limited liability entity by any authorized employee, whether or not licensed to practice law.

(g) Division of Fees.

It shall be lawful, ethical and proper for a lawyer employed by a limited liability entity, as part of the terms of his employment, to agree to turn over to the entity by which he is employed all fees, compensation or reimbursement which he may be entitled to receive for his professional services, regardless of where such professional services are rendered. No limited liability entity with a Certificate of Registration in effect shall be deemed a lay agency, nor shall any employee of such entity be deemed to be practicing law through an intermediary during any period for which such entity maintains a Certificate of Registration in effect.

(h) Professional Responsibility.

Nothing in this Paragraph 14 shall be deemed to diminish or change the obligation of any lawyer employed by a limited liability entity to conduct the practice of law in accordance with any specific standards promulgated by the Supreme Court of Virginia. Any lawyer who by act or omission causes the entity by which he is employed to act or fail to act in a manner which violates any applicable standard of professional conduct, including any of the provisions of this Paragraph 14, shall be personally responsible for such act or omission and subject to discipline therefore.

(i) Attorney-Client Privilege.

Nothing in this Paragraph 14 shall be deemed to modify, abrogate or reduce the attorney-client privilege or any comparable privilege or relationship, whether derived by statute or from common law.

(j) Discipline.

A Certificate of Registration shall continue in effect until it is suspended or revoked as provided herein. Such certificate may be suspended or revoked if a limited liability entity fails at any time to comply fully with the provisions of this Paragraph 14, the Rules of Professional Conduct, the Code of Professional Responsibility, the applicable Virginia Professional Corporation Act, the Virginia Professional Limited Liability Company Act, or the Virginia Registered Limited Liability Partnership Act, after notice and an opportunity to be heard as provided in 14(j)(ii) below; provided that, if the violation be such as can be corrected upon notice to the entity of its violation, or if the violation be that of one or several persons only, suspension or revocation of the certificate need not be invoked if the interest of justice and the protection of the public can be fairly served by appropriate disciplinary proceedings against the individual(s) involved.

(i) Upon receipt of a resolution of the board of directors or the written statement of the manager(s) or partner(s) of a limited liability entity requesting the cancellation of the Certificate of Registration of that entity, such certificate shall be cancelled by the Executive Director of the Virginia State Bar, or by a person or persons designated by him. The cancellation of a Certificate of Registration at the request of a limited liability entity shall be effective as of the date such request is received at the office of the Virginia State Bar, except that a later effective date shall be granted upon request of the entity or, in the discretion of the Executive Director of the Virginia

State Bar, an earlier effective date may be granted if good cause appears therefore.

(ii) Where a limited liability entity has violated or is about to violate any pertinent statute, rule or any provision of this Paragraph 14, the Executive Director of the Virginia State Bar, or a person or persons designated by him, may issue a notice directing Bar Counsel to investigate the alleged violation. Bar Counsel may issue such summons and subpoenas, and/or compel the production of such documents as he/she may reasonably deem necessary or material for the effective conduct of an investigation. Every Circuit Court shall have power to enforce any summons or subpoena issued by Bar Counsel and to adjudge disobedience thereof as contempt.

If the report of Bar Counsel concludes either that the allegation is without merit or that specific corrective action has been or will be taken, the Executive Director shall dismiss the matter forthwith. If Bar Counsel concludes that the allegation has merit warranting court action, Bar Counsel shall file with the Circuit Court having jurisdiction in the premises a verified complaint. The court shall issue a rule against the limited liability entity concerned and conduct further proceedings in the matter in accordance with Section 54.1-3937 of the *Code of Virginia*, as amended, which is incorporated herein by reference. In addition to or in lieu of a Circuit Court complaint against the entity, Bar Counsel may refer the matter to the appropriate District Committee pursuant to Part 6, Section IV, Para. 13, B.(5)(a) et seq. of these Rules. After the court has held its hearing pursuant to its rule, it shall enter an order reprimanding the entity or revoking or suspending its Certificate of Registration if it finds that the circumstances of the violation warrant such action; otherwise the court shall dismiss the matter.

(k) Certificate Renewal.

On the date two years after the effective date of its initial Certificate of Registration and biennially thereafter, each limited liability entity shall pay a fee of $50 whereupon its Certificate of Registration shall be automatically renewed.

(l) Annual Report; Corporate or Partnership Changes.

Each limited liability entity shall file with the Virginia State Bar a copy of any document or report required to be filed with the State Corporation Commission. Each professional limited corporation, upon renewal every two years, must file on a special form provided by the Virginia State Bar, information regarding any changes in its shareholders, directors, officers, members, managers, partners, employees or agents duly licensed to practice law.

(m) Effective Dates.

This Paragraph 14 shall become effective on July 1, 2006 and shall apply in like manner to professional corporations theretofore or thereafter organized under the provisions of Chapter 7 (Section 13.1-542 et seq.) of Title 13.1 of the *Code of Virginia* to practice law, and to professional limited liability companies theretofore or thereafter organized under the provisions of Chapter 13 (Section 13.1-1100 et. seq.) of Title 13.1 of the *Code of Virginia* to practice law, and to registered limited liability partnerships theretofore or thereafter organized under the provisions of Article 9 (Section 50-73.132 et seq.) of Chapter 2.2 of Title 50 of the *Code of Virginia* to practice law, except where inconsistent with the provisions of such laws.

15. THIRD YEAR STUDENT PRACTICE RULE.—

(a) Activities.

(i) An eligible law student may, in the presence of a supervising lawyer, appear in any court or before any administrative tribunal in this Commonwealth in any civil, criminal or administrative matter on behalf of any person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance. The eligible law student must obtain written approval from the court or administrative tribunal prior to any appearance before the court or administrative tribunal.

(ii) An eligible law student may also, in the presence of a supervising lawyer, appear in any criminal matter on behalf of the Commonwealth with the written approval of the prosecuting attorney or his authorized representative, provided the student obtains the written authorization from the court or administrative tribunal prescribed in paragraph (a)(i) of this Rule.

(iii) The written consent and approval of the person or entity on whose behalf the student appears

shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

(b) Requirements and Limitations.

In order to qualify pursuant to this Rule, the law student must:

(i) (a) Be duly enrolled and in good standing in a law school that is approved by the American Bar Association, but if such school is located in another state that permits law student practice, only if such other state permits a student of a law school in this State to engage in such practice; or

(b) Be duly enrolled in a program of study in the office of an attorney as authorized in subdivision 2.of §54.1-3926, *Code of Virginia*, and in accordance with the Rules of the Virginia Board of Bar Examiners.

(ii) (a) Have completed satisfactorily legal studies amounting to at least four semesters, or the equivalent if the school is on a basis other than a semester basis; or

(b) Be certified by the Virginia Board of Bar Examiners as being in the final year of a program of study in the office of an attorney as authorized in subdivision 2. of §54.1-3926, *Code of Virginia*, and in accordance with the Rules of the Virginia Board of Bar Examiners.

(iii) Be certified by the dean of his law school, or by the attorney under whom he is studying in the case of a law reader, as being of good character and competent ability, and as having completed satisfactorily a course or program of study in each of the following: criminal law, professional ethics, evidence and procedure.

(iv) Be introduced to the court or agency in which he is appearing by an attorney admitted to practice in that court or agency.

(v) Neither ask for nor receive any compensation or remuneration of any kind for his services from the person on whose behalf he renders services but this shall not prevent a lawyer or law firm, legal aid bureau, public defender agency, or the Commonwealth from paying compensation to the eligible law student, nor shall it prevent charges by a lawyer or law firm for such services as may otherwise be proper.

(c) Certification.

The certification of a student by Virginia Board of Bar Examiners, the law school dean or the attorney under whom the student is studying in compliance with Paragraph 15 (b)(ii) and (iii) above:

(i) Shall be filed with the Executive Director of the Virginia State Bar and, unless it is sooner withdrawn, shall remain in effect until the expiration of eighteen months after it is filed, or until the announcement of the results of the first examination be given by the Virginia Board of Bar Examiners following the student's graduation or completion of the program of study, whichever date is earlier. Thereafter, the certification shall lapse and be of no further force and effect.

(ii) May be withdrawn by the Board, dean or attorney under whom the student is studying at any time by mailing a notice to that effect to the Executive Director of the Virginia State Bar. It is not necessary that the notice state the cause for withdrawal.

(d) Supervision.

The supervising attorney under whose supervision an eligible law student performs any of the activities permitted by this Rule (Paragraph) 15 shall:

(i) Be an active member of the Virginia State Bar who practices before, and whose service as a supervising lawyer for this program is approved by, each court or administrative body in which the eligible law student engages in limited practice.

(ii) Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.

(iii) Assist the student in his preparation to the extent the supervising lawyer considers it necessary.

(iv) The approval of the court designated in (a)(i) or (d)(i) may be withdrawn at any time without

stating the cause for withdrawal.

(e) Miscellaneous.

Nothing contained in this Rule (Paragraph) shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do before the adoption of this Rule (Paragraph).

16. CLIENTS' PROTECTION FUND.— The Council may establish a Clients' Protection Fund for the purposes of reimbursing all or part of losses sustained by a client or other person or entity to whom a fiduciary duty is owed as a result of dishonest conduct of a member of the Virginia State Bar. The Board shall be appointed by Council, and shall receive, hold, manage, invest and distribute funds appropriated to it by Council or otherwise received, in accordance with procedures established by Council.

Effective July 1, 2007, each active member of the Virginia State Bar shall be assessed a required fee of $25 for the Clients' Protection Fund on the bar's annual dues statement. The fee shall be in addition to each member's annual dues as prescribed in Part 6, Section IV, Paragraph 11 of these rules, and it shall be paid on or before the 31st day of July each fiscal year.

All monies collected under this Paragraph 16 shall be accounted for and paid into the State Treasury of Virginia and transferred by the bar from the Treasury to the Clients' Protection Fund. The bar shall report annually on or about January 15 to the Supreme Court of Virginia on the financial condition of the Clients' Protection Fund, and the assessment will be discontinued whenever directed by the Court.

Failure to comply with the requirements of this Paragraph 16 shall subject the active member to penalties set forth in Part 6, Section IV, Paragraph 19 of these rules.

17. MANDATORY CONTINUING LEGAL EDUCATION RULE.— The Virginia Supreme Court hereby establishes a Mandatory Continuing Legal Education Program in the Commonwealth of Virginia.

A. Purpose:

Continuing professional education of lawyers serves to improve the administration of justice and benefit the public interest. Regular participation in Continuing Legal Education programs will enhance the professional skills of practicing lawyers, afford them periodic opportunities for professional self-evaluation and improve the quality of legal services rendered to the public. All active members of the Virginia State Bar shall participate in an additional amount of further legal study throughout the period of their active practice of law, and failure to do so shall result in their suspension from membership in the Virginia State Bar.

B. Continuing Legal Education Board:

A Continuing Legal Education Board shall be established for the purpose of administering the program.

(1) Appointment:

The Chief Justice of the Supreme Court shall appoint, after consultation with the Council, the members of the board who shall be members of the Bar and twelve in number. One member shall be designated by the Chief Justice as Chair and another as Vice chairman. Members shall serve terms of three years each, except that, initially, four members shall be appointed for terms of one year, four for terms of two years, and four for terms of three years. No member shall serve more than two consecutive terms but shall be eligible for reappointment after the lapse of one or more years following expiration of the previous term. The Executive Director of the Virginia State Bar shall be an *ex officio* member of the board.

(2) Notice of Meetings/Quorum:

The board shall meet on reasonable notice by the Chair, Vice chair or the Executive Director. Five members shall constitute a quorum and the action of a majority of a quorum shall constitute action of the Board.

(3) Powers:

The Board shall have those general administrative and supervisory powers necessary to effectuate the purposes of this Rule, including the power to adopt reasonable and necessary regulations consistent with this Rule. The Virginia State Bar shall have the responsibility for funding the Board and for enforcing Mandatory Continuing Legal Education requirements.

The board shall specifically have the following powers and duties:

(a) To approve, on an individual basis, CLE programs and sponsors and publish a list of those approved. The publication shall include the number of credits earned for completion of a particular program;

(b) To establish procedures for the approval of Continuing Legal Education courses, whether those courses are offered within the Commonwealth or elsewhere. These procedures should include the method by which CLE sponsors could make application to the Board for approval, and if necessary, make amendments to their application;

(c) To authorize sponsors of Continuing Legal Education programs to advertise that participation in their program fulfills the CLE requirements of this Rule;

(d) To formulate and distribute to all members of the Virginia State Bar appropriate information regarding the requirements of this Rule, including the distribution of a certification form to be filed annually by each active member.

C. Continuing Legal Education Requirements:

(1) All active members of the Virginia State Bar shall annually complete and certify attendance at a minimum of twelve (12) credit hours of approved Continuing Legal Education courses of which at least two (2) hours shall be in the area of legal ethics or professionalism, except those lawyers expressly exempted from the requirement by this Rule or by decision of the Continuing Legal Education Board; provided, however, that for the period July 1, 2001 through October 31, 2002, active members shall complete and certify attendance at a minimum of fifteen (15) credit hours of approved Continuing Legal Education courses of which at least two (2) hours shall be in the area of legal ethics or professionalism, except those lawyers expressly exempted from the requirement by this rule or by decision of the Continuing Legal Education Board. Each active member shall complete the required Continuing Legal Education courses each year during the period November 1 through October 31 of the following year; provided, however, the next completion period following June 30, 2001, shall be July 1, 2001 through October 31, 2002.

(2) In order to provide flexibility in fulfilling the annual requirement, a one-year carryover of credit hours is permitted, so that accrued credit hours in excess of one year's requirement may be carried forward from one year to meet the requirement for the next year. A member may carry forward a maximum of twelve (12) credit hours, two (2) of which, if earned in legal ethics or professionalism, may be counted toward the two (2) hours required in legal ethics or professionalism.

(3) Each active member of the Virginia State Bar shall be responsible for ascertaining whether or not a particular course satisfies the requirements of this Rule. Each member should exercise discretion in choosing those approved programs which are most likely to enhance professional skills and improve delivery of legal services.

D. Certificate of Attendance:

(1) Each active member of the Virginia State Bar shall certify prior to December 15 each year that such lawyer attended approved Mandatory Continuing Legal Education programs for the minimum number of hours required during the previous calendar year ending October 31; provided, however, the next certification deadline following July 31, 2001, shall be December 15, 2002. The failure to certify shall cause suspension of such lawyer's license to practice law. An untruthful certification shall subject the lawyer to appropriate disciplinary action.

E. Exemptions:

Each active member of the Virginia State Bar shall comply with this Rule except as follows:

(1) A newly admitted member shall be exempted from filing a certification for the completion period in which he or she is first admitted.

(2) A member who has obtained a waiver for good cause shown, as may be determined by the board, shall be exempted from filing a certification for the completion period for which the waiver is granted.

F. Activation or Reactivation:

A member of any category who wishes to become an active member of the Virginia State Bar shall furnish

to the Secretary an affidavit stating that he or she has completed twelve (12) hours of Continuing Legal Education, including two (2) hours in legal ethics or professionalism within the previous twelve months. Thereafter, that member shall have the same completion period and certification deadline as other active members.

G. Credits:

(1) Credit will be given only for Continuing Legal Education courses or activities approved by the board.

(2) Hours in excess of the minimum requirements defined in this Rule may not be carried forward for credit beyond the one year provided for in the Rule.

(3) Credit will not be given for Continuing Legal Education hours accumulated prior to admission to the Virginia State Bar.

(4) Credit shall be given to active members of the Virginia State Bar who prepare course materials and who personally participate as instructors. The credit, as determined by the board, will reflect the time reasonably required for preparation of materials, as well as the actual time spent instructing.

H. Standards:

The Board shall evaluate, and where appropriate, approve, those programs which serve to satisfy the requirements of this Rule. In evaluating the specific programs, the Board shall consider the following factors:

(1) Whether the course tends to increase the participant's professional competence as a lawyer.

(2) The number of hours of actual presentation, lecture, or participation, so that the appropriate number of credit hours can be identified and published.

(3) The usage of written educational materials which reflect a thorough preparation by the provider of the course, and which assist course participants in improving their legal competence.

(4) To qualify for mandatory legal education credit, a course is not required to have a component on legal ethics or professionalism, although such components are encouraged. When topics on legal ethics or professionalism are offered, either as an entire course or component thereof, they must be clearly identified as such.

18. FINANCIAL RESPONSIBILITY.— In order to make available to the public information about the financial responsibility of each active member of the Virginia State Bar for professional liability claims, each such member shall, upon admission to the bar, and with each application for renewal thereof, submit the certification required herein or obtain a waiver for good cause shown. The active member shall certify to the bar on or before July 31 of each year: a) whether or not such member is currently covered by professional liability insurance, other than an extended reporting endorsement; b) whether or not such member is engaged in the private practice of law involving representation of clients drawn from the public, and, if so, whether the member intends to maintain professional liability insurance coverage during the period of time the member remains engaged in the private practice of law; and c) the date, amount, and court where rendered, of any unsatisfied final judgment(s) against such member, or any firm or professional corporation in which he or she has practiced, for acts, errors, or omissions (including, but not limited to, acts of dishonesty, fraud, or intentional wrongdoing) arising out of the performance of legal services by such member.

The foregoing shall be certified by each active member of the Virginia State Bar in such form as may be prescribed by the Virginia State Bar and shall be made available to the public by such means as may be designated by the Virginia State Bar.

Each active member who certifies to the bar that such member is covered by professional liability insurance shall notify the bar in writing within thirty (30) days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason, unless the policy is replaced with another policy and no lapse in coverage occurs.

Failure to comply with this Rule shall subject the active member to the penalties set forth in Paragraph 19 herein. An untruthful certification or unjustified failure to notify the bar of a lapse or termination of coverage shall subject the member to appropriate disciplinary action.

"Good cause shown" as used herein shall include illness, absence from the Commonwealth of Virginia, or such

cause as may be determined by the Executive Committee of the Virginia State Bar whose determination shall be final. Any determination by the Executive Committee may be reviewed by the Supreme Court upon request of the member seeking a waiver.

19. PROCEDURE FOR THE ADMINISTRATIVE SUSPENSION OF A MEMBER.— Whenever it appears that a member of the Virginia State Bar has failed to comply with any of the Rules of Court relating to such person's membership in the bar, the Secretary-Treasurer shall mail a notice to the member advising of the member's noncompliance and demanding (1) compliance within sixty (60) days of the date of such notice and (2) payment of a delinquency fee of $50, for each Rule violated, provided, however, that the delinquency fee for an attorney who does not comply with the timely completion requirements of Paragraphs 13.2 and 17 (C) of these rules shall be $100, and the delinquency fee for an attorney who does not comply with the certification requirements of Paragraphs 13.2 and 17 (D) of these rules shall be $100, and shall increase by $100 on February 1 for noncompliance with the certification requirements. The notice shall be mailed to the member at his last address on file at the Virginia State Bar.

In the event the member fails to comply with the directive of the Secretary-Treasurer within the time allowed, the Secretary-Treasurer will then mail a notice to the member by certified mail to advise (1) that the attorney's membership in the bar has been suspended and (2) that the attorney may no longer practice law in the Commonwealth of Virginia or in any way hold himself or herself out as a member of the Virginia State Bar. Thereafter the attorney's membership in the Virginia State Bar may be reinstated only upon showing to the Secretary-Treasurer (1) that the attorney has complied with all the Court's rules relating to his or her membership in the bar and (2) upon payment of a reinstatement fee of $150 for each Rule violated, provided, however, that the reinstatement fee for an attorney who was suspended for noncompliance with Paragraphs 13.2 and 17 of these rules shall be $250, and shall increase by $50 for each subsequent such suspension, not to exceed a maximum of $500.

Whenever the Secretary-Treasurer notifies a member that his or her membership in the bar has been administratively suspended, the Secretary-Treasurer shall also (1) advise the Chief Judges of the circuit and district in which the attorney has his or her office, as well as the clerks of those courts and the Clerk of the Supreme Court, of such suspension and (2) publish notice of the suspension in the next issue of the *Virginia Lawyer Register*.

An administrative suspension shall not relieve the delinquent member of his or her annual responsibility to attend continuing legal education programs or to pay his or her dues to the Virginia State Bar.

20. MAINTENANCE OF TRUST ACCOUNTS; NOTICE OF ELECTION REQUIREMENTS.— Every trust account maintained by an active member of the VSB under Rules of Professional Conduct 1.15 shall also be maintained in accordance with this paragraph.

(A) A lawyer may maintain funds of clients in one or more interest-bearing accounts in one or more banks, whenever the lawyer has established and follows record-keeping, accounting, clerical, and administrative procedures to compute and credit or pay periodically, but at least quarterly, pro rata to each client the interest on such client's funds less fees, costs, or expenses charged by the lawyer for the record-keeping, accounting, clerical, and administrative procedures associated with computing and crediting or paying such amounts.

(B) A lawyer may deposit funds of a client in an interest-bearing trust (IOLTA) bank account for which the lawyer has not established procedures to compute and credit or pay pro rata net earnings to such client whenever:

(1) At the time of such deposit the lawyer reasonably expects that the fees, costs, or expenses which the lawyer would be entitled to charge under Paragraph 20(A) would equal or exceed the pro rata interest on such client's funds, and

(2) The bank has agreed to:

(a) Periodically, but at least quarterly, remit to the Legal Services Corporation of Virginia (LSCV) interest or dividends on the average monthly balance of each such account or as otherwise computed in accordance with such bank's standard accounting practice, provided that such rate of interest shall not be less than the rate paid by such bank to regular, non-attorney depositors;

(b) Transmit with each remittance to LSCV a statement identifying the name of the lawyer or law firm from whose account the remittance is sent, the rate of interest applied, the

period for which the remittance is made, the total amount of interest earned, the service charges or other fees assessed against the account, if any, and the net amount of interest remitted;

(c) Transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to LSCV from such interest-bearing account, the rate of interest applied, the fees assessed, if any, and the average account balance for the period for which the report is made;

(d) Charge no fees against an IOLTA trust account that are greater than the fees charged to non-attorney depositors, except that an IOLTA remittance fee may be charged to defray the depository institution's administrative costs attributable to calculating and remitting the interest to LSCV;

(e) Collect no fees from the principal deposited in the IOLTA trust account; and

(f) Pay all or part of the funds deposited in such interest-bearing trust account upon demand or order.

(3) Interest accruing on such accounts and paid by the financial institution to LSCV shall be used for funding 1) civil legal services to the poor in Virginia, 2) LSCV's administrative expenses, and 3) the creation and augmentation of a reserve fund for the same purposes.

(4) The Virginia Law Foundation (Foundation), which prior to July 1, 1995 was the recipient of interest accruing on IOLTA trust accounts, shall, after July 1, 1995, continue to administer and may enhance its endowment, which was created and augmented with IOLTA funds, and shall use those funds, the interest and all other income earned on those funds to support the objectives of legal services to the poor, pro bono activities, improvements in the administration of justice, law-related education of the public, summer internships for law students and the Foundation's administrative expenses.

(C) A lawyer who deposits funds of a client in an interest-bearing account in accordance with Paragraph 20(B) shall not be required to seek permission from such client or to compute or report to such client any payment to LSCV of interest or dividends by the banking institution on funds in any such account wherein the client's funds have been deposited by the lawyer.

(D) Unless an election not to participate in the maintenance of an interest-bearing trust account as described in Paragraph 20(B) is submitted in accordance with the procedures set forth in Paragraph 20(F) of this rule, a member of the Virginia State Bar shall maintain such account(s).

(E) A law firm of which any participating lawyer is a member may maintain the account(s) on behalf of any or all lawyers in the firm.

(F) A lawyer who elects not to maintain an account as described in Paragraph 20(B) after June 30, 1995 shall make such election on a notice of election form provided by LSCV. A lawyer admitted into the Virginia State Bar after July 1, 1995, who elects not to maintain such an account shall submit an appropriate notice of election within ninety days after admission into the bar. If a notice of election is not submitted within the applicable time, the lawyer shall be required to maintain an account as described in Paragraph 20(B) until such election is made. Except for the above provision regarding new admittees to the bar, any lawyer may begin or withdraw from participation in the program at any time during the year by submitting an appropriate notice of election during the preceding month to LSCV. Notwithstanding the foregoing provisions of this paragraph, LSCV may for good cause permit withdrawal from participation in the program at any time. Any lawyer who does not receive client funds may file a certificate with the LSCV and will thereafter be exempt from the requirement of maintaining interest-bearing accounts under this rule so long as such lawyer does not receive client funds.

21. COMPUTERIZED LEGAL RESEARCH SERVICES RULE**.** —The Supreme Court of Virginia hereby authorizes and directs the Virginia State Bar to contract to provide online computerized legal research services to its members.

A. *Purpose* — It is the policy and objective of the Commonwealth of Virginia to improve the quality and reduce the costs of legal services available to the citizens of Virginia. It is also the policy of this Commonwealth to enhance the availability of legal services to poor litigants and indigent criminal defendants. The provision of online computerized legal research tools to all Virginia lawyers will further these policies by increasing and improving the available

knowledge and information base for attorneys, enhancing the quality of legal research and advice, making legal research more efficient for many attorneys, reducing the costs of legal services to the poor, and providing additional resources to lawyers who are appointed by courts to represent indigent criminal defendants. The provision of online computerized legal research services to all lawyers in Virginia will reduce the time spent and costs incurred in performing legal research, which will decrease the costs of legal services to consumers in Virginia and thereby increase access to attorneys. In addition, the provision of online computerized legal research will enable more lawyers to provide *pro bono* services since this research tool will lower their costs and reduce the amount of research time required.

B. *Procedure* — For these reasons, the Virginia State Bar, through its governing body, is authorized to contract to provide online computerized legal research services to its members. In connection therewith, the Virginia State Bar is authorized and directed to solicit proposals from providers of online computerized legal research services, enter into contracts for those services, and expend funds for the purchase of online computerized legal research services for its members. The Virginia State Bar shall supervise and periodically review the provision of online computerized legal research services to its members to ensure the continued quality of those services and that the policies and objectives of the Commonwealth are being met. The Virginia State Bar also shall submit to the Supreme Court of Virginia an annual report that describes and analyzes the status of the Bar's contracts for online computerized legal research services, the online computerized legal research services that are being provided, and the utilization of those services.

Rule 1A:4. Out-of-State Lawyers—When Allowed to Participate in a Case *Pro Hac Vice*.

1. **Introduction.** A lawyer who is not a member of the Virginia State Bar, but is currently licensed and authorized to practice law in another state, territory, or possession of the United States of America (hereinafter called an "out-of-state lawyer") may apply to appear as counsel *pro hac vice* in a particular case before any court, board or administrative agency (hereinafter called "tribunal") in the Commonwealth of Virginia upon compliance with this rule.

2. **Association of Local Counsel.** No out-of-state lawyer may appear *pro hac vice* before any tribunal in Virginia unless the out-of-state lawyer has first associated in that case with a lawyer who is an active member in good standing of the Virginia State Bar (hereinafter called "local counsel"). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the case. Local counsel shall personally appear and participate in pretrial conferences, hearings, trials, or other proceedings actually conducted before the tribunal. Local counsel associating with an out-of-state lawyer in a particular case shall accept joint responsibility with the out-of-state lawyer to the client, other parties, witnesses, other counsel and to the tribunal in that particular case. Any pleading or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is signed by local counsel. The tribunal in which such case is pending shall have full authority to deal with local counsel exclusively in all matters connected with the pending case. If it becomes necessary to serve notice or process in the case, any notice or process served upon local counsel shall be deemed valid as if served on the out-of-state lawyer.

3. **Procedure for applying.** Appearance *pro hac vice* in a case is subject to the discretion and approval of the tribunal where such case is pending. An out-of-state lawyer desiring to appear *pro hac vice* under this rule shall comply with the procedures set forth herein for each case in which *pro hac vice* status is requested. For good cause shown, a tribunal may permit an out-of-state lawyer to appear *pro hac vice* on a temporary basis prior to completion by the out-of-state lawyer of the application procedures set forth herein. At the time such temporary admission is granted, the tribunal shall specify a time limit within which the out-of-state lawyer must complete the application procedures, and any temporary *pro hac vice* admission shall be revoked in the event the out-of-state lawyer fails to complete the application procedure within the time limit.

(a) *Notarized Application.* In order to appear *pro hac vice* as counsel in any matter pending before a tribunal in the Commonwealth of Virginia, an out-of-state lawyer shall deliver to local counsel to file with the tribunal an original notarized application and a non-refundable application fee of $250.00 payable to the Clerk of the Supreme Court. *Pro hac vice* counsel must submit a notarized application with the non-refundable application fee of $250.00 for each separate case before a tribunal. The fee shall be paid to the Clerk of the Supreme Court of Virginia. The tribunal shall file a copy of the notarized application, as well as its order granting *pro hac vice* admission in the case and the $250.00 fee, with the Clerk of the Supreme Court of Virginia. Original, notarized applications and orders granting, denying or revoking applications to appear *pro hac vice* shall be retained in a separate file containing all applications. The clerk of the tribunal shall maintain the application for a period of three years after completion of the case and all appeals.

(b) *Motion to associate counsel pro hac vice.* Local counsel shall file a motion to associate the out-of-state lawyer as counsel *pro hac vice* with the tribunal where the case is pending, together with proof of service on all parties in accordance with the Rules of the Supreme Court of Virginia. The motion of local counsel shall be accompanied by: (1) the original, notarized application of the out-of-state lawyer; (2) a proposed order granting or denying the motion; and (3) the required application fee.

(c) *Entry of Order*. The order granting or denying the motion to associate counsel *pro hac vice* shall be entered by the tribunal promptly and a copy of the order shall be forwarded to the Clerk of the Supreme Court. An out-of-state lawyer shall make no appearance in a case until the tribunal where the case is pending enters the order granting the motion to associate counsel *pro hac vice* unless temporary admission has been approved pursuant to this rule. The order granting *pro hac vice* status shall be valid until the case is concluded in the courts of this Commonwealth or a court revokes the *pro hac vice* admission.

4. **Notarized Application.** The notarized application required by this rule shall be on a form approved by the Supreme Court of Virginia and available at the office of the clerk of the tribunal where the case is pending.

5. **Discretion and Limitation on Number of Matters.** The grant or denial of a motion pursuant to this rule by the tribunal is discretionary. The tribunal shall deny the motion if the out-of-state lawyer has been previously admitted *pro hac vice* before any tribunal or tribunals in Virginia in twelve (12) cases within the last twelve (12) months preceding the date of the current application. In the enforcement of this limitation, the tribunal may consider whether the pending case is a related or consolidated matter for which the out-of-state lawyer has previously applied to

appear *pro hac vice*. Before ruling on a *pro hac vice* motion, the court shall verify with the Supreme Court of Virginia the number of cases during the preceding twelve (12) months in which the out-of-state lawyer was admitted in Virginia *pro hac vice*.

6. **Transfer of Venue and Appeal.** The out-of-state lawyer's *pro hac vice* admission shall be deemed to continue in the event the venue in the case or proceeding is transferred to another tribunal or is appealed; provided, however, that the tribunal having jurisdiction over such transferred or appealed case shall have the discretion to revoke the authority of the out-of-state lawyer to appear *pro hac vice*.

7. **Duty to Report Status.** An out-of-state lawyer admitted *pro hac vice* shall have a continuing obligation during the period of such admission to advise the tribunal promptly of any disposition made of pending disciplinary charges or the institution of any new disciplinary proceedings or investigations. The tribunal shall advise the Clerk of the Supreme Court of Virginia if the tribunal denies or revokes the out-of-state lawyer's permission to appear *pro hac vice*.

8. **Record-keeping.** The Clerk of the Supreme Court of Virginia will maintain an electronic database necessary for the administration and enforcement of this rule.

9. **Disciplinary Jurisdiction of the Virginia State Bar.** An out-of-state lawyer admitted *pro hac vice* pursuant to this rule shall be subject to the jurisdiction of all tribunals and agencies of the Commonwealth of Virginia, and the Virginia State Bar, with respect to the laws and rules of Virginia governing the conduct and discipline of out-of-state lawyers to the same extent as an active member of the Virginia State Bar. An applicant or out-of-state lawyer admitted *pro hac vice* may be disciplined in the same manner as a member of the Virginia State Bar.

10. **In-State Services Related to Out-of-State Proceedings.** Subject to the requirements and limitations of Rule 5.5 of the Virginia Rules of Professional Conduct, an out-of-state lawyer may provide the following services without the entry of a *pro hac vice* order:

(a) In connection with a proceeding pending outside of Virginia, an out-of-state lawyer admitted to appear in that proceeding may render legal services in Virginia pertaining to or in aid of such proceeding.

(b) In connection with a case in which an out-of-state lawyer reasonably believes he is eligible for admission *pro hac vice* under this rule: (1) the out-of-state lawyer may consult in Virginia with a member of the Virginia State Bar concerning a pending or potential proceeding in Virginia; (2) the out-of-state lawyer may, at the request of a person in Virginia contemplating or involved in a proceeding in Virginia, consult with that person about that person's retention of the out-of-state lawyer in connection with that proceeding; and (3) on behalf of a client residing in Virginia or elsewhere, the out-of-state lawyer may render legal services in Virginia in preparation for a potential case to be filed in Virginia.

(c) An out-of-state lawyer may render legal services to prepare for and participate in an ADR process, regardless of where the ADR process or proceeding is expected to take place or actually takes place.

APPENDIX OF FORMS.

1. APPLICATION TO APPEAR *PRO HAC VICE* BEFORE A VIRGINIA TRIBUNAL

I, , the

NAME OF APPLICANT

undersigned attorney, hereby apply to this tribunal of the Commonwealth of Virginia,

_____, to appear as counsel

NAME OF TRIBUNAL

pro hac vice pursuant to Rule 1A:4 of the Rules of the Supreme Court of Virginia.

I further state the following:

1. The case in which I seek to appear *pro hac vice* is styled

_____ , has

docket number _____and is pending in _____.

This case [ ] is [ ] is not a related or consolidated matter for which I have previously applied to appear *pro hac vice*.

2. _____

APPLICANT'S RESIDENCE ADDRESS

_____

APPLICANT'S OFFICE ADDRESS

3. _____

NAME OF LOCAL COUNSEL VSB NUMBER

_____

STREET ADDRESS

_____

_____

FAX NUMBER EMAIL ADDRESS TELEPHONE NUMBER

4. _____

NAME OF PARTY TO CASE

_____

NAME AND ADDRESS OF COUNSEL FOR PARTY

_____

NAME OF PARTY TO CASE

_____

NAME AND ADDRESS OF COUNSEL FOR PARTY

_____

NAME OF PARTY TO CASE

_____

NAME AND ADDRESS OF COUNSEL FOR PARTY

[ ] Additional sheet attached.

5. _____

COURT TO WHICH APPLICANT IS ADMITT DATE OF ADMISSION

_____

COURT TO WHICH APPLICANT IS ADMITTED DATE OF ADMISSION

[ ] Additional sheet attached.

6. I am a member in good standing and authorized to appear in the courts identified in paragraph 5.

7. I am not currently disbarred or suspended in any state, territory, United States possession or tribunal.

8. I [ ] am not [ ] am subject to a pending disciplinary investigation or proceeding by any court, agency or organization authorized to discipline me as a lawyer. (If such an investigation or proceeding is pending, attach to this application and incorporate by reference a statement specifying the jurisdiction, the nature of the matter under investigation or being prosecuted, and the name and address of the disciplinary authority investigating or prosecuting the matter.)

9. Within the past three (3) years, I [ ] have not [ ] have been disciplined by any court, agency or organization authorized to discipline me as a lawyer. (If so, attach to this application and incorporate by reference a statement specifying the name of the court, agency or organization imposing discipline, the date(s) of such discipline, the nature of the complaint or charge on which discipline was imposed, and the sanction.)

10. Within the last twelve (12) months preceding this application, I [ ] have not [ ] have sought admission *pro hac vice* under this rule. (If so, attach to this application and incorporate by reference a copy of the order of the tribunal granting or denying your previous application. Such order(s) must include the name of the tribunal, the style of case and the docket number for the case(s) in which you filed an application and whether the application was granted or denied.)
[ ] Order(s) attached and incorporated by reference.

11. I hereby consent to the jurisdiction of the courts and agencies of the Commonwealth of Virginia and of the Virginia State Bar and I further consent to service of process at any address(es) required by this Rule.

12. I agree to review and comply with appropriate rules of procedure as required in the case for which I am applying to appear *pro hac vice*.

13. I understand and I agree to comply with the rules and standards of professional conduct required of members of the Virginia State Bar.

_____ _____

DATE SIGNATURE OF APPLICANT

Commonwealth/State of _____

[ ] City [ ] County of _____

Subscribed and sworn to/affirmed before me on this date by the above-named person.

_____ _____

DATE NOTARY PUBLIC

My commission expires: _____

SCVAppvd. 11/28/06
Effective 7/1/07

Rule 1A:5. Virginia Corporate Counsel & Corporate Counsel Registrants.

Introduction

Notwithstanding any rule of this Court to the contrary, after July 1, 2004, any person employed in Virginia as a lawyer exclusively for a for-profit or a non-profit corporation, association, or other business entity, including its subsidiaries and affiliates, that is not a government entity, and the business of which consists solely of lawful activities other than the practice of law or the provisions of legal services ("Employer"), for the primary purpose of providing legal services to such Employer, including one who holds himself or herself out as "in-house counsel," "corporate counsel," "general counsel," or other similar title indicating that he or she is serving as legal counsel to such Employer, shall either (i) be a regularly admitted active member of the Virginia State Bar; (ii) be issued a Corporate Counsel Certificate as provided in Part I of this rule and thereby become an active member of the Virginia State Bar with his or her practice limited as provided therein; or (iii) register with the Virginia State Bar as provided in Part II of this rule; provided, however, no person who is or has been a member of the Virginia State Bar, and whose Virginia License, at the time of application, is revoked or suspended, shall be issued a Corporate Counsel Certificate or permitted to register under this Rule.

Part I
Virginia Corporate Counsel

(a) A lawyer admitted to the practice of law in a state (other than Virginia), or territory of the United States, or the District of Columbia may apply to the Virginia State Bar for a certificate as a Virginia Corporate Counsel ("Corporate Counsel Certificate") to practice law as in-house counsel in this state when he or she is employed by an Employer in Virginia.

(b) Each applicant for a Corporate Counsel Certificate shall:

(1) File with the Virginia State Bar an application, under oath, upon a form furnished by the Virginia State Bar.

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of a jurisdiction in which the applicant is admitted to practice law, stating that the applicant is licensed to practice law and is an active member in good standing of the bar of such jurisdiction.

(3) File an affidavit, upon a form furnished by the Virginia State Bar, from an officer of the applicant's Employer attesting to the fact that the applicant is employed as legal counsel to provide legal services exclusively to the Employer, including its subsidiaries and affiliates; that the nature of the applicant's employment conforms to the requirements of Part I of this rule; and that the Employer shall notify the Virginia State Bar immediately upon the termination of the applicant's employment.

(4) Certify that the applicant has read and is familiar with the Virginia Rules of Professional Conduct.

(5) Pay an application fee of one-hundred and fifty dollars.

(c) During the period in which an application for a Corporate Counsel Certificate is pending with the Virginia State Bar until the applicant is notified that either (i) his or her application is rejected; or (ii) he or she is eligible to practice pursuant to Part I of this rule, the applicant may be employed in Virginia as Certified Corporate Counsel on a provisional basis by an Employer furnishing the affidavit required by Part I (b)(3) of this rule.

(d) Upon a finding by the Virginia State Bar that the applicant has complied with the requirements of Part I(b) of this rule, the Virginia State Bar shall notify the applicant that he or she is eligible to be issued a Corporate Counsel Certificate. After the applicant has taken and subscribed to the oath required of attorneys at law, the applicant shall be issued a Corporate Counsel Certificate, which shall permit the applicant to practice law in Virginia solely as provided in Part I(f) of this rule.

(e) A lawyer issued a Corporate Counsel Certificate shall immediately become an active member of the Virginia State Bar, with his or her practice limited as provided in Part I(f) of this rule, and shall pay to the Virginia State Bar the annual dues required of regularly admitted active members of the Virginia State Bar.

(f) The practice of a lawyer certified pursuant to Part I of this rule shall be limited to practice exclusively for the Employer furnishing the affidavit required by Part I(b)(3) of this rule, including its subsidiaries and affiliates, and may include appearing before a Virginia court or tribunal as counsel for the Employer. Except as specifically authorized under Part I (g) below, no lawyer certified pursuant to Part I of this rule shall (i) undertake to represent any person other than his or her Employer before a Virginia court or tribunal; (ii) offer or provide legal services to any person other than his or her Employer; (iii) undertake to provide legal services to any other person through his or

her Employer; or (iv) hold himself or herself out to be authorized to provide legal services or advice to any person other than his or her Employer.

(g) Notwithstanding the foregoing restrictions set out in Part I (f) above on the scope of practice, a lawyer certified pursuant to Part I of this rule may participate, and is encouraged to participate, in pro bono programs operated and controlled by a legal aid society licensed by the Virginia State Bar and under the direction of a supervising attorney.

(1) "Supervising attorney," is an attorney who directs and supervises an attorney engaged in activities permitted by Part I (g). The supervising attorney must:

(i) Be an active member of the Virginia State Bar in good standing employed by or participating as a volunteer for the licensed legal aid society; and

(ii) Assume personal professional responsibility for supervising the conduct of the litigation, administrative proceeding, or other legal service in which the certified Part I attorney engages; and

(iii) Direct and assist the certified Part I attorney in his or her preparation to the extent the supervising attorney considers it necessary.

(2) A lawyer certified pursuant to Part I of this rule may, in association with a licensed legal aid society, and only under the supervision of a supervising attorney, perform only the following activities:

(i) appear in any court or before an administrative tribunal or arbitrator in the Commonwealth of Virginia on behalf of a client of a licensed legal aid society if the person on whose behalf the certified Part I lawyer is appearing has consented in writing to that appearance and a supervising attorney has given written approval for that appearance. The written consent and approval shall be filed in the record of each case and shall be brought to the attention of the presiding judge or presiding officer in any administrative or arbitration proceeding.

(ii) prepare and sign pleadings and other documents to be filed in any court or with any administrative tribunal or arbitrator in this state in any matter in which the certified Part I attorney is involved.

(iii) render legal advice and perform other appropriate legal services, but only with the express approval of the supervising attorney.

(iv) engage in such other preparatory activities as are necessary for any matter in which he or she is properly involved.

(3) The presiding judge, hearing officer, or arbitrator may, in his or her discretion, determine the extent of the certified Part I attorney's participation in any proceeding.

(4) Supervision and Limitations

(i) The certified Part I attorney must perform all activities authorized by this subparagraph under the direct supervision of a supervising attorney.

(ii) Certified Part I Attorneys permitted to perform services under this Part I (g) are not, and shall not represent themselves to be, active members of the Virginia State Bar licensed to practice law generally in the Commonwealth of Virginia.

(iii) The licensed legal aid society shall be entitled to receive all court awarded attorney's fees for any representation rendered by a certified Part I attorney authorized under Part I (g).

(h) The provision of legal services to his or her Employer by a lawyer certified pursuant to Part I of this rule shall be deemed the practice of law in Virginia and shall subject the lawyer to all rules governing the practice of law in Virginia, including the Virginia Rules of Professional Conduct and Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia. Jurisdiction of the Virginia State Bar shall continue whether or not the lawyer retains the Corporate Counsel Certificate and irrespective of the lawyer's presence in Virginia.

(i) A lawyer certified pursuant to Part I of this rule shall be subject to the same membership obligations as other active members of the Virginia State Bar, including Mandatory Continuing Legal Education requirements. A lawyer certified pursuant to Part I of this rule shall use as his or her address of record with the Virginia State Bar a business address in Virginia of the Employer furnishing the affidavit required by Part I(b)(3) of this rule.

(j) A lawyer certified pursuant to Part I of this rule shall promptly report to the Virginia State Bar any change in employment, any change in bar membership status in any state, territory of the United States or the District of Columbia in which the lawyer has been admitted to the practice of law, or the imposition of any disciplinary sanc-

tion in a state, territory of the United States or the District of Columbia or by any federal court or agency before which the lawyer has been admitted to practice.

(k) A lawyer's authority to practice law which may be permitted pursuant to Part I of this rule shall be automatically suspended when (i) employment by the Employer furnishing the affidavit required by Part I(b)(3) of this rule is terminated, (ii) the lawyer fails to comply with any provision of Part I of this rule, or (iii) when the lawyer is suspended or disbarred for disciplinary reasons in any state, territory of the United States or the District of Columbia or by any federal court or agency before which the lawyer has been admitted to practice. Any lawyer whose authority to practice is suspended pursuant to (i) above shall be reinstated upon evidence satisfactory to the Virginia State Bar that the lawyer is in full compliance with the requirements of Part I of this rule, which shall include an affidavit furnished by the lawyer's new Employer. Any lawyer whose authority to practice is suspended pursuant to (ii) above may be reinstated by compliance with applicable provisions of Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia. Any lawyer whose authority to practice is suspended or terminated under (iii) above shall petition for reinstatement pursuant to Part 6, Section IV, Paragraph 13 I.7. of the Rules of the Supreme Court of Virginia.

(l) The period of time a lawyer practices law is permitted by a Corporate Counsel Certificate issued pursuant to Part I of this rule shall be considered in determining whether the lawyer has fulfilled the requirements for admission to practice law in Virginia without examination pursuant to Rule 1A:1 and any guidelines approved by the Supreme Court of Virginia for review of applications for admission without examination.

(m) The Virginia State Bar may adopt regulations as needed to implement the requirements of Part I of this rule.

Part II
Corporate Counsel Registrants

(a) Notwithstanding the requirements of Part I of this rule, any lawyer as defined in the Introduction and Part I(a) of this rule may register with the Virginia State Bar as a "Corporate Counsel Registrant." A person admitted to the practice of law only in a country other than the United States, and who is a member in good standing of a recognized legal profession in that country, the members of which are admitted to practice law as lawyers, counselors at law, or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or public authority, may also register under Part II of this rule.

(b) A registrant shall:

(1) Register with the Virginia State Bar upon a form, under oath, furnished by the Virginia State Bar, which shall include affirmations that (i) he or she will at no time undertake to represent his or her Employer or any other person, organization or business entity before a Virginia court or tribunal except as permitted pursuant to Rule 1A:4 of this Court, (ii) his or her work is limited to business and legal services related to issues confronting his or her Employer at a regional, national or international level with no specific nexus to Virginia, and (iii) he or she will not provide legal advice or services to any person other than his or her Employer.

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of a jurisdiction in which the registrant is admitted to practice law, stating that the registrant is licensed to practice law and is an active member in good standing of the bar of such jurisdiction.

(3) File an affidavit, upon a form furnished by the Virginia State Bar, from an officer of the registrant's Employer attesting to the fact that the registrant is employed as legal counsel to provide legal services exclusively to the Employer, including its subsidiaries and affiliates; that the nature of the registrant's employment conforms to the requirements of Part II of this rule; and that the Employer shall notify the Virginia State Bar immediately upon the termination of the registrant's employment.

(4) Certify that the registrant has read and is familiar with the Virginia Rules of Professional Conduct.

(5) Pay a registration fee of one hundred and fifty dollars.

(c) During the period in which a corporate counsel registration is pending with the Virginia State Bar until the registrant is notified that either (i) his or her registration is rejected; or (ii) he or she is eligible to practice pursuant to Part II of this rule, the registrant may be employed in Virginia as a Corporate Counsel Registrant on a provisional basis by the Employer furnishing the affidavit required by Part II(b)(3) of this rule.

(d) Upon completion of the requirements of Part II(b) of this rule, the registrant shall immediately be recorded by the Virginia State Bar as a Corporate Counsel Registrant. Each registrant shall pay to the Virginia State Bar the annual

dues required of regularly admitted active members of the Virginia State Bar. No lawyer registered pursuant to Part II of this rule shall (i) undertake to represent his or her Employer or any other person or entity before a Virginia court or tribunal except as permitted for lawyers licensed and in good standing in another United States jurisdiction pursuant to Rule 1A:4 of this Court; (ii) offer or provide legal services to any person other than his or her Employer; (iii) undertake to provide legal services to another through his or her Employer; or (iv) hold himself or herself out to be authorized to provide legal services or advice to any person other than his or her Employer.

(e) The provision of legal services to his or her Employer by a lawyer registered pursuant to Part II of this rule shall be deemed the practice of law in Virginia only for purposes of subjecting the lawyer to the Virginia Rules of Professional Conduct; the jurisdiction of the disciplinary system of the Virginia State Bar; and Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia. Jurisdiction of the Virginia State Bar shall continue whether or not the lawyer maintains the registration and irrespective of the lawyer's presence in Virginia.

(f) A lawyer registered pursuant to Part II of this rule shall use as his or her address of record with the Virginia State Bar a business address in Virginia of the Employer furnishing the affidavit required by Part II(b)(3) of this rule.

(g) A lawyer registered pursuant to Part II of this rule shall promptly report to the Virginia State Bar any change in employment, any change in bar membership status in any state, territory of the United States, the District of Columbia, or other country in which the lawyer has been admitted to the practice of law, or the imposition of any disciplinary sanction in a state, territory of the United States, the District of Columbia, or other country, or by any federal court or agency before which the lawyer has been admitted to practice.

(h) A lawyer's authority to provide legal services which may be permitted pursuant to Part II of this rule shall be automatically suspended when (i) employment by the Employer furnishing the affidavit required by Part II(b)(3) of this rule is terminated, (ii) the lawyer fails to comply with any provision of Part II of this rule, or (iii) the lawyer is suspended or disbarred for disciplinary reasons in any state, territory of the United States, the District of Columbia, other country, or by any federal court or agency before which the lawyer has been admitted to practice. Any lawyer whose authority to practice is suspended pursuant to (i) above shall be reinstated upon evidence satisfactory to the Virginia State Bar that the lawyer is in full compliance with the requirements of Part II of this rule, which shall include an affidavit furnished by the lawyer's new Employer. Any lawyer whose authority to practice is suspended pursuant to (ii) above may be reinstated by compliance with applicable provisions of Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia. Any lawyer whose authority to practice is suspended or terminated pursuant to (iii) above, shall petition for reinstatement pursuant to Part 6, Section IV, Paragraph 13 I.7. of the Rules of the Supreme Court of Virginia.

(i) No time spent as Corporate Counsel Registrant shall be considered in determining eligibility for admission to the Virginia Bar without examination.

(j) The Virginia State Bar may adopt regulations as needed to implement the requirements of Part II of this rule.

Rule 1A:7. Certification of Foreign Legal Consultants.

(a) General Requirements. A person admitted to practice law by the duly constituted and authorized professional body or governmental authority of any foreign nation may apply to the Virginia Board of Bar Examiners ("Board") for a certificate as a foreign legal consultant, provided the applicant:

(1) is a member in good standing of a recognized legal profession in a foreign nation, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a governmental authority;

(2) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the authorized practice of law, substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign nation;

(3) possesses the good moral character and general fitness requisite for a member of the bar of this Commonwealth;

(4) is at least twentysix years of age; and

(5) intends to practice as a foreign legal consultant in this Commonwealth and maintain an office in this Commonwealth for that purpose.

(b) Proof Required. An applicant under this rule shall file with the secretary of the Board:

(1) an application for a foreign legal consultant certificate, on a form furnished by the Board;

(2) a certificate, for each foreign nation in which the applicant is admitted to practice, from the professional body or governmental authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as an attorney or counselor at law or the equivalent;

(3) a letter of recommendation, for each foreign nation in which the applicant is admitted to practice, from one of the members of the executive body of such professional body or governmental authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(4) a duly authenticated English translation of each certificate and letter if, in either case, it is not in English;

(5) a copy or summary of the law, regulations, and customs of the foreign country that describes the opportunity afforded to a member of the Virginia State Bar ("the Bar") to establish an office to provide legal services to clients in such foreign country, together with an authenticated English translation if it is not in English;

(6) the requisite documentation establishing the applicant's compliance with the immigration laws of the United States; and

(7) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of paragraph (a) of this rule as the Board may require.

(c) Reciprocal Treatment of Members of the Bar of this Commonwealth. In considering whether to certify an applicant to practice as a foreign legal consultant, the Board may in its discretion take into account whether a member of the Bar would have a reasonable and practical opportunity to establish an office and give legal advice to clients in the applicant's country of admission**.** Any member of the Bar who is seeking or has sought to establish an office or give advice in that country may request the Board to consider the matter, or the Board may do so *sua sponte*.

(d) Scope of Practice. A person certified to practice as foreign legal consultant under this Rule may render legal services in the Commonwealth only with regard to matters involving the law of foreign nation(s) in which the person is admitted to practice or international law. For purposes of this paragraph, the term "international law" means a body of laws, rules or legal principles that are based on custom, treaties or legislation and that control or affect (1) the rights and duties of nations in relation to other nations or their citizens, or (2) the rights and obligations pertaining to international transactions.

The practice permitted under this rule does not authorize the foreign legal consultant to appear in court.

(e) Rights and Obligations. Subject to the scope of practice limitations set forth in paragraph (d) of this rule, a person certified as a foreign legal consultant under this rule shall be entitled and subject to:

(1) the rights and obligations contained in the Virginia Rules of Professional Conduct as set forth in Part 6, Section II of the Rules of the Supreme Court of Virginia; and the procedure for disciplining attorneys as set forth in Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia

(2) the rights and obligations of a member of the Bar with respect to:

(i) affiliation in the same law firm with one or more members of the bar of this Commonwealth, including by:

(A) employing one or more members of the Bar;

(B) being employed by one or more members of the Bar or by any partnership or other limited liability entity authorized to practice law pursuant to Part 6, Section IV, Paragraph 14 of the Rules of the Supreme Court of Virginia, which such entity includes an active member of the Bar or which maintains an office in this Commonwealth;

(C) being a director, partner, member, manager or shareholder in any partnership or other professional limited liability entity authorized by Part 6, Section IV, Paragraph 14 to practice law in this Commonwealth which includes an active member of the Bar or which maintains an office in this Commonwealth;

(ii) employment as in-house counsel under Part II of Rule 1A:5; and

(iii) attorneyclient privilege, workproduct privilege and similar professional privileges.

(3) No time spent practicing as a foreign legal consultant shall be considered in determining eligibility for admission to the Virginia bar without examination.

(f) Disciplinary Provisions. A person certified to practice as a foreign legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as any member of the Bar and to this end:

(1) Every person certified to practice as a foreign legal consultant under these Rules:

(i) shall be subject to regulation by the Bar and to admonition, reprimand, suspension, removal or revocation of his or her certificate to practice in accordance with the rules of procedure for disciplinary proceedings set forth in Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia; and

(ii) shall execute and file with the Bar, in such form and manner as the Bar may prescribe:

(A) his or her commitment to observe the Virginia Rules of Professional Conduct and any other rules of court governing members of the bar to the extent they may be applicable to the legal services authorized under paragraph (d) of this Rule;

(B) a written undertaking to notify the Bar of any change in such person's good standing as a member of any foreign legal profession referred to in paragraph (a)(1) of this rule and of any final action of any professional body or governmental authority referred to in paragraph (b)(2) of this rule imposing any disciplinary censure, suspension, or other sanction upon such person; and

(C) a duly acknowledged instrument, in writing, setting forth his or her address in this Commonwealth which shall be both his or her address of record with the Bar and such person's actual place of business for rendering services authorized by this rule. Such address shall be one where process can be served and the foreign legal consultant shall have a duty to promptly notify the Membership Department of the Bar in writing of any changes in his or her address of record.

(g) Application and Renewal Fees. An applicant for a certificate as a foreign legal consultant under this rule shall pay to the Virginia Board of Bar Examiners the application fee and costs as may be fixed from time to time by the Board. A person certified as a foreign legal consultant shall pay an annual fee to the Virginia State Bar which shall also be fixed by the Supreme Court of Virginia. A person certified as a foreign legal consultant who fails to complete and file the renewal form supplied by the Bar or pay the annual fee shall have his or her certificate as a foreign legal consultant administratively suspended in accordance with the procedures set out in Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia.

(h) Revocation of Certificate for Non-Compliance. In the event that the Board determines that a person certified as a foreign legal consultant under this rule no longer meets the requirements under this rule, it shall revoke the certificate granted to such person hereunder.

(i) Reinstatement. Any foreign legal consultant whose authority to practice is suspended shall be reinstated upon evidence satisfactory to the Bar that such person is in full compliance with this rule; however, a reinstatement of a foreign legal consultant's certificate following a suspension for non-compliance with paragraph (g) of this rule shall be governed by Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia; and reinstatement of a foreign legal consultant's certificate following a disciplinary suspension or revocation shall be governed by Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia.

(j) Admission to Bar. In the event that a person certified as a foreign legal consultant under this rule is subsequently admitted as a member of the Bar under the provisions of the rules governing such admission, the certificate granted to such person hereunder shall be deemed superseded by the admission of such person to the Bar.

(k) Regulations. The Bar and the Board may adopt regulations as needed to implement their respective responsibilities under this rule.

(l) Effective Date. This rule shall become effective on January 1, 2009.

PART I - BYLAWS OF THE VIRGINIA STATE BAR

ARTICLE I
Members

The Virginia State Bar is comprised of all attorneys licensed to practice law in Virginia.

ARTICLE II
Officers

The officers of the Virginia State Bar shall be a President, a President-Elect, an Immediate Past President and a Secretary-Treasurer.

ARTICLE III
Election of PresidentElect

Sec. 1. *Nominations.* In order to qualify for election to the office of president-elect for the ensuing bar year, a candidate must be duly qualified as set forth in Paragraph 4 of the Rules of Court, Part Six, Section IV and must file a nominating petition with the executive director.

Sec. 2. *Petition.* The nominating petition shall be signed by at least 50 members of the Virginia State Bar and shall be signed by the candidate, who shall certify that he or she is qualified to run for the office. The nominating petition must be received by the executive director on or before October 1 of each year.

Sec. 3. *Method of Election.* In the event only one nominating petition is received by the executive director on or before October 1 of any year, the election for the office of president-elect shall be held at the next annual meeting in accordance with the provisions of Article IV, below.

In the event two or more nominating petitions are received by the executive director on or before October 1 of any year, the election of the presidentelect will be in accordance with the provisions of Sections 4 and 5, below.

Sec. 4. *Mail Ballots.* In the event nominating petitions for two or more candidates are received by the executive director on or before October 1 of any year, then:

(a) The executive director shall prepare a ballot which shall list in alphabetical order the names of those persons nominated to the office of president-elect.

(b) The ballot shall be mailed to all members on or before November 5. The form of the ballot and the procedure for the collection and tabulation of ballots shall be determined by the executive director.

(c) If any member fails to receive a ballot within ten (10) days of mailing, or by November 15, whichever is earlier, the intended recipient shall be given a replacement ballot upon executing an affidavit, in a form to be prescribed by the Executive Committee, averring (i) that no ballot has been received and (ii) that in the event the original ballot is subsequently received, it will promptly be returned unmarked to the executive director. The affidavit and request for a replacement ballot must be received by the executive director not later than November 22, and the replacement ballot must be returned to the executive director by the December 1 deadline.

(d) If any member receives more than one ballot, he or she shall return the excess ballot or ballots, unmarked, to the executive director in the same envelope provided for return of his or her marked ballot.

Sec. 5. *Mail Ballot Elections.* The ballots shall be collected and counted in a manner which assures the confidentiality of the members' votes. A plurality of the votes cast by all members shall elect. No ballot received by the executive director after December 1 shall be counted.

Sec. 6. *General Provisions.* The following provisions shall be applicable to any election of the president-elect under this Article III.

(a) For purposes of these provisions, a "member" is an active member in good standing of the Virginia State Bar. Only such person may nominate, be nominated, vote or be elected in any election for the office of presidentelect.

(b) Records maintained by the executive director as to membership and good-standing status shall be controlling.

(c) The failure to comply with the dates designated for the occurrence of completion of certain acts shall not invalidate any election, unless substantial prejudice can be shown to have resulted therefrom.

(d) For purposes of determining voter and candidate eligibility, the membership list maintained by the executive director as of October 1 shall be controlling. Except to correct clerical errors in records maintained as of that date, no revisions or additions to the membership list for purposes of the election shall be made after October 1.

(e) The executive director shall announce the results of the election for the office of president-elect in a newsletter, magazine or other mailing of the bar, after the election.

(f) Any responsibility assigned herein to be discharged by the executive director may be assumed and discharged by the Executive Committee, at its discretion.

(g) Any challenge to an election shall be resolved by a committee which shall be chaired by the president and shall include the president-elect, the immediate past president and two members of Council appointed by the president who shall not be current members of the Executive Committee.

ARTICLE IV
Meetings

Sec. 1. The Secretary shall give thirty days' notice by mail of annual meetings of the bar, and such written notice of special meetings of the bar as the Executive Committee shall prescribe in its call. Meetings of the organization shall be held at such times and places and after such notices as may be prescribed by the appropriate provisions of Section IV, Rules of the Supreme Court for the Integration of the Virginia State Bar and Council Bylaws.

Sec. 2. A quorum at any such meeting shall be as set forth in the Court Rules.

Sec. 3. The program and order of business at any meeting of the Virginia State Bar, unless otherwise ordered by the Council, shall be determined by the president in consultation with the president-elect and the executive director.

Sec. 4. Proceedings at any such meeting shall be governed by Roberts Rules of Order, except that no member shall without unanimous consent speak more than twice on any one subject nor more than five minutes at any one time.

Sec. 5. Voting at any such meeting shall be *viva voce* with each active member present entitled to vote, unless at least ten active members shall either before or immediately after such vote demand a vote by judicial circuits on a roll called in numerical order. In the latter event, each circuit shall be entitled to one vote for each twenty-five active members or fraction of twenty-five registered in that circuit. When a vote by circuits is ordered, the active members present from each circuit shall cast the entire vote to which such circuit is entitled. If there be a division among the active members present from any circuit as to how the vote of such circuit shall be cast, the vote of such circuit shall be divided and cast in proportion to the vote on such division, unless such circuit at a meeting of its members shall have adopted and caused to be certified to the Secretary a resolution providing that the entire vote of such circuit shall be cast as a majority of the active members from that circuit present and voting shall determine.

Provided, however, that in any election for the office of president-elect, voting shall be *viva voce* unless more than one candidate shall be duly nominated, in which event voting shall be by written ballot by judicial circuits as provided in Article III above.

Sec. 6. An active member shall be deemed to be registered in the circuit where he or she is entitled to vote for a member of Council provided that for the purpose of this section, no member may change his or her registration within five days preceding a meeting of the organization. At the opening of the meeting the Secretary shall post in a conspicuous place a list showing the number of votes to which each circuit is entitled and shall, upon the request of a member of any circuit, also post a list of the active members officially registered in that circuit. The lists so posted shall be conclusive as to the number of votes to which each circuit is entitled and as to the active members registered in each circuit, provided that any interested active member challenging the correctness of any such list, either as to the number of votes to which a circuit is entitled or as to the circuit in which an active member is registered, may appeal to the floor; but the circuits or members affected shall not vote on such appeal.

ARTICLE V
Committees

Sec. 1. Unless otherwise provided in the Supreme Court Rules, by action of Council, or elsewhere in these by-laws or the by-laws of Council, all committees shall be appointed by the president, who shall have power to determine the size and composition of the committee and to designate the chair thereof and to fill any vacancy therein.

Sec. 2. A majority of any committee shall constitute a quorum.

Sec. 3. In addition to the Executive Committee, district committees, and standing committees specified in the by-laws of Council, there shall be special committees to carry out the other ongoing work of the bar, and study committees, where appropriate in the judgment of the president, to examine and make recommendations on specific proposals or programs within a reasonably brief and discrete period of time.

Sec. 4. Members of special committees shall be appointed to three-year terms, with the exception of the Special Committee on Lawyer Malpractice Insurance whose members shall be appointed to five-year terms. No member shall serve more than two consecutive three-year terms on such a committee. A member appointed to fill an unexpired term shall be eligible to serve two additional full three-year terms. An eligible member wishing to be reappointed to a special committee shall be required to reapply in writing prior to the end of his or her current term under procedures established by Council and administered by the executive director. If any member of a committee fails to attend either three meetings during any bar year or two successive meetings of the committee without providing an explanation satisfactory to the committee chair, or in the case of a lawyer member, is declared not in good standing with the Virginia State Bar, such person's position shall automatically be considered vacated and filled as in the case of other vacancies.

Sec. 5. In making initial appointments to new special committees, the president shall appoint members to one, two and three-year terms so as to allow for the retirement or reappointment of one-third of the membership of each special committee at the end of each bar year.

Sec. 6. Effective July 1, 1996, the size of special committees shall be as specified by Council. A list of the committees and their respective sizes shall be maintained by the executive director. Changes in the size of special committees may be approved by the Executive Committee.

PART II — BYLAWS OF THE COUNCIL

ARTICLE I
Members

The Council is comprised of attorneys elected or appointed in accordance with applicable provisions of Section IV, Rules of the Supreme Court for the Organization and Government of the Virginia State Bar.

ARTICLE II
Election of Council

The election of members of Council for each circuit shall be by one of the two following methods.

Sec. 1. *Circuit Bar Meeting.* Prior to March 1 of any year in which a Council member from the circuit is to be elected, the executive director shall notify the Chief Judge of the circuit of the need for a meeting of the bar of the circuit and the number of vacancies to be filled. The executive director shall obtain from the Chief Judge the date and location for a meeting of the members of the circuit which shall be held prior to May 1. The executive director shall mail a written notice to the members of the meeting at least 14 days before such meeting.

All members whose Virginia State Bar membership mailing addresses are maintained in the circuit may attend and vote at the meeting. A quorum shall consist of those members who vote at the meeting. No member shall vote by proxy. Prior to the meeting, the executive director shall transmit to the Chief Judge or the designated presiding officer a list of the members whose names appear on the membership roster for such circuit. The Chief Judge shall either preside at the meeting, designate another active or retired judge of the circuit to preside, or designate an attorney to preside who is neither a candidate for election to Council nor associated in the practice of law with a candidate nominated for election.

At the circuit meeting, any member eligible to vote in the circuit who is not then serving a second successive full term on Council shall be eligible for election. Nominations may be made at the circuit meeting or by any member eligible to vote in the circuit. No supporting petition or second for such nomination will be required. After the nominations are closed, an election by written ballot shall be conducted. In the event of a tie vote, the winner shall be chosen by lot drawn by the presiding judge or his designee.

Within ten days after the meeting, the presiding officer or the Chief Judge shall communicate the names of the person or persons elected to the executive director.

Sec. 2. *Mail Ballot.* On or about March 1, the executive director shall cause to be mailed to every member eligible to vote in the circuit a notice of any vacancy or vacancies on Council, and a brief description of the method of nomination and voting. All members whose Virginia State Bar membership mailing addresses are maintained in the circuit are eligible to vote.

Nominations for election to Council shall be by petition filed by the candidate with the executive director. Such petition shall be signed by not fewer than ten other members eligible to vote in the circuit, and shall be accompanied by a statement of qualifications not exceeding one hundred and fifty words. Nominations must be filed in the office of the executive director on or before April 1. Any petition failing to comply with these requirements shall be rejected.

On or before April 15, the executive director shall mail to all eligible members of the circuit a ballot containing the names of all persons nominated, along with each nominee's statement of qualifications.

Ballots shall be in a form prescribed by the executive director and shall be collected and counted in a manner prescribed by the executive director. In the event of a tie vote, the executive director shall pick the winner by lot. No ballot received by the executive director after May 1 shall be counted.

Write-in votes shall be permitted, but the executive director may exclude illegible write-in votes. In those instances where there are more candidates for Council positions than there are positions to be filled from the circuit, the ballot will contain instructions to vote only for the same number of persons as there are positions to be filled; ballots which do not conform to this requirement will not be counted.

Sec. 3. General Provisions. The following provisions shall be applicable to both methods of election:

(a) The timeline for special elections to fill vacancies on Council shall be determined by the executive director.

(b) For purposes of these provisions, a "member" is an active member in good standing of the Virginia State Bar. Only such person may nominate, be nominated, vote or be elected in any Council election.

(c) Records maintained by the executive director as to membership, good-standing status and assignment of a member to a particular circuit shall be controlling.

(d) The failure to comply with the dates designated for the occurrence or completion of certain acts shall not invalidate any election unless substantial prejudice can be shown to have resulted therefrom.

(e) 1) In all elections the candidate receiving the highest number of votes shall be elected.

2) In the event that more than one full term is to be filled by a circuit at any single election, the candidates receiving the highest number of votes shall be elected.

3) In the event that a regular election and special election to fill an unexpired term are held simultaneously in the same circuit, they shall be conducted as a single election and the successful candidate receiving the highest number of votes shall be entitled to choose either a regular term or the unexpired term, with the choice passing down in order until the unexpired term is selected. The successful candidate(s) receiving the lower number of votes shall be elected to fill the term(s) not chosen. In the event two or more unexpired terms are to be filled in the same election, the longer unexpired term(s) shall go to the successful candidate(s) receiving the highest number of votes who choose(s) to fill an unexpired term.

4) As a part of the election process in each circuit under these bylaws, the voting members of the circuit shall prescribe the method for that circuit's next election and, in the event of a meeting, shall determine the length of time during which ballots may be cast in the next election, not to exceed one business day. A vote to change the method of election shall be by majority of votes cast. The ballot in each circuit's election shall provide a space for the voting member to indicate a preference for one of the two election methods described by these bylaws. For the meeting method, the ballot shall also provide a space to indicate whether voting shall be allowed all day, half day or only during the meeting. No quorum call shall be required for any meeting.

5) For purposes of determining voter and candidate eligibility, the membership list maintained by the executive director as of March 15 shall be controlling. Except to correct clerical errors in records maintained as of that date, no changes in circuit membership, revisions or additions to the membership list for purposes of the election shall be made after March 15.

6) The executive director shall announce the results of Council elections in a newsletter, magazine or other mailing of the bar after the election.

7) Any challenge to an election shall be resolved by a committee which shall be chaired by the president and shall include the president-elect, the immediate past president, and two members of Council appointed by the president who shall not be current members of the Executive Committee.

ARTICLE III
Secretary-Treasurer [Executive Director]

Sec. 1. The Secretary-Treasurer [Executive Director] shall perform all duties prescribed by the Rules and these by-laws, and in addition such other duties as may be delegated to him from time to time by the Council or Executive Committee. He or she shall act as Secretary of the Bar, of the Council and of the Executive Committee.

Sec. 2. The Secretary-Treasurer [Executive Director] shall give bond of $250,000 with corporate surety conditioned for the faithful performance of his or her duties, the premium of which shall be paid by the bar.

ARTICLE IV
Notices of Meetings

The Secretary shall give twenty days' notice by mail of all meetings of the Council, and five days' notice by mail of all meetings of the Executive Committee. Notice of mailing shall commence on the date of mailing.

ARTICLE V
Meetings

Sec. 1. In the absence of specific action by the Council, the Executive Committee shall fix the time and place of the annual meeting of the bar, and may call any special meetings of the bar at such time and place as it shall designate.

Sec. 2. In the absence of specific action by the Council, the Executive Committee shall fix the time and place of all meetings of the Council. There shall be at least two meetings annually. Special meetings of the Council may be called at any time by the Executive Committee. The Executive Committee shall call a special meeting at the written request of twelve members of the Council.

Sec. 3. The Executive Committee shall meet on the call of the president or of the president-elect and a meeting shall be called at the written request of three members of the committee.

Sec. 4. Proceedings at all meetings shall be governed by Roberts Rules of Order, except that no member shall without unanimous consent speak more than twice on any one subject or more than five minutes at any one time.

ARTICLE VI
Executive Committee

Sec. 1. There shall be an Executive Committee consisting of twelve members, six of whom shall be elected annually by and from the Council, with the president, president-elect, immediate past president, President of the Young Lawyers Conference, Chair of the Senior Lawyers Conference and Chair of the Conference of Local Bar Associations serving as *ex officio* members.

Sec. 2. A quorum of the Executive Committee shall consist of six members thereof.

Sec. 3. The Executive Committee shall have authority to:

(a) Allocate funds as required for authorized bar purposes and functions within amounts available to the bar;

(b) Employ such staff as it deems necessary and fix the duties and compensation of such staff;

(c) Cause proper books and records of account to be kept and audited annually, and cause proper financial statements of receipts and expenditures to be prepared and regularly presented to Council;

(d) Review annually the performance of the Executive Director, Deputy Executive Director and Bar Counsel and set the compensation of each;

(e) Review matters which are placed on the agenda for Council meetings and make recommendations to Council when appropriate; and

(f) Between meetings of Council, perform any other duties and powers prescribed for Council under any of the rules of the Supreme Court of Virginia, except such duties and powers as Council may reserve to itself or delegate to other committees.

Article VII
District Committees and the Disciplinary Board

Sec. 1. *District Committees*—The several district committees provided for by Part 6, Section IV, Paragraph 13 of the Rules of Court and elected by the Council shall be known as District Committees under numerical designation of

the respective districts, for example, First District Committee, etc. A district committee shall consist of ten or, in the discretion of Council, twenty, thirty or forty members. Three members of a ten-member district committee, six members of a twenty-member district committee, nine members of a thirty member district committee, and twelve members of a forty member district committee shall be non-lawyers. All other district committee members shall be active members of the bar. No member of the Council shall be a member of a district committee. All potential district committee appointees shall fulfill the qualification requirements provided for in Paragraph 13 before appointment.

Effective July 1, 1992, the District Committees shall be comprised of the following judicial circuits:

First District Committee: Circuits 1, 3, 5, 7 and 8
Second District Committee: Circuits 2 and 4 (2 sections)
Third District Committee: Circuits 6, 11, 12, 13 and 14 (3 sections)
Fourth District Committee: Circuits 17 and 18 (2 sections)
Fifth District Committee: Circuits 19 and 31 (3 sections)
Sixth District Committee: Circuits 9 and 15
Seventh District Committee: Circuits 16, 20 and 26
Eighth District Committee: Circuits 23 and 25
Ninth District Committee: Circuits 10, 21, 22 and 24
Tenth District Committee: Circuits 27, 28, 29 and 30 (2 sections)

The Secretary shall notify the members of each district committee of their appointments and each district committee shall meet within forty (40) days thereafter and shall elect from their attorney members a Chair, Vice-Chair, and Secretary and such other officers as they deem necessary.

Sec. 2. *Disciplinary Board*—The Council shall recommend persons to the Court for appointment as members of the Disciplinary Board. The Disciplinary Board shall consist of twenty members, four of whom shall be non-lawyers and sixteen of whom shall be active members of the bar. The Council shall also recommend attorney members of the Disciplinary Board to the Court to serve as Chair and two Vice Chairs. All potential Disciplinary Board appointees shall fulfill the qualification requirements provided for in Paragraph 13 before appointment.

ARTICLE VIII
Standing Committees

Sec. 1. *Committee on Legal Ethics*—There shall be a standing committee to be appointed by the president and to be known as the Committee on Legal Ethics. The committee shall consist of nine active members of the bar, at least three of whom shall be members of the Council. All powers and duties of the Council with respect to legal ethics, not otherwise delegated or reserved, shall be exercised and discharged by the committee.

Members shall be appointed to three-year terms. No member shall serve more than two consecutive three-year terms. A member appointed to fill an unexpired term shall be eligible to serve two additional full three-year terms. An eligible member wishing to be reappointed shall be required to reapply in writing prior to the end of his or her current term under procedures established by Council and administered by the executive director.

Sec. 2. *Committee on Unauthorized Practice of Law*—There shall be a standing committee to be appointed by the president and to be known as the Committee on the Unauthorized Practice of Law. The committee shall consist of nine members. Seven of the members shall be active members of the bar, at least three of whom shall be members of the Council. Two of the members shall be non-lawyers. All powers and duties of the Council with respect to the unauthorized practice of the law, not otherwise delegated or reserved, shall be exercised and discharged by the committee.

Members shall be appointed to three-year terms. No member shall serve more than two consecutive three-year terms. A member appointed to fill an unexpired term shall be eligible to serve two additional full three-year terms. An eligible member wishing to be reappointed shall be required to reapply in writing prior to the end of his or her current term under procedures established by Council and administered by the executive director.

Sec. 3. *Committee on Lawyer Discipline*—There shall be a standing committee to be appointed by the president and to be known as the Committee on Lawyer Discipline. The committee shall consist of twelve persons, ten of whom shall be active members of the bar and two shall be non-lawyers. In addition, the vice-chairman of the Virginia State Bar Disciplinary Board shall be an ex-officio, non-voting member of the committee. At least two of the lawyers who are members shall be members of the Council. All members shall serve a three-year term and the president shall appoint members to the committee so as to allow for the retirement from the committee of one third of its membership at the end of each fiscal year. No member shall serve more than two consecutive three-year terms. A member appointed to fill an unexpired term shall be eligible to serve two additional full three-year terms. An eligible member wishing to be reappointed shall be required to reapply in writing under procedures established by Council

and administered by the executive director. All powers and duties of the Council with respect to operation of the bar's disciplinary system, not otherwise delegated or reserved, shall be exercised and discharged by the committee.

Sec. 4. *Committee on Professionalism* —There shall be a standing committee to be appointed by the president and to be known as the Committee on Professionalism. The committee shall consist of fifteen members, each of whom shall be an active or judicial member of the bar. At least two of the committee members shall be members of the Council, at least three shall be current or former members of the faculty of the mandatory course on professionalism, and at least one shall, when initially appointed, be an officer or member of the board of governors of the Young Lawyers Conference. In addition, the Virginia State Bar Counsel shall be an *ex officio* member of the committee. All members shall serve for a three-year term. No member may serve more than two consecutive three-year terms. A member appointed to fill an unexpired term shall be eligible to serve two additional full three-year terms. An eligible member wishing to be reappointed shall be required to reapply in writing under procedures established by Council and administered by the executive director. All powers and duties of Council with respect to the implementation of Paragraph 13.1 of Part Six, Section IV of the Rules of the Supreme Court of Virginia, and with respect to professionalism in the practice of law in Virginia, not otherwise delegated or reserved, shall be exercised and discharged by the Committee.

Sec. 5. *Budget and Finance Committee* —There shall be a standing committee to be appointed by the president and to be known as the Budget and Finance Committee. The committee shall consist of nine active members of the bar, three of whom shall be elected members of the Executive Committee and three of whom shall be other members of Council. In addition, the president-elect shall serve as an *ex officio* member.

All members, other than the president-elect, shall serve three-year terms. No member shall serve more than two consecutive three-year terms. A member appointed to fill an unexpired term shall be eligible to serve two additional full three-year terms. An eligible member wishing to be reappointed shall be required to reapply in writing under procedures established by Council and administered by the Executive Director.

The committee shall perform such tasks as are delegated or assigned by the Executive Committee and/or the Bar Council. The committee shall work with appropriate members of the bar staff to develop the bar's annual budget and present the budget to the Executive Committee and Council for approval. The committee shall also be responsible for reviewing and making recommendations with respect to the bar's appropriation requests prior to their submission to the Commonwealth of Virginia, Department of Planning and Budget. The committee shall also be responsible for assessing and making recommendations to the Executive Committee and Council regarding other budget matters, including personnel issues which are budget-related or budget-driven.

ARTICLE IX
Votes by Mail or Telephone

By unanimous consent of the members of any committee, all questions before such committee may be settled by mail ballot or telephone call.

ARTICLE X
Vacancies in Committees

All vacancies in committees appointed by the president shall be filled by him. Vacancies in other committees shall be temporarily filled by the president, his or her appointees to act until the next meeting of the Council.

ARTICLE XI
Sections

The Council may create and abolish sections as it may consider necessary or desirable to accomplish the purposes and serve the interests of the Virginia State Bar and of the sections and shall prescribe the powers and duties of the sections. The bylaws of any section shall be subject to approval of Council.

PART SIX
Integration of the State Bar
Section I.
Unauthorized Practice Rules and Considerations.

INTRODUCTION.

The right of individuals to represent themselves is an inalienable right common to all natural persons. But no one has the right to represent another; it is a privilege to be granted and regulated by law for the protection of the public.

The Supreme Court of Virginia has the inherent power to make rules governing the practice of law in the Commonwealth of Virginia. The Court has promulgated the definition of the practice of law. See "PRACTICE OF LAW IN THE COMMONWEALTH OF VIRGINIA," *infra*.

The public is best served in legal matters by lawyers. A client is entitled to be served disinterestedly by a lawyer who is not motivated or influenced by any allegiance other than to the client and our system of justice.

The services of a lawyer are essential and in the public interest whenever the exercise of professional legal judgment is required. The essence of such judgment is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem. The public is better served by those who have met rigorous educational requirements, have been certified of honest demeanor and good moral character, and are subject to high ethical standards and strict disciplinary rules in the conduct of their practice.

By statute, any person practicing law without being duly authorized or licensed is guilty of a misdemeanor. The Attorney General of Virginia may leave the prosecution to the local attorney for the Commonwealth, or he may in his discretion institute and conduct such proceedings.

The courts of the Commonwealth have the inherent power, apart from statute, to inquire into the conduct of any person to determine whether he is illegally engaged in the practice of law, and to enjoin such conduct. The State Corporation Commission of Virginia may order the dissolution of any corporation or revoke its certificate of authority to transact business in the Commonwealth upon a finding that any officer, member, agent or employee thereof has been engaged in the unauthorized practice of law.

Any fees charged by a person engaged in the unauthorized practice of law are not collectible in court.

Any lawyer who aids a non-lawyer in the unauthorized practice of law is subject to discipline and disbarment. A lawyer has an affirmative duty to report unprivileged knowledge of such misconduct by another lawyer to the appropriate District Committee, and to discontinue his representation of a client when he discovers that his employment furthers the unauthorized practice of law by the client. Advisory opinions on the unauthorized practice of law, therefore, are as much intended to assist lawyers in fulfilling their ethical responsibilities as to inform and deter those who are engaged, or would engage, in such practice in derogation of the public's interest in a trained and regulated legal profession.

With the increase in the complexity of our society and its laws, the independence and integrity of a strong legal profession, devoted disinterestedly to those requiring legal services, are crucial to a free and democratic society. Allegiance to this principle, rather than the preservation of economic benefits for lawyers, is the basis upon which the Virginia State Bar, as the administrative agency of the Supreme Court of Virginia, carries forward the responsibility for the discipline of lawyers and the investigation of persons practicing law in the Commonwealth without proper authority.

PRACTICE OF LAW IN THE COMMONWEALTH OF VIRGINIA.

(A) No non-lawyer shall engage in the practice of law in the Commonwealth of Virginia or in any manner hold himself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute.

(B) Definition of the Practice of Law. The principles underlying a definition of the practice of law have been developed through the years in social needs and have received recognition by the courts. It has been found necessary to protect the relation of attorney and client against abuses. Therefore, it is from the relation of attorney and client that any practice of law must be derived.

The relation of attorney and client is direct and personal, and a person, natural or artificial, who undertakes the duties and responsibilities of an attorney is nonetheless practicing law though such person may employ others to whom may be committed the actual performance of such duties.

The gravity of the consequences to society resulting from abuses of this relation demands that those assuming to advise or to represent others shall be properly trained and educated, and be subject to a peculiar discipline. That fact, and the necessity for protection of society in its affairs and in the ordered proceedings of its tribunals, have developed the principles which serve to define the practice of law.

Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever

(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal-judicial, administrative, or executive-otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

(4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

(C) Definition of "Non-lawyer." The term "non-lawyer" means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. However, any lawyer not licensed to practice law in Virginia, but licensed in any other state or territory of the United States or the District of Columbia, or a foreign nation, who provides legal advice or services to clients in Virginia, shall not be subject to these Unauthorized Practice rules but shall be subject to the laws, rules and regulations of the jurisdiction(s) in which he/she is licensed to practice, as well as otherwise applicable Virginia Law including the Virginia Rules of Professional Conduct.

Unauthorized Practice Rule 1.
Practice Before Tribunals.

UPR 1-101. Representation Before Tribunals.

(A) A non-lawyer, with or without compensation, shall not represent the interest of another before a tribunal, otherwise than in the presentation of facts, figures or factual conclusions, as distinguished from legal conclusions, except:

(1) A non-lawyer under the supervision of a lawyer who is a regular employee of a legal aid society approved by the Virginia State Bar in accordance with its rules and regulations adopted under Section 54.1-3916 of the Code of Virginia may represent an indigent patron of such society before such a tribunal when authorized to do so by the governing body of such society and when such representation is permitted by the rules of practice of such tribunal. The supervising attorney shall assume personal professional responsibility for any work undertaken by the non-lawyer.

(2) A law student may appear and represent others before such a tribunal in accordance with the third-year student practice rule.

(B) A non-lawyer regularly employed on a salary basis by a corporation appearing on behalf of his employer before a tribunal shall not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions.

(C) A non-lawyer regularly employed by a corporation or partnership may appear and file certain pleadings on behalf of his or her employer as authorized by Virginia Code § 16.1-88.03.

Unauthorized Practice Considerations.

UPC 1-1. The term "tribunal" shall include, in addition to the courts and judicial officers of Virginia or of the United States of America, the State Corporation Commission of Virginia and its various divisions, the Virginia Workers' Compensation Commission, and the Alcoholic Beverage Control Board, or any agency, authority, board, or commission when it determines the rights and obligations of parties to proceedings before it, as opposed to promulgating rules and regulations of general applicability. Such term does not include a tribunal established by virtue of the Constitution or laws of the United States, to the extent that the regulation of practice before such tribunal has been preempted by federal law, nor does it include a tribunal established under the Constitution or laws of Virginia before which the practice or appearance by a non lawyer on behalf of another is authorized by statute.

UPC 1-2. A non-lawyer may represent himself, but not the interest of another, before any tribunal. A non-lawyer regularly employed on a salary basis or one specially retained as an expert (whether as an independent contractor or an employee of another) may present facts, figures, or factual conclusions, as distinguished from legal conclusions, when such presentation does not involve the examination of witnesses or preparation of briefs or pleadings.

UPC 1-3. A corporation (other than a duly registered law corporation) does not have the same right of appearance before a tribunal as an individual and may not be represented before a tribunal by its officers, employees or agents who are not duly authorized or licensed to practice law in Virginia. A corporation can be represented only by a lawyer before a tribunal, with respect to matters involving legal conclusions, examination of witnesses or preparation of briefs or pleadings.

UPC 1-4. A lawyer who is duly authorized or licensed to practice law in Virginia and who is also regularly employed on a salary basis by a corporation may represent such corporation before a tribunal as lawyer for the corporation, with the same privileges of a lawyer in private practice (including confidential communications with his employer when he is acting as a lawyer in connection with such communication).

UPC 1-5. A lawyer who is duly authorized or licensed to practice law in Virginia and who is regularly employed on a salary basis by a corporation may also represent before a tribunal the interest of a subsidiary or affiliated corporation when requested to do so by his employer and when not otherwise in conflict with the Virginia Code of Professional Responsibility. Such lawyer (unless a regular employee of a duly registered law corporation) in the course of his employment may not normally represent before a tribunal customers or patrons of his employer.

Unauthorized Practice Rule 2.
Lay Adjusters.

UPR 2-101. Definitions.

(A) "Lay adjuster" refers to a non-lawyer retained by a principal as an employee, independent contractor, or employee of an independent contractor, for the purposes of

(1) investigating facts and circumstances related to a personal injury and/or property claim;

(2) reporting such facts to his principal; or

(3) assisting his principal in the handling, negotiation and settlement of such claim.

(B) "Principal" refers to:

(1) an insurance company as defined in Title 38.2 of the Code of Virginia;

(2) a self-insured; or

(3) any insured individual, business entity or governmental organization asserting a right to payment under an insurance policy or insurance contract issued to such individual, business entity or governmental organization arising out of the occurrence of the contingency or loss covered by such policy or contract.

(C) A business entity shall include but not be limited to a sole proprietorship, firm, partnership, corporation, joint venture, association or unincorporated association engaged in a commercial, charitable or professional activity.

(D) "Self-insured" refers to any person, business entity (as defined hereinabove) or governmental organization which is potentially liable for claims and which does not elect to insure against loss or, to the extent such organization retains by way of a percentage or deductible, a portion of its risk.

UPR 2-102. Investigation.

(A) A non-lawyer shall not for compensation, direct or indirect, advise another as to the law governing the facts as disclosed by his investigation, except:

(1) A lay adjuster may investigate the facts relative to a claim, and make a report thereon and an estimate of its monetary value to his principal.

(2) A lay adjuster may give his opinion to his principal as to liability with respect to a claim investigated by him.

UPR 2-103. Negotiation of a Settlement.

(A) A non-lawyer shall not for compensation, direct or indirect, negotiate or settle a claim on behalf of another party not represented by a lawyer except:

(1) A lay adjuster may secure and convey factual data and information, transmit settlement offers made by either party, determine and express his opinion on the extent of damage or injury and its monetary value, deliver releases or other documents, and assist the lawyer for his principal in the efficient performance of ministerial acts arising out of the settlement negotiations.

(2) A lay adjuster may, in the course of negotiating a settlement for his principal, make statements to the claimant or others as to his principal's liability or as to the law governing the facts to the extent consistent with the principles enunciated in the Rules Governing Unfair Claim Settlement Practices as from time to time promulgated by the State Corporation Commission of Virginia, Section 38.2-510 of the Code of Virginia, provided that

(a) the lay adjuster has informed the claimant or other person that his principal may be adversarial to the claimant or other person;

(b) it is clear that the claimant or other person recognizes the lay adjuster as an adversary; and

(c) it is apparent that the claimant or other person is otherwise competent to manage his own affairs.

(B) A non-lawyer shall not for compensation, direct or indirect, conduct negotiations to settle a claim pending in court except with the approval of the lawyer for his principal.

UPR 2-104. Preparation of Documents.

(A) A non-lawyer shall not, with or without compensation, direct or indirect, prepare or deliver legal instruments of any character except a lay adjuster may prepare a form of release or other document prepared or approved by his principal as to which the lay adjuster may fill in blanks supplying factual data.

UPR 2-105. Third Party Claims.

(A) The activities authorized under UPR 2-102, 2-103 and 2-104 are permitted only on behalf of a principal

(1) which is making a claim against its own insurance carrier; or

(2) which is subject to a claim which may be paid by the principal or its insurance carrier; or

(3) which is pursuing its subrogation rights.

(B) Except as permitted in (A)(3) above, neither a non-lawyer nor a lay adjuster may engage in any of the activities described in UPR 2-102, 2-103 and 2-104, on behalf of any principal or other party which is making or may make a claim against a third party or against an insurance carrier or other potential guarantor or payor of third party liability to the principal or other party. Claims against an insured's insurance carrier for Uninsured Motorists or Under Insured Motorists coverage shall be deemed to be third party claims.

Unauthorized Practice Considerations.

UPC 2-1. For example, the activities of a lay adjuster in claims may consist of acting on behalf of his principal in identifying the facts and parties, securing witness statements, estimating the costs of repair, and compiling other information about the

claim. Statements are given by the lay adjuster to his principal from whom he receives instructions as to the disposition of the claim. The lay adjuster then may attempt to settle the claim at the monetary value his principal is willing to pay or accept.

UPC 2-2. As a part of his factual analysis, a lay adjuster may express his opinion on the extent of damage or injury and the monetary value of any claim investigated by him.

UPC 2-3. A lay adjuster may, incident to his investigation of the facts, give to his principal his opinion of liability as disclosed by his investigation. Such lay adjuster is authorized to make a settlement on behalf of his principal and, in the course of such negotiations, make statements as to his principal's liability or as to the law governing the facts to the extent consistent with the Rules Governing Unfair Claim Settlement Practices, as applicable. A lay adjuster not now covered by such Rules may make statements as to his principal's legal liability, or as to the law governing the facts to the extent consistent with the principles enunciated in such Rules, and with the requirements of UPR 2103(A)(2).

UPC 2-4. In a claim pending in court, a lay adjuster may properly secure factual data and transmit settlement offers made on behalf of his principal when acting with the consent of the lawyers for both plaintiff and defendant. With such consent, he may also assist in the settlement negotiations with the approval of the lawyer for his principal.

UPC 2-5. A lawyer who is regularly employed on a salary basis as a lay adjuster is deemed to be acting on behalf of his employer and is subject to the same limitations with respect to representing his employer's customers or patrons as are imposed on his employer hereunder.

UPC 2-6. If a lay adjuster in any case attempts to draft legally binding settlement papers, he is engaged in the unauthorized practice of law. A lay adjuster may draft a receipt or fill in blanks supplying factual data in a form of release or other document prepared or approved by his principal, but he may not otherwise undertake to draft particular provisions intended to have legally binding effect in a specific case.

Unauthorized Practice Rule 3.
Collection Agencies.

UPR 3-101. Attorney-Client Relationship.

(A) An agency shall not disrupt the relationship of confidence and trust which must exist between a lawyer and his client.

(B) An agency shall not prevent a lawyer from exercising independent professional judgment on behalf of his client by attempting to fix the lawyer's compensation, or sharing in a percentage of his compensation, or prescribing the terms of his employment, or attempting in any way to control or direct his actions.

(C) An agency shall not place itself between the lawyer and the creditor in an attempt to act as the only conduit of information between the two, since this would prevent the establishment of the fundamental relationship of trust and direct personal responsibility which ought to exist between a lawyer and his client.

UPR 3-102. Referral and Control of Claims.

(A) An agency may refer claims to a lawyer on behalf of the creditor subject to the following:

(1) The creditor shall first have the opportunity to select a lawyer of his own choosing.

(2) If the creditor does not so select a lawyer, the agency shall submit a list of lawyers from which the creditor may make his selection, which list may include the customary fee of each attorney. The creditor may subsequently authorize the agency to refer his account to the lawyer so selected by the creditor.

(3) The lawyer shall be free at all times to communicate directly with the creditor; and, upon receipt of the initial referral, as well as upon receipt of any subsequent referral unacceptable to the lawyer on the basis of the prior fee arrangement, the lawyer shall communicate with the creditor for the purpose of establishing the fee arrangement, in which arrangement the agency shall not participate.

(4) The agency may thereafter, if authorized by the creditor, continue correspondence of a routine nature with the lawyer on behalf of the creditor.

(B) An agency shall not exercise or attempt to exercise any control or imply that it has any right to control the actions of the lawyer in the handling of the creditor's claim. All decisions are to be those of the lawyer acting on behalf of his client, the creditor.

UPR 3-103. Preparation of Documents.

(A) An agency may prepare statements of accounts and affidavits of facts relating to accounts and may file the same with personal representatives and trustees in bankruptcy.

(B) An agency shall not prepare a proof of claim or file such a claim as agent for the creditor with the bankruptcy court except to the extent it is permitted to do so by the Bankruptcy Rules.

(C) An agency shall not prepare for others any document which requires legal training or the application of legal principles to factual situations except as authorized under these Rules.

(D) An agency shall not use any letters or forms which threaten the institution of legal proceedings or simulate judicial process or notice of judicial process.

Unauthorized Practice Considerations.

UPC 3-1. A collection agency (herein referred to as "an agency") is a business involved in the collection of past-due accounts for its customer (herein referred to as "the creditor"). The efforts of an agency to collect such a claim through correspondence or personal contacts, or both, are not the unauthorized practice of law. It is, however, improper for an agency to refer an account to a lawyer in a manner which disrupts the fundamental lawyerclient relationship.

UPC 3-2. It is critical to the lawyer-client relationship that the lawyer remain in a position that will enable him to exercise independent judgment on behalf of his client, the creditor. A lawyer should not accept a claim from an agency under circumstances or pursuant to an arrangement that would render his judgment susceptible to control by the agency.

UPC 3-3. A referral by an agency which permits the agency to fix the lawyer's compensation, or share in a percentage of his compensation, or prescribe the terms of his employment, or control and direct his actions, is improper. The lawyer, while handling such a claim, would not be governed by his independent judgment of what would best benefit his client, the creditor, but would be influenced, if not controlled, by the provisions of the agreement by which the referral was made. Since an agency itself cannot directly provide the creditor with legal advice, it cannot be permitted to provide such advice indirectly by influencing the actions of the lawyer.

UPC 3-4. With regard to referrals by an agency to a lawyer, any arrangement or understanding requiring that communications between the lawyer and the creditor be handled only through the agency is improper. Such an arrangement could disrupt the relationship of trust and direct personal responsibility which ought to exist between a lawyer and his client. With direct communications, the lawyer can better perceive and analyze the individual needs of his client, and the creditor's direct contact with his lawyer lessens the possibility of misunderstanding and affords him the opportunity to determine for himself the quality of service that he is receiving. Furthermore, if the agency is the sole conduit of information, the lawyer is unable to preserve the confidences and secrets of his client. There can be no effective representation of a client if the client is reluctant to provide his lawyer with a complete and accurate statement of the facts because of his concern that this information might be divulged to some third party without his permission. It is the responsibility of both the lawyer and the agency to abide by these considerations and to avoid arrangements contrary thereto.

UPC 3-5. The decision to bring suit on a claim involves the application of legal principles to a factual situation. An agency threatening the institution of legal proceedings is engaged in the unauthorized practice of law, but the mere statement that the claim is being or will be referred to a lawyer, without more, is not deemed to be threatening the institution of legal proceedings as long as the lawyer remains free to exercise his independent professional judgment on behalf of the creditor. Likewise, the use by an agency of letters or forms that simulate or are intended to simulate judicial process or notice of judicial process is improper.

UPC 3-6. Statements of account and affidavits of facts relating to accounts and other matters are not legal instruments, and the preparation of the same by an agency is not the unauthorized practice of law. Such preparation does not require legal training or the application of legal principles; nor is the mere filing of such accounts or affidavits with personal representatives, trustees in bankruptcy and the like representing the interest of another before a tribunal.

UPC 3-7. A non-lawyer may properly act as a trustee in bankruptcy but may not prepare pleadings in the bankruptcy court except as authorized by the Bankruptcy Rules.

Unauthorized Practice Rule 4.
Estate Planning and Settlement.

UPR 4-101. Estate Planning Advice.

(A) A non-lawyer shall not advise another for compensation, direct or indirect, in any matter involving the application of legal principles to particular facts or purposes or desires, except:

(1) A non-lawyer may collect information and analyze the facts and assets of a particular estate in relation to its economic or investment needs.

(2) A non-lawyer may, incident to the sale or transfer of a particular investment asset, give information about the laws affecting the holding or disposition of such asset, such as making projections of possible tax effects arising from a transfer of ownership of a life insurance policy, security or other investment.

(3) A non-lawyer may specifically recommend dispositive provisions for a will or trust.

UPR 4-102. Holding Out With Regard to Estate Planning.

(A) Except to the extent estate planning advice is permitted under UPR 4-101, a non-lawyer shall not hold himself out as authorized to furnish another advice or service under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, to a specific set of facts for a particular person.

(B) A non-lawyer shall not be excused from any violation of these Rules by any disclaimer or other statement that his unauthorized advice or conduct should be reviewed by his customer's own lawyer.

UPR 4-103. Preparation of Documents.

(A) A non-lawyer shall not, with or without compensation, prepare or draft, or cause his own lawyer to prepare or draft, for another, legal instruments of any character, including the filling out of a form for any will or trust, except:

(1) A non-lawyer may prepare forms of wills or trust of general application.

(2) A non-lawyer, as an incident to the regular course of conducting his business, may submit to his customer's lawyer specimen language for inclusion in a legal instrument to be prepared by such lawyer, subject to acceptance, modification or rejection by such lawyer.

(3) A non-lawyer, as an incident to the regular course of conducting his business, may furnish his customer with routine forms or contracts of generally accepted application which do not go beyond the legitimate interest of the non-lawyer and do not involve a selection by the customer as between alternatives with materially different legal results not generally understood in the community. For example, the offering by a savings institution of a joint account with right of survivorship, a simple revocable trust account or a custodial account under the Virginia Uniform Gifts to Minors Act would normally not constitute the unauthorized practice of law.

UPR 4-104. Settlement of Estates.

(A) A non-lawyer shall not give legal advice with respect to a person's domicile.

(B) A non-lawyer shall not prepare or draft instruments, or give legal advice, with respect to the disclaimer of all or part of a person's interest in property, or a person's right to renounce all or part of any interest due under the will of such person's spouse.

(C) A non-lawyer shall not undertake in the settlement of an estate or trust to represent the interest of another before any tribunal, judicial, administrative or executive, otherwise than in the presentation of facts, figures or factual conclusions, except:

(1) A non-lawyer may offer to the proper clerk of court a will for probate or qualify as a fiduciary in any uncontested proceeding.

(2) A non-lawyer may prepare and file accountings and confer with the Commissioner of Accounts in any uncontested proceeding.

(3) With respect to tax matters, as set forth in Unauthorized Practice Rule 5, infra.

Unauthorized Practice Considerations.

UPC 4-1. "Estate planning," as that term is generally used and understood today, refers to the orderly arrangement of an individual's assets so as to provide most effectively for his economic needs while living, and for the personal and economic needs of those he may wish to benefit after his death. Estate planning necessarily involves, among other things, a knowledge and application of principles of the law relating to wills and descents and distribution, trusts and future interests, real and personal property, gifts, and taxation. In addition, effective postmortem estate planning requires an intimate familiarity with probate procedure and practice.

UPC 4-2. The proper planning of an individual's estate is often aided by the services of non-lawyers skilled in insurance, investments, accounting services, and the like. An analysis of the facts and assets of an estate in relation to its economic or investment needs, and the giving of general information as to the laws affecting the disposition of estates without any specific application thereof to a particular situation, other than mathematical computations to support a hypothetical analysis, is not the unauthorized practice of law.

UPC 4-3. The holding out to the public, directly or indirectly, overtly or subtly, by any non-lawyer of his willingness to give advice as to the legal consequences of a particular plan which goes beyond matters incident to the sale or transfer of a particular investment asset, such as a life insurance policy or security, in the regular course of the non-lawyer's business, or his willingness to perform legal services in the field of estate planning, is a holding out to engage in the unauthorized practice of law. A non-lawyer cannot solicit such services and then hire a lawyer to perform them. A non-lawyer consultant or adviser cannot offer the legal services of his own lawyer. Such practices are not purged or purified by an acknowledgment that the consultant or adviser is not authorized to give legal advice, or by any disclaimer or suggestion that such advice should be reviewed by the customer's own lawyer.

UPC 4-4. Activities geared to motivating an individual to give consideration to his estate, and to seek the advice of a lawyer of his own choosing as early as possible, preferably from the outset, with regard to the development of an overall estate plan, are in the public interest. Advice on matters of law with respect to the particular factual situation of the individual concerned, however, is the unauthorized practice of law whenever it goes beyond advice on matters incident to the sale or transfer of a particular investment asset, such as a life insurance policy or security, in the regular course of the non-lawyer's business.

UPC 4-5. The preparation of legal instruments such as wills, codicils and trusts by a non-lawyer for another, with or without compensation, goes beyond the area of permitted advice incident to the regular course of a non-lawyer's business. There is nothing improper, however, in the submission of suggested forms for various types of wills or trusts to lawyers for present or prospective customers of a non-lawyer. Distributing forms of separate administrative or dispositive provisions setting forth the proper name of a fiduciary, a charity or the like is not improper.

UPC 4-6. Selecting or filling out a form of will or trust for another is an exercise in legal judgment. As an aid to a customer's lawyer, a non-lawyer may submit to such lawyer, and only to him, specimen language for technical provisions to be included in his client's will, codicil or trust; but such non-lawyer is not entitled to hold himself out as the responsible draftsman of such provisions.

UPC 4-7. Advice by a non-lawyer as to the use of his "standard form trust," "plain English trust," "mini-trust," or the like constitutes the unauthorized practice of law when the provisions of such instrument go beyond the legitimate interest of the non-lawyer therein, seek to do more than the normal agency or deposit contract, or affect the legal rights of persons not parties to the contract. For example, the furnishing by a non-lawyer to his customer of a power of attorney which extends the authority of the attorney-in-fact to deal on behalf of his principal with all his principal's assets or accounts, whether or not maintained by that particular non-lawyer, goes beyond the area of that non-lawyer's legitimate interest.

UPC 4-8. The settlement of a decedent's estate invariably poses problems of a legal nature. Such settlement may involve the practice of law in such areas, among others, as the offering of writings for probate, the qualification of fiduciaries, the preparation of accountings, and the determination of legal rights and liabilities with respect to the assets of the estate. In administering and settling the affairs of an estate, a fiduciary is not acting primarily for himself; and the drafting of instruments and appearance at probate hearings by a non-lawyer, as contrasted to the preparation and filing of a list of heirs, inventory or accountings, whether in person or through lawyers who are salaried employees, ordinarily constitutes the unauthorized practice of law.

Unauthorized Practice Rule 5.
Tax Practice.

UPR 5-101. Holding Out as a Tax Expert.

(A) A non-lawyer shall not hold himself out as authorized to furnish to another advice or service under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, dealing with taxes, except:

(1) A non-lawyer may hold himself out as an expert in the preparation of tax returns.

(2) A certified public accountant or a person duly enrolled may hold himself out as authorized to practice before the Internal Revenue Service, as those terms are defined by the then applicable federal regulations and to the extent permitted therein.

(3) A person admitted to practice before the United States Tax Court may hold himself out as such to the extent permitted by the rules of such Court.

(4) As permitted by UPR 5-102.

UPR 5-102. Practicing Law in Tax Matters.

(A) A non-lawyer shall not furnish to another for compensation, direct or indirect, advice or service under circumstances which require his use of legal knowledge or skill in the application of any law, federal, state or local, dealing with taxes, except:

(1) A non-lawyer may prepare tax returns.

(2) A certified public accountant or a person duly enrolled may practice before the Internal Revenue Service, as those terms are defined by the then applicable federal regulations and the extent permitted therein.

(3) A non-lawyer may render such advice or service in connection with his representation of his employer or others before a tribunal, judicial, administrative, or executive, (i) in the presentation of facts, figures or factual conclusions, (ii) as authorized before the Internal Revenue Service, in (2) above, or (iii) as permitted by the rules of practice of the United States Tax Court.

(4) A non-lawyer may render such advice or service incident to an engagement to provide products or services which he is otherwise authorized to provide, where such advice or service arises out of the providing of such other products or services and was not the principal purpose of the engagement.

(5) A non-lawyer may render such advice or service to his regular employer other than in aid of such employer's unauthorized rendition of legal advice or services to another.

Unauthorized Practice Considerations.

UPC 5-1. Taxation affects almost every phase of modern life. The giving of tax advice necessarily involves many branches of law and requires a familiarity with many non-tax legal principles on which the tax issues depend. In addition, the legal and accounting phases of tax practice are often so interrelated and overlapping that they are difficult to distinguish.

UPC 5-2. The preparation of a tax return does not necessarily involve the practice of law. It may often be accomplished by one having only incidental legal knowledge.

UPC 5-3. A non-lawyer otherwise entitled to do so may hold himself out as a tax return preparer or as enrolled to practice before the Internal Revenue Service; but he may not hold himself out as qualified to deal with difficult and involved questions of tax law, wholly apart from any engagement to prepare tax returns or practice before the Internal Revenue Service.

UPC 5-4. In general, tax planning is not considered to be the unauthorized practice of law. Attempting to resolve uncertainties as to the interpretation or application of tax or general law to a particular transaction, however, involves the practice of law unless it is incidental to a tax return preparer's engagement or the regular course of conducting a licensed business, for example, an investment business, or is limited to an analysis of merely the facts and assets of an estate.

UPC 5-5. Only a lawyer may prepare legal instruments for others or take the necessary steps to create, amend or dissolve a partnership, corporation or other business entity. Suggesting that any such legal work should be reviewed by the taxpayer's

lawyer will not cure any unauthorized practice. In general, a lawyer working for a corporation not engaged in the practice of law as a registered law corporation is not entitled in the course of his employment to provide such services for customers or patrons of his employer.

UPC 5-6. Non-lawyers authorized by statute or Treasury Department regulations to represent taxpayers may do so in accordance with the existing law, rules and regulations governing such practice.

UPC 5-7. When a taxpayer is being investigated for a possible criminal violation of the tax laws, he should be promptly advised to seek advice from a lawyer. The lawyer-client privilege is a unique relationship to which the taxpayer is entitled at the earliest stage of the investigation.

UPC 5-8. Nothing herein is intended to modify or limit the right of a certified public accountant to certify, attest or express an opinion that financial data comply with conditions established by law or contract. Certified public accountants are members of a profession regulated by law who must meet certain minimal education requirements and observe certain rules of professional conduct. As such, certified public accountants engaged in the practice of their profession are entitled to a greater degree of latitude in the resolution of issues involving overlapping legal and accounting principles.

Unauthorized Practice Rule 6.
Real Estate Practice.

UPR 6-101. Giving Legal Advice.

(A) A non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate, except that, incident to his investigation of factual matters, he may give advice to his regular employer, other than in aid of his employer's unauthorized practice of law, or to a lawyer upon request by the lawyer therefor.

(B) A non-lawyer or lay entity may not employ a lawyer, directly or indirectly, to advise a customer in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate. A non-lawyer or lay entity may, however, refer its customer to a lawyer for legal services.

(C) If a non-lawyer or lay entity refers its customer to a lawyer for legal services involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate, such a non-lawyer or lay entity shall not exercise or attempt to exercise any control over, or imply that the non-lawyer or lay entity has any right to control, the actions of the lawyer in the handling of the transaction. All decisions are to be those of the lawyer acting on behalf of his client.

UPR 6-102. Holding Out With Regard to Real Estate Services.

(A) Except as specifically provided in UPR 6-101(A), a non-lawyer shall not hold himself out as authorized to furnish to another advice or service with respect to real estate transactions under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, to a specific set of facts for a particular person.

(B) Notwithstanding any rule of this Court to the contrary, a settlement agent authorized by law to provide escrow, closing or settlement services for real estate transactions may hold himself out as authorized to provide such services in the purchase or financing of real estate in the Commonwealth of Virginia.

(C) A non-lawyer shall not be excused from any violation of these Rules by any disclaimer, admonition to seek the advice of an attorney, or waiver by the customer.

UPR 6-103. Preparation of Legal Instruments.

(A) Unless a party to the transaction, a non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate.

(1) A non-lawyer may prepare a deed for any real estate owned by him. A non-lawyer may prepare a deed of trust or deed of trust note for any real estate owned by him or in connection with any transaction to which he is a party involving its purchase, sale, transfer or encumbrance.

(2) A regular employee may prepare legal instruments for use by his employer for which no separate charge shall be made. However, such employee may not assist his employer in the unauthorized practice of law.

(3) A real estate agent, or his regular employee, involved in the negotiation of a transaction and incident to the regular course of conducting his licensed business, may prepare a contract of sale, exchange, option or lease with respect to such transaction, for which no separate charge shall be made.

(4) A lending institution may in the regular course of conducting its business prepare a deed of trust or mortgage on real estate securing the payment of its loan, for which no separate charge shall be made.

(5) A settlement agent authorized to provide escrow, closing or settlement services for real estate transactions under the Consumer Real Estate Settlement Protection Act (CRESPA), Va. Code §§ 6.1-2.19, et seq. or the Real Estate Settlement Agent Registration Act (RESARA), Va. Code §§ 6.1-2.30, et seq. or any other Virginia statute now existing or hereafter enacted may complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction.

(B) A non-lawyer or lay entity may not employ a lawyer, directly or indirectly, for the purpose of drafting legal instruments affecting the title to or use of real estate for a customer of the non-lawyer or lay entity. A non-lawyer or lay entity may, however, refer its customer to a lawyer for legal services.

UPR 6-104. Real Estate Closings.

(A) In connection with a real estate closing, a non-lawyer shall not give legal advice to another, or prepare for or advise another in the preparation of legal instruments, for compensation, direct or indirect. A non-lawyer may:

(1) Act as a settlement agent if registered under and in compliance with CRESPA.

(2) Provide such services of a clerical or ministerial nature as may assist the parties in the settlement of a contract, commitment or other agreement with respect to the sale or encumbrance of property including administrative and clerical services as authorized under CRESPA and RESARA.

(3) Act as an agent or broker in connection with issuance of title insurance commitments, binders and policies.

(4) Perform searches of public land and related records, make abstracts of title (i.e., copy salient portions of what the public records show as distinguished from expressing an opinion on the legal consequences of such records), prepare title reports and, to the extent licensed to do so, underwrite for and prepare title insurance commitments or binders and policies.

UPR 6-105. Lawyer-Client Relationship.

(A) A real estate agent, closing agent, lender or other party interested in a real estate transaction shall not:

(1) Disrupt the relationship of confidence and trust which must exist between a lawyer and his client.

(2) Prevent a lawyer from exercising independent judgment on behalf of his client by attempting to fix the lawyer's compensation, or sharing in a percentage of his compensation, or prescribing the terms of his employment, or attempting in any way to control or direct his actions.

(3) Place himself between the lawyer and the owner or landlord in an attempt to act as the only conduit of information between the two, since this would prevent the establishment of the fundamental relationship of trust and direct personal responsibility which ought to exist between a lawyer and his client.

UPR 6-106. Referral of Business.

(A) A real estate agent, closing agent, lender or other party interested in a real estate transaction may refer its customer to a lawyer subject to the following:

(1) The customer shall first have the opportunity to select a lawyer of his own choosing.

(2) If the customer does not so select a lawyer, the agency shall submit a list of lawyers from which the customer may make his selection and subsequently authorize the agent to refer the representation of such customer to the lawyer so selected.

(3) The lawyer shall be free at all times to communicate directly with such customer, now his client; and, upon receipt of the initial referral, as well as upon the receipt of any subsequent business unacceptable to the lawyer on the basis of the prior fee arrangement, the lawyer shall communicate with his client for the purpose of establishing the fee arrangement, in which arrangement the agent shall not participate.

(B) A real estate agent, closing agent, lender or other party interested in a real estate transaction shall not exercise or attempt to exercise any control over or imply that he has any right to control the actions of the lawyer in the handling of the transaction. All decisions are to be those of the lawyer acting on behalf of his client.

Unauthorized Practice Considerations.

UPC 6-1. A non-lawyer may not express to any person, an opinion as to the validity or legal status of title to real estate or as to the legal effect of anything found in the chain of title such as, for example, a suit, will, judgment, release deed or extension agreement or as to the effect on title of matters not necessarily appearing of record such as, for example, adverse possession, the statute of limitations, or the disabilities of parties. A lawyer employed by a lay agency to render services for others is restricted to the doing of acts in the course of his employment that a non-lawyer can lawfully do. Nothing herein shall be construed to impair the right to practice of duly licensed house counsel, see Unauthorized Practice Rule 1, Practice Before Tribunals; or to impair rights guaranteed by the Constitution; or to impair the rights of a subscriber under a legal services plan licensed under Chapter 23 of Title 38.2 of the Code of Virginia.

UPC 6-2. A non-lawyer may not hold out to the public, directly or indirectly, his willingness to give legal advice or perform legal services, nor solicit such services and then hire a lawyer to perform them. Such practices are not validated by an acknowledgment that the non-lawyer is not authorized to give legal advice, or by any disclaimer or suggestion that such advice should be reviewed by the customer's own lawyer. A settlement agent registered under and in compliance with CRESPA or RESARA, may hold himself or herself out as providing escrow, closing or settlement services in the purchase or financing of real estate in the Commonwealth of Virginia.

UPC 6-3. A non-lawyer may compile and report factual information as disclosed by the public records, sometimes referred to as making an abstract of title; but he may not express an opinion or issue a certificate as to the legal consequences of what his investigation of the public records may show. Incident to his investigation of the facts, an abstracter may give to his regular employer or, upon request, to a lawyer his opinion as to the status of legal title as disclosed by his investigation; but neither he nor his employer, unless a lawyer or registered law corporation, may give a certificate of title or opinion to a third party, or otherwise hold themselves out as possessing legal knowledge or skill.

UPC 6-4. The drawing or preparation of deeds, deeds of trust, mortgages, deeds of release, and other instruments affecting title to real estate requires the possession and use of legal knowledge and skill. Such instruments are extraordinary contracts and muniments of title to real estate. This is nonetheless true where a form of deed or deed of trust prepared by a lawyer may be followed or filled in, and whether the instrument is deemed simple or complex. Legal knowledge and skill are required, in any event, in the selection and completion of the proper form to fit the facts of the particular case. Notwithstanding the foregoing, a settlement agent registered under and in compliance with CRESPA may complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction. However, a non-lawyer settlement agent may not draft the deed or deed of trust or select the form of the deed or deed of trust to be used for a particular transaction.

UPC 6-5. An individual, if he chooses to do so, may draw or attempt to draw legal instruments for himself or affecting his property. A corporation acting through its employees may do the same with respect to its own property.

UPC 6-6. A non-lawyer licensed real estate agent may, pursuant to Virginia Code § 54.1-2101.1, prepare for another contracts incident to the regular course of conducting a licensed real estate business. Whether in a particular case the preparation of a contract by a non-lawyer is incident to the regular course of conducting such licensed business must, of necessity, be determined on the facts of that particular case. Preparation, in this context, includes not only the drafting of a form but also the filling in of a previously prepared form. In making such a determination, the following facts, not necessarily listed in the order of their importance, are among those which should be considered:

A. Whether the preparer is a party to the contract;

B. Whether the object to be accomplished by the contract is essential to the regular conduct of the real estate business of the preparer or merely ancillary thereto or an indirect by-product;

C. Whether a separate charge is made for preparation of the contract;

D. Whether the implication of legal knowledge and skill on the part of the drafter is minimal;

E. Whether the reliance on such service as a legal service is minimal;

F. The extent to which the licensed purpose of the business would be frustrated if preparation of the contract were not permitted;

G. The likelihood that legal advice will in fact be given by a non-lawyer, in connection with the execution of the contract by the parties;

H. The extent to which preparation of the contract by a non-lawyer reduces costs, saves time and avoids inconvenience to the parties; and

I. The custom and practice in the industry.

UPC 6-7. In connection with a real estate closing, a non-lawyer settlement agent may not give legal advice to another, or prepare for or advise another in the preparation of legal instruments, for compensation, direct or indirect. A non-lawyer may, however:

A. Order a survey, but not give an opinion as to the adequacy of such survey or with respect to matters reflected therein.

B. Obtain copies of leases, easements, restrictions, building codes, zoning ordinances and the like, but not give an opinion as to the legal effects thereof or any party's legal obligation to comply therewith.

C. Order termite or other inspections, but not give an opinion as to a party's legal obligations with respect thereto.

D. Ascertain the status of utility services and assist in their transfer, but not give advice as to a party's legal obligation with respect thereto.

E. Arrange for the issuance of casualty insurance coverage, as requested by a party in interest.

F. Provide lien payoff figures as asserted by the lienholder, but not give advice as to a party's legal obligation to pay the amount claimed.

G. Make mathematical computations involving the proration of taxes, insurance, rents, interest and the like in accordance with the terms of the contract or local custom.

H. Obtain lien waivers from mechanics or materialmen in form acceptable to the party in interest.

I. Prepare settlement statements and complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction and prepare settlement statements, such as the HUD-1, and other form documents such as the Owner's /Seller's Affidavit, Notice of Availability(of Owner's Title Insurance), and tax reporting forms including FIRPTA, Form 1099, VA R-5, and VA R-5E.

J. Receive and disburse settlement funds, and serve as escrow agent, to the extent licensed to do so.

K. Prepare receipts and certificates of satisfaction, but not deeds, deeds of trust, deeds of trust notes, or deeds of release.

L. Create or prepare a title abstract or title report, and to the extent licensed to do so, underwrite for and prepare title insurance commitments or binders and policies.

The foregoing list of examples would not be considered to be the unauthorized practice of law; it is intended only to provide guidance and is thus non-exclusive.

UPC 6-8. While a lay agency may recommend to its customers the employment of a lawyer, the lawyer so employed should in all matters be employed, controlled and paid by his client, the customer. The lay agency may refer its customer to a lawyer and may consult with that lawyer or any other lawyer engaged by its customer. The lawyer, however, owes his undivided loyalty to his client, the customer, and not to the lay agency, and should be especially sensitive in real estate transactions to the ethical constraints governing conflicts of interest. To the extent the lawyer considers the lay agency to be his client and, in the preparation of legal instruments for the lay agency, he knows, or should know, that the lay agency intends to use such legal instruments in the closing of a real estate transaction for another, such lawyer is aiding such lay agency in the unauthorized practice of law. A lawyer may, however, in representing his or her lay agency client, advise the lay agency as to compliance with applicable law including the legal sufficiency and accuracy of legal documents or instruments. A direct and personal lawyer-client relationship must be established and preserved at all times; otherwise, through its own lawyer, such lay agency becomes engaged in the business of providing legal services to others.

UPC 6-9. If legal advice is requested by a party, the non-lawyer settlement agent should take care to refer the party to a lawyer. Defining what is legal advice is difficult; however, a non-lawyer acting as a settlement agent is engaged in the unauthorized practice of law if he or she:

A. Recommends or urges a course of action to a party to the transaction under circumstances which require the exercise of legal judgment;

B. Drafts a legal instrument for a party to the transaction, other than completing form documents selected by and in accordance with the instructions of the parties to the transaction; or selects or assists a party in selecting a form document, if such selection or assistance requires the exercise of legal judgment;

C. Assists a party to the transaction in the completion of a legal document, other than a form document selected by and in accordance with the instruction of the parties, if such assistance requires the exercise of legal judgment;

D. Advises or instructs a party to the transaction of which way to take title to the property or the legal consequences of taking title in a particular manner, except that providing a description of the various tenancies recognized under Virginia law shall be permitted;

E. Attempts to settle or resolve a dispute between the parties to the transaction which requires the exercise of legal judgment to a particular situation;

F. Explains the legal effect of an item reported as an exception in a title commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency or agent may explain an underwriting decision to an insured or prospective insured including providing the reason for such decision;

G. Provides a legal opinion in response to inquiries regarding rights and obligations under legal documents provided that a layman's description of the purpose or intent of a document shall not constitute a legal opinion.

The foregoing list of examples considered to be the unauthorized practice of law is intended only to provide guidance and is thus non-exclusive.

Unauthorized Practice Rule 7.
Title Insurance.

UPR 7-101. Title Insurance Practice.

(A) A title insurance company, through its employees, agents or other representatives acting as such, shall not give legal advice or express an opinion to any person other than, upon request, to a lawyer, as to the status or marketability of title to real property in Virginia, or as to the legal effect of documents comprising the chain of title or matters revealed by a title search or examination.

(B) A title insurance commitment, binder or policy, or any of the provisions thereof, shall not be held out, directly or indirectly, by any person as constituting the equivalent of, or as tantamount to, a legal opinion based upon an examination of title.

(C) A title insurance company may in the regular course of conducting its business, issue directly to an insured or prospective insured its title insurance commitments, binders and policies, as otherwise permitted by law.

(D) A title insurance company, its employees, agents and other representatives are subject in all respects to the Rules set forth in Unauthorized Practice Rule 6, Real Estate Practice.

Unauthorized Practice Considerations.

UPC 7-1. Title insurance is insurance indemnifying the insured from loss if the status of title on a certain date is other than as stated in the policy, subject to the exclusions and exceptions from coverage set out in the policy.

UPC 7-2. The abstracting of title to real property located in Virginia by a non-lawyer from public records does not, standing alone, constitute the practice of law; but the interpretation of the meaning of documents comprising and affecting the chain of title, and the concepts attendant thereto, require a knowledge of statutes, general law in the field, and judicial decisions not generally possessed by non-lawyers. It is not improper, however, for an employee of a title insurance company to search the title records and report his findings to his employer, and express his conclusions to his employer or, upon request, to a lawyer as to which liens, encumbrances and the like relate to or affect the status of a particular title.

UPC 7-3. Although legal knowledge and skill may be utilized in the preparation and issuance of a title insurance policy, this does not make such policy a legal opinion. The policy is one of indemnity against loss issued in the regular course of its business by a title insurance company subject to inspection, supervision and regulation by the State Corporation Commission of Virginia.

UPC 7-4. If an employee, agent or other representative of a title insurance company attempts to advise another, other than such company or, upon request, a lawyer, on the legal effect of matters affecting the chain of title to real estate located in

Virginia and the concepts attendant thereto, he then engages in the unauthorized practice of law since he would be furnishing to another advice or service under circumstances which imply his possession and use of legal knowledge and skill.

Unauthorized Practice Rule 8.
Trade Associations.

UPR 8-101. Giving Legal Advice.

(A) A trade association shall not give legal advice or provide legal services to its members, directly or through its employed or retained lawyer, except that a trade association may:

(1) Distribute to its members any legal opinion rendered to the trade association by its lawyer on a matter which affects or may affect the general membership of the association.

(2) Appear through its lawyer as an intervenor or amicus curiae in any case involving a member, to the extent otherwise permitted by the court.

(3) Refer one or more of its members to its lawyer with respect to any legal matter so long as such lawyer is recognized throughout by all concerned as representing solely the interest of such member or members, free of control by or interference from the trade association.

(4) Solicit the comments of its members on proposed legislation or regulations drafted by its lawyer which affect or may affect the general membership of the association.

(5) Provide legal advice and the services of its lawyer to one or more of its members preliminary to and in connection with any matter that may seek to:

(a) Further the political goals of the association;

(b) Obtain meaningful access to the courts; or

(c) Vindicate civil liberties guaranteed by the Constitutions of Virginia or the United States.

UPR 8-102. Holding Out With Regard to Legal Services.

(A) Except to the extent legal advice or services are permitted to be provided under UPR 8-101, a trade association shall not hold itself out as authorized to furnish its members legal advice or services.

UPR 8-103. Attorney-Client Relationship.

(A) A trade association shall not:

(1) Disrupt the relationship of confidence and trust which must exist between a lawyer and his client.

(2) Prevent a lawyer from exercising independent judgment on behalf of his client by attempting to fix the lawyer's compensation, or sharing in a percentage of his compensation, or prescribing the terms of his employment, or attempting in any way to control or direct his actions, except that in matters of collective interest a trade association may negotiate on behalf of its members with respect to the legal fees to be charged.

(3) Place itself between the lawyer and the member in an attempt to act as the only conduit of information between the two, since this would prevent the establishment of the fundamental relationship of trust and direct personal responsibility which ought to exist between a lawyer and his client.

UPR 8-104. Referral of Business.

(A) A trade association may refer its member to a lawyer subject to the following:

(1) The member shall first have the opportunity to select a lawyer of his own choosing.

(2) If the member does not so select a lawyer, the trade association shall submit a list of lawyers from which the member may make his selection, which list may include the customary fee of each lawyer on the list.

(3) The lawyer shall be free at all times to communicate directly with such member, now his client; and upon receipt of the initial referral, as well as upon the receipt of any subsequent business unacceptable to the lawyer on the basis of the prior fee arrangement, the lawyer shall communicate with his client for the purpose of establishing the fee arrangement, in which arrangement the trade association, in pursuit of its associational goals, may participate as a negotiator or contributor, or both.

(B) A trade association shall not exercise or attempt to exercise any control or imply that it has any right to control the action of the lawyer in the handling of the transaction. All decisions are to be those of the lawyer acting on behalf of his client.

Unauthorized Practice Considerations.

UPC 8-1. The term "trade association" as used herein means a nonprofit organization formed for the principal purpose of furthering the common business or professional interest of its members. Any organization that qualifies as a business league or chamber of commerce under Section 501(c)(6) of the Internal Revenue Code shall be presumed to be a trade association for purposes of this Rule. The conduct of a prepaid legal services plan is not to be considered governed by this Rule.

UPC 8-2. A trade association may recommend to its members the services of a lawyer. A trade association should not interfere with the personal lawyerclient relationship that should exist between a member and such member's own lawyer.

UPC 8-3. If a trade association offers to provide or provides its members with the services of a lawyer subject to the trade association's direction and control, it is engaged in the unauthorized practice of law unless such services seek to further the political or ideological goals of their associational activity. For example, a trade association may provide its members with its views, including the legal opinions of its employed or retained lawyer, on legislative, administrative and judicial developments or other matters of general interest to some or all of its members, but may not advise, or hold itself out as permitted to advise, an individual member as to the application of a statute, regulation or decision to such member's particular set of facts, unless such advice is incident to or part of the association's collective activity undertaken to obtain meaningful access to the courts or other fundamental rights within the protection of Article I, Section 12 of the Virginia Constitution or the First Amendment to the United States Constitution.

UPC 8-4. Incident to his normal duties as a lobbyist or otherwise, a non-lawyer representative of a trade association may discuss with a member of the trade association the possible application of a proposed or enacted statute, regulation or decision to a particular set of facts; provided that such discussion does not constitute the giving of legal advice.

Unauthorized Practice Rule 9.
Administrative Agency Practice.

UPR 9-101. Holding Out as an Expert.

(A) A non-lawyer shall not hold himself out as authorized to furnish to another advice or service under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, or administrative regulation or ruling applicable thereto, except that a person admitted to practice by an administrative agency may hold himself out as such to the extent permitted by such agency as long as he does not misrepresent the scope of his practice authorized by such agency.

(B) A person duly licensed or authorized to practice law in another state or before any administrative agency shall not use the descriptive term "law office" or its equivalent on any signs or listings in Virginia, unless he is an employee or member of a firm with one or more lawyers duly licensed to practice law in Virginia.

UPR 9-102. Agency Practice.

(A) A non-lawyer shall not furnish to another for compensation, direct or indirect, advice or service under circumstances which require his use of legal knowledge or skill in the application of any law, federal, state or local, or administrative regulation or ruling applicable thereto, except:

(1) As an employee to his regular employer.

(2) As permitted by the rules of such agency and reasonably within the scope of his practice authorized by such agency.

(B) A non-lawyer shall not undertake, with or without compensation, to prepare for another legal instruments of any character incident to his practice before an administrative agency, except:

(1) As an employee for his regular employer.

(2) In the regular course and reasonably within the scope of his practice authorized by such agency.

(C) As to representing the interest of another before an administrative tribunal, see Unauthorized Practice Rule 1, Practice Before Tribunals.

UPR 9-103. Immigration Practice.

(A) The preceding provisions of UPR 9 also apply to unauthorized non-lawyers who represent persons, with or without compensation, before federal administrative agencies in connection with petitions or applications for benefits under the Immigration and Nationality Act and other federal immigration and nationality statutes and regulations.

(B) For purposes of UPR 9-103(A):

(1) "Unauthorized" means unable to show specific authorization by the appropriate federal agency to practice before it. With respect to matters before the Immigration and Naturalization Service, this means unable to show recognition as an authorized non-lawyer representative pursuant to 8 CFR Part 292, to wit: providing for representation by law students, law graduates not yet admitted to the bar, "reputable individuals" appearing without direct or indirect remuneration, accredited representatives, accredited officials, and certain attorneys residing outside the United States.

(2) "Represent" means to engage in "practice" or "preparation" as those terms are defined, respectively, in 8 CFR ''1.1(i) and (k), to wit:"practice" means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service . . . ;"preparation" means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure or as 8 CFR Part 292 may be amended from time to time.

(C) The provisions of (A) and (B) above are not intended to prohibit an unauthorized non-lawyer from assisting an individual in the completion of forms which had been personally selected by the individual, to the extent that such assistance involves only the taking and transcription of dictation or the translation of such dictation into English. However, the referenced provisions are intended to prohibit such an unauthorized non-lawyer from selecting specific forms for completion or from advising the individual as to which forms are appropriate for completion and submission to the Service provided such activities require the use of legal knowledge and skill.

Unauthorized Practice Considerations.

UPC 9-1. Representing another before an administrative agency normally constitutes the practice of law.

UPC 9-2. Regulation of the practice of law before federal administrative agencies is the responsibility of Congress. When Congress grants authority to an agency to prescribe regulations governing the recognition and conduct of a person representing the interest of another before such agency, the State is preempted from enforcing its own rules of practice while such person is acting reasonably within the scope of the practice authorized by the agency. As to rules of practice before Virginia administrative agencies, see Unauthorized Practice Rule 1, Practice Before Tribunals.

UPC 9-3. Normally, a person authorized to practice before an administrative agency may give advice to others informing them of their rights and obligations as to matters pending before, to be presented to or otherwise within the jurisdiction of such agency; prepare applications, exhibits and other documents as required by such agency in the submission of matters to it and in the performance of its regulatory functions; appear before such agency at any hearing, formal or informal, within

Virginia and, as otherwise permitted by such agency, represent the interests of others before such agency, including filing motions and briefs, cross-examining witnesses, and making oral arguments as to matters of law; and hold himself out as qualified to perform such services before such agency within the scope of his agency license.

UPC 9-4. A person authorized to practice before an administrative agency may not prepare for another, not his regular employer, legal instruments not reasonably within the scope of his agency practice. For example, the preparation of a lease or contract to be approved by an administrative agency may facially appear to be incident to the regular course of conducting an approved agency practice; but such a document normally creates substantive rights and obligations for the parties under state law, and to prepare such documents and give advice concerning their significance beyond their compliance with federal law or regulations may constitute the unauthorized practice of law.

UPC 9-5. The privilege of practicing before most federal administrative agencies is not restricted to lawyers. The federal Administrative Procedure Act grants to an individual who is a member in good standing of the bar of the highest court of any state an initial right to represent others before any federal agency; but if such person is not duly licensed or authorized to practice law in Virginia or has not obtained the requisite revenue license required by Section 58.1-3700 of the Code of Virginia, he is subject to the same rules as a non-lawyer when his activities in Virginia extend beyond the scope of the practice authorized by the federal agency.

UPC 9-6. A person who is authorized to practice before an administrative agency and who is duly licensed or authorized to practice law in another state presumably has met certain minimal educational requirements and is subject to discipline for violations of a code of professional responsibility similar to that governing the conduct of lawyers licensed to practice in Virginia. As such, a person licensed or authorized to practice law in another state is entitled to a greater degree of latitude in the resolution of issues involving whether his activity is within the scope of the practice authorized by such agency and whether any legal instruments prepared by him are properly incident thereto.

UPC 9-7. Aliens are especially vulnerable to the unauthorized practice of law. Such unauthorized practice, which may include incompetent or fraudulent legal services, can cause serious economic harm, may result in the separation of families, and may even result in the death of an individual forcibly repatriated to another country if asylum is denied to him in the United States.

The Virginia State Bar recognizes that certain non-lawyers may be authorized to practice before a federal immigration agency. However, non-lawyers who are not so authorized are limited to providing assistance to an alien resident for such limited services as translation of documents, and assistance in the transcription of documents or answers provided by the alien, for a fee commensurate with such limited services. However, the selection of appropriate immigration forms, the assistance to the alien in the information to be provided on such forms, and other related services by an unauthorized non-lawyer may constitute the unauthorized practice of law.

Furthermore, in addition to engaging in the unauthorized practice of law, an individual who holds himself or herself out as qualified to render such legal services and performs such services, may also be subject to criminal prosecution, to civil remedies such as quo warranto actions, and to such discipline and sanctions as may be imposed under federal statutes and regulations.

MANDATORY CONTINUING LEGAL EDUCATION REGULATIONS

PURPOSE

The Virginia Supreme Court has established, by Rule of Court, a mandatory continuing legal education program in the Commonwealth of Virginia, which requires each active member of the Virginia State Bar annually to complete a minimum of twelve (12) hours of approved continuing legal education courses, of which at least two (2) hours shall be in the area of legal ethics or professionalism, unless expressly exempted from such requirement.

The Virginia Supreme Court has established a Continuing Legal Education Board to administer the program and has given to it those general administrative and supervisory powers necessary to effectuate the purposes of the Rule, including the power to adopt reasonable and necessary regulations consistent with the Rule.

Pursuant to this authority, these regulations have been adopted by the Continuing Legal Education Board.

REGULATION 101
DEFINITIONS

As used in these regulations, the following definitions shall apply:

(a) The "Rule" shall mean the provisions of the Mandatory Continuing Legal Education Rule established by Paragraph 17 of Section IV, Part Six, Rules of Virginia Supreme Court.

(b) The "Board" shall mean the Virginia State Bar Mandatory Continuing Legal Education Board established by Paragraph B of the Rule.

(c) A "Member" as defined by Paragraph 2 of Section IV, Part Six, Rules of the Virginia Supreme Court, shall comprise all attorneys-at-law in this commonwealth.

(d) An "Active Member," as defined by Paragraph 3(a) of Section IV, Part Six, Rules of Virginia Supreme Court, shall mean a person who is admitted to practice law in the courts of this state and who is engaged in the practice of law, either full time or part-time, salaried or nonsalaried, including a person admitted to practice limited to patent and trademark law pursuant to Rule 1A:2, rules of Virginia Supreme Court.

(e) A "newly-admitted member" shall mean a person first admitted to practice during the current completion period.

(f) A "program sponsor" or "sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs.

(g) The terms "course" and "program" mean a discrete continuing legal education offering, regardless of length or daily schedule, provided that the course or program is a minimum of 30 minutes in length.

(h) An "accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board, pursuant to Regulation 105 herein.

(i) An "approved course" means a course expressly approved by the Board for the relevant completion period or a course offered by an accredited sponsor during the completion period for which the sponsor is accredited.

(j) A "specially approved course or program" means a course which does not meet the standards of regulation 103(b) and (c) but which, because of its significant value to the practice of a member who has sought approval, has been approved by the Board for such member. As to such member, the term "approved course" includes a specially approved course or program.

(k) The term "panel(s)" shall mean a committee or committees organized by the Board for the purpose of expeditiously considering and deciding matters arising under the Rule and these regulations.

(l) A course or program offered "in-house" means one sponsored by a single private law firm, a single corporate law department or a single federal, state or local governmental agency or military branch for lawyers who are members or employees of the firm, department, agency or branch.

(m) The term "completion period" shall mean a period of one year beginning on November 1, of one year and ending on October 31 of the next year; provided, however, that the next completion period following June 30, 2001, shall be July 1, 2001, to October 31, 2002.

(n) The term "faculty member" shall mean a person qualified by practical or academic experiences to teach the subject he or she covers.

(o) "Credit hours" (also referred to in context as "hours," "credits," and "hours credit") are the units used for measuring completion of Mandatory Continuing Legal Education as required by the Rule.

(p) "Ethics credits" are credit hours which apply toward Mandatory Continuing Legal Education in the area of legal ethics or professionalism as required by the Rule.

(q) A "qualified ethics course or component" is a clearly identified segment of a course or program which meets the requirements of Regulation 103(d) and is devoted to one or more topics embraced in recognized formulations of rules of professional conduct or codes of professional responsibility applicable to attorneys and/or to the systems and procedures which have been established for enforcement and interpretation of those rules or codes. An ethics component in a course or program involving a substantive area of law may constitute a "clearly identified segment" if the integration of the substantive material is necessary to understand the ethical topic, and if the ethical topic is the primary focus of the segment. Such a segment must be appropriately described or entitled in the course materials and must have a defined duration in the course or program schedule.

(r) A "qualified professionalism course or component" is a clearly identified segment of a course or program which meets the requirements of Regulation 103(d) and is devoted to one or more topics designed to educate and encourage attorneys to aspire to and achieve higher and more noble standards of professional conduct than the minimum standards set forth in recognized formulations of rules of professional conduct or codes of professional responsibility. All or part of a malpractice program may qualify as a professionalism course or component if it is devoted to one or more topics designed to educate and encourage attorneys to take measures in the conduct of the practice of law to serve the interests of the client, consistent with the attorney's fiduciary duty to the client, and to endeavor to maintain an appropriate standard of care in the practice of the profession. Such a course or component will not be approved if the primary focus is malpractice litigation tactics or strategy. A professionalism component in a course or program involving a substantive area of law may constitute a "clearly identified segment" if the integration of the substantive material is necessary to understand the professionalism topic, and if the professionalism topic is the primary focus of the segment. Such a segment must be appropriately described or entitled in the course materials and must have a defined duration in the course or program schedule.

(s) A "course presented by distance learning methods" includes any course in which the participant seeking credit received the instruction at a location different from the location from which the instruction was presented or at a time different from the time when the instruction was presented. Thus, all courses presented to participants from pre-recorded media (e.g. videotape presentations, DVD presentations, pre-recorded telephone seminars or webcasts, etc.) are "courses presented by distance learning methods." Similarly, any course taken by a participant at a location separate from the instructor (e.g. live telephone seminars, live webcasts, etc.) are "courses presented by distance learning methods."

REGULATION 102
REQUIREMENTS AND COMPUTATIONS

(a) Each active member, other than a newly-admitted member as defined in Regulation 101, shall complete, during each completion period in which he or she is an active member for any part thereof, a minimum of twelve (12) credit hours of approved continuing legal education courses, of which at least two (2) hours shall be in the area of legal ethics or professionalism, by obtaining credit in the manner hereinafter provided, unless expressly exempted therefrom pursuant to the provisions of Regulation 110; provided, however, that for the completion period of July 1, 2001 to October 31, 2002 a minimum of fifteen (15) credit hours of approved continuing legal education courses, of which at least (2) hours shall be in the area of legal ethics or professionalism shall be required.

(b) Credit will be given to a member who personally attends an approved course and to a member who prepares written materials for an approved course and to a member who personally participates as an instructor for such course. Credit in the area of legal ethics or professionalism will be given a member who attends a course approved for credit in such area and to a member who personally prepares materials for a qualified ethics or professionalism component of such course and to a member who personally participates as an instructor for such a component.

(c) Credits for attendance will be awarded on the basis of time spent in personal attendance at an approved course which meets the standards of these regulations. Credits for teaching will be awarded on the basis of time spent in personal participation as an instructor at an approved course. However, no credit will be awarded for teaching and preparation of a "specially approved course or program." Credit hours will be computed by calculating the total instructional minutes attended or taught for the course, rounded to the nearest half hour. Credit will not be given for time spent in meal or coffee breaks. Credit will not be given for keynote speeches or introductory remarks or time spent on any subject matter which is not directly related to instruction pertinent to that course.

EXAMPLES:

(1) A member attends a one-day course or seminar with seven (7) segments, each lasting 50 minutes. Two of the segments are in the area of legal ethics or professionalism under the standards set forth in Regulation 103. Credit hours will be computed by calculating the total instructional minutes rounded to the nearest half hour. Since there are 350 total instructional minutes (5 hours, 50 minutes) the Board will round this time to the nearest half hour and the member will receive six (6) hours credit, not seven (7). Of such six (6) hours credit, one and one-half (11/2) hours (100 minutes rounded to the nearest half hour) will be in the area of legal ethics or professionalism.

(2) A member attends a course or program which is presented all day Friday and on Saturday morning. The member attends a 3 hour, 15 minute Friday morning session; a 2 hour, 15 minute Friday afternoon session; and a 3 hour, 10 minute Saturday morning session. Since the total instruction time is eight (8) hours and 40 minutes for the two-day program, the Board will round this time to the nearest half hour and the member will receive 8 1/2 hours of credit.

(3) A member attends a course or program which is advertised as having been "approved by the Virginia Mandatory Continuing Legal Education Board" for six (6) credit hours, of which one and one-half (1 1/2) apply in the area of legal ethics or professionalism. No further computation need be made by the member if he attends the entire course or program.

(4) A member personally teaches any of the courses in the previous examples. The teaching member will receive credit hours for teaching time computed in the same fashion as the credit hours are computed for the attending member.

(5) A member is a teacher at a one-day course or program with seven (7) segments, each lasting 50 minutes. Application forms are filed certifying that the member taught one segment and also attended one segment. The member did not attend or teach the other five segments. Since the member attended or taught 100 total instructional minutes for the course, the Board will round this time to the nearest half hour and the member will receive 1 1/2 hours of credit. The member does not receive one credit hour for 50 minutes teaching plus one credit hour for the other 50 minutes attending.

(d) Credits for preparation will be awarded on the basis of time spent by a member (i) in preparing written materials which meet the standards of these regulations for use in the presentation of an approved course; and (ii) in preparing a personal presentation as an instructor for an approved course. The number of preparation minutes eligible for credit shall not exceed four times the number of instructional minutes in the presentation which is being prepared. Credit hours will be computed by calculating the total minutes spent in preparation for the course, rounded to the nearest half hour. In no event shall more than eight (8) hours of credit be awarded for preparing a single course or program.

EXAMPLES:

(1) A member prepares thorough, high-quality instructional written materials which appropriately cover the subject matter for an approved program which lasts 120 minutes. The member certifies that eight (8) hours or more was spent preparing the written materials. The Board will award eight (8) credit hours for preparation time. This does not exceed the maximum limit of four times the presentation time of the program and is consistent with the maximum limit of eight (8) hours of credit for preparing a single course or program.

(2) Same as example 1 above except the member also taught the entire program and certifies that an additional eight (8) hours or more was spent preparing for the presentation as an instructor. This is a total preparation time of sixteen (16) hours. The Board will still award eight (8) credit hours for preparation time because this is the maximum limit of four times the presentation time and also because this is the maximum limit of credit for preparing a single course or program. However, the member will be awarded two (2) credit hours for teaching time and will therefore receive a total of ten (10) credit hours for the activities in preparing and teaching the program.

(3) A member teaches at a course approved for five (5) credits including one (1) ethics credit. The member certifies that he taught the morning ethics segment of twenty (20) minutes. The member further certifies that one hour and twenty minutes was spent preparing for the presentation. Since the member taught twenty (20) minutes the Board will round this time to one half (1/2) hour teaching credit. Eighty (80) minutes (four (4) times the presentation time) of the member's preparation time is also eligible for credit. The Board will round this time to the nearest half hour and the member will receive one and one half (1 1/2) hours of preparation credit. The member will therefore receive a total of two (2) hours CLE credit including two (2) hours ethics credit for preparing the ethics segment.

(e) A one-year carryover of credit hours will be permitted, so that accrued credit hours in excess of one year's requirement may be carried forward to meet the requirement of the following year. From the 1990-91 completion period an active member may carry forward a maximum of ten (10) credit hours toward the 1991-92 requirement, none of which may be counted toward the two hours required in the area of legal ethics or professionalism. Thereafter, a member may carry forward a maximum of twelve (12) credit hours, not more than two (2) of which, if earned in the area of legal ethics or professionalism, may be counted toward credit hours required in such area.

(f) A member shall not receive credit for any course attended in preparation for admission topractice law in any state, nor for attending the legal ethics course required by Paragraph 13.1 of the Rules of the Virginia Supreme Court, unless such course has been approved by the Board pursuant to these regulations. A member shall not receive credit for teaching that is directed primarily to persons preparing for admission to practice law. Regular full time, part-time and adjunct academic faculty shall not receive credit for teaching any law school courses (undergraduate or graduate) or bar review courses. A member attending law classes, for a purpose other than preparing for admission to practice law, may receive credit in accordance with the manner described in Regulation 102(c). A member may not receive credit for any course which is not materially different in substance from a course for which the same member received credit during the same completion period or the completion period immediately prior to the one for which credit is sought.

(g) A member may receive credit for attending a course delivered by distance learning methods which otherwise satisfies the requirements of these Regulations.

REGULATION 103
STANDARDS FOR APPROVAL OF PROGRAMS

(a) Subject to the provisions of Regulation 105(d), a course is approved for credit if it has been specifically approved by the Board or is presented by an accredited sponsor previously designated by the Board under the provisions of Regulation 105. A course is approved for credit in the area of legal ethics or professionalism if and to the extent specifically approved by the Board. Subject to the provisions of Regulation 105(d), a course presented by an accredited sponsor is also approved for credit in the area of legal ethics or professionalism if and to the extent so represented by such sponsor.

(b) The course must have significant intellectual or practical content. Its primary objective must be to increase the attendee's professional competence and skills as an attorney, and to improve the quality of legal services rendered to the public.

(c) The course must pertain to a recognized legal subject or other subject matter which integrally relates to the practice of law, or to the professional responsibility or ethical obligations of the participants.

(d) A course may be approved for credit in the area of legal ethics or professionalism only to the extent that the course constitutes or contains one or more qualified ethics or professionalism components as defined in Regulation 101. A minimum scheduling of thirty (30) minutes in the aggregate of one or more qualified ethics or professionalism components is required before an approved course can be approved for credit in the area of legal ethics or professionalism.

EXAMPLES:

(1) A sponsor's application for approval of a one-day program comprising seven 50 minute segments states in relevant part "each speaker will devote ten minutes of allotted time to ethical considerations." The program does not contain a qualified ethics component and is not eligible for approval for credit in the area of legal ethics. The requirement that a qualified component be a "clearly defined segment" is not met. Such segment must be capable of identification on the schedule and have a defined beginning and end.

(2) A sponsor's application for approval of a one-day program reveals in relevant part that the opening 30 minute morning segment is clearly identified as devoted to ethical considerations and that the concluding 20 minutes of the afternoon session is also clearly identified as devoted to ethical considerations. Assuming that other requirements for course approval are met, the Board will approve the program for one (1) hour credit in the area of legal ethics or professionalism. See Regulation 102.

(e) Courses must be conducted in a setting physically suitable to the educational course or program. A suitable writing surface should be provided.

(f) Thorough, high quality instructional written materials which appropriately cover the subject matter must be distributed to all attendees at or before the time the course is presented. A mere agenda or topical outline will not be sufficient.

(g) Each course shall be presented by a faculty member or members qualified by academic or practical experience to teach the subjects covered. Consistent with Virginia State Bar policy, course sponsors should exercise care to ensure that faculty members, where possible, reflect the racial and gender diversity of the State Bar as a whole.

(h) A course presented by distance learning methods which otherwise satisfies the requirements of these Regulations (including the requirements for high quality instructional material) may be approved so long as the course is provided in a manner that affords participants the opportunity for discussion or the exchange of ideas with the instructor or other participants. No course will be approved that involves only selfstudy.

EXAMPLES:

(1) Three attorneys listen to a pre-recorded audio program under conditions which present adequate opportunity for discussion and exchange of ideas among the participants. Credit will be granted so long as the course otherwise satisfies the requirements of these Regulations.

(2) Several attorneys, from different locations, view a pre-recorded audio-video course presentation which is downloaded from an Internet web site. The web site provides an area in which the participants may engage in an on-line discussion with other participants or may present questions to the instructor. Credit will be granted so long as the course otherwise satisfies the requirements of these Regulations.

(3) An attorney participates in a course presented on a web site that consists entirely of text material read by the participant. The web site provides an area in which the participants may engage in an on-line discussion with other participants or may present questions to the instructor. Credit will not be granted because the course involves only self-study.

(i) A program offered "in-house" will be approved by the Board if it meets the standards of these regulations and if the approval procedures prescribed by these regulations are followed.

(j) Participation in deliberative groups concerned with law reform, judicial administration, or regulation of the profession will not be approved for credit.

(k) A course that does not meet the requirements of subsections (b) and (c) of this Regulation may, on application of a member, be approved as a "specially approved course or program" for the applicant where the Board is satisfied that the course has significant value to the applicant's practice. Thus, for example, in appropriate cases courses on engineering, accounting or medical topics may be approved for a particular member.

REGULATION 104
PROCEDURE FOR APPROVAL OF PROGRAMS

(a) A member or course sponsor desiring approval of a course or program shall submit to the Board all information called for by the "Application for Approval of a Continuing Legal Education Course." The content of this application has been promulgated by the Board and may be changed from time to time. A member seeking approval of a course as a "specially approved course or program" should include on the Application for Approval of a Continuing Legal Education Course, or as an attachment thereto, a statement of why the course has significant value to the member's practice. The Board shall then determine whether or not the course or program satisfies the requirements of Regulation 103. If the course or program is approved, the Board also shall determine the number of credit hours to be awarded. The Board shall notify the requesting member or sponsor of its decision within 60 days after receipt of the completed application. The Board shall maintain and make available a list of all approved courses and programs for each completion period. An approved course or program is accredited only for the completion period for which it is approved. A "specially approved course or program" is accredited only for the member for whom approved.

(b) The sponsor of an approved course or program should include in its brochures or course descriptions the information contained in the following illustrative statement: "This course or program has been approved by the Virginia Mandatory Continuing Legal Education Board for _____ hours of credit, of which _____ hours will also apply in the area of legal ethics or professionalism." An announcement is permissible only after the course or program has been specifically approved pursuant to an application submitted directly by the sponsor.

(c) The sponsor of an approved course or program that has not yet been approved after application should announce: "Application for approval for this course or program is pending with the Virginia Mandatory Continuing Legal Education Board."

(d) At each presentation of an approved course or program or one for which approval is pending, the sponsor shall make available copies of the Board's Certification of Attendance at an Approved Course or Program for completion by attendees and the Board's Certification of Teaching at an Approved Course or Program for completion by

instructors and shall collect those executed and turned in. The content of these certifications has been promulgated by the Board and may change from time to time. Within five (5) days following the final presentation of the course, the sponsor shall submit to the Board the forms turned in by the attendees and instructors.

(e) In the instance of a course or program presented while an application for approval is pending, it will be the responsibility of the sponsor to notify each member in attendance, within thirty (30) days after the course or program is presented, whether the course or program was approved and if so, the number of credit hours for which approved. If such course or program is not approved, then such attending member will not receive any credit hours for attendance. However, a member may seek approval in the manner specified in Regulation 104(f).

(f) Any member seeking credit after attending, or any sponsor seeking approval after presenting a course or program, shall submit to the Board within 30 days after the date of the program all information called for on the Application for Approval of a Continuing Legal Education Course. The Board will then determine whether the program qualifies under these Regulations and, if so, how many credit hours are approved. The Board will promptly notify the applicant of its decision.

REGULATION 105
PROCEDURE FOR ACCREDITATION OF SPONSORS

(a) Any sponsor may apply for approval of individual courses by complying with the criteria of Regulation 103 and the procedures of Regulation 104.

(b) If the Board determines that a sponsor regularly provides a significant volume of continuing legal education courses, that these courses uniformly meet the approval criteria of Regulation 103, and that the sponsor will maintain and submit the records directed by these Regulations, the Board may designate such a course provider as an "accredited sponsor" under the Rule. Such designation shall be effective for a period of no more than two years unless renewed.

(c) A sponsor applying for status as an accredited sponsor shall submit to the Board all information called for on the Application for Status as Accredited Sponsor of Continuing Legal Education.

(d) An accredited sponsor shall be subject to and governed by the applicable provisions of the Rule and these regulations, including the quality standards of Regulation 103 and the record-keeping and reporting requirements of this Regulation 105. The Board may at any time review an accredited sponsor program and reserves the right to deny CLE or ethics credit when the standards for approval are not met. Accordingly, for example, an accredited sponsor may represent in its descriptive literature that a course or program generates credits in the area of legal ethics or professionalism only to the extent the course contains one or more qualified ethics components as provided in Regulation 103.

(e) The approval procedure of Regulation 104 does not apply to accredited sponsors. An accredited sponsor must notify the Board at least thirty days in advance of a program of the name, date, location and credit hours allowable for a particular course, including, where appropriate, credit hours in the area of legal ethics or professionalism. The Board may request additional information regarding a course or program. The Board will provide the sponsor with copies of the Board's Certification of Attendance and Certification of Teaching for each course or program and the sponsor shall make available, collect and transmit such forms in accordance with the requirements of Regulation 104(d).

(f) The Board may at any time reevaluate and revoke the status of an accredited sponsor. If the Board finds there is a basis for revocation of the accreditation granted to an accredited sponsor, the Board shall send notice by certified mail to that sponsor of the revocation within thirty (30) days of the Board's decision.

(g) Law firms, professional corporations, and corporate law departments are not eligible to become accredited sponsors.

REGULATION 106
DELEGATION

To facilitate the orderly and prompt administration of the Rule and these regulations, and to expedite the processes of course approval, sponsor accreditation and the interpretation of these regulations, the Board may organize itself into panels for the purpose of considering and deciding matters arising under the Rule and under these regulations.

REGULATION 107
BOARD'S DETERMINATION AND REVIEW

(a) Pursuant to directions established by the Board, a panel shall, in response to written requests for approval of courses or programs or for awarding of credit for the attendance at or teaching in approved courses, waivers, extensions of time deadlines and interpretations of these regulations, make a written response describing the action taken. A Panel may seek a determination of the Board before taking action. At each meeting of the Board, the panel shall report on all determinations made since the last meeting of the Board.

(b) An aggrieved party may file with the Board a written appeal of an adverse decision by a panel within thirty (30) days after notice of the adverse decision has been mailed to him or her. No form of appeal is required but the aggrieved party shall state in narrative form the action complained of and all of the reasons he or she believes the decision of the panel is erroneous.

(c) The Board shall review any adverse determination of a panel which has been appealed to it pursuant to Regulation 107(b). The aggrieved party may present information to the Board in writing or in person, and at such time and place as the Board may direct. If the Board finds that a panel has incorrectly interpreted the facts, the provisions of the Rule or the provisions of these regulations, it may take such action as may be appropriate. The Board shall advise the aggrieved party of its findings and any action taken.

(d) Pursuant to Paragraph 17 of Section IV, Part Six, Rules of the Virginia Supreme Court, the Virginia State Bar may from time to time establish fees for processing applications, approving courses and accrediting sponsors; the remittance of any of these may be required before action is taken by the Board.

(e) All decisions of the Board under this Regulation 107 and any other of these regulations shall be final and binding on all persons affected thereby and no appeal or other relief therefrom shall lie, except as specifically provided in Regulation 109.

REGULATION 108
REPORTING OF CERTIFICATION PROCEDURES

(a) Where a sponsor makes copies of the Certification of Attendance and the Certification of Teaching available at a course or program, each active member who wishes credit may complete the form and turn it in to the sponsor or its representative.

(b) Where a member attends a course or program, and for any reason the member does not return to a sponsor the Certification of Attendance or the Certification of Teaching on the day of a course or program, the member who wishes the Board to record credit may obtain a copy of the form from the Board or a sponsor, complete it and forward it to the Board.

(c) Each active member shall submit on or before October 31 of each year Certification of Attendance or Certification of Teaching at an approved course(s) for the minimum educational requirement.

(d) Following the end of each completion period, the Board shall advise each active member of his or her status respecting completion of the annual educational requirement. Such notice shall indicate the hours forwarded from the previous year, the hours earned during the current completion period and the total. This notice shall be entitled the "MCLE END OF YEAR REPORT."

(e) If the active member accepts the MCLE END OF YEAR REPORT as accurately reflecting his or her credit hours for the period, including any teaching credits or carryover hours from the previous reporting period, and the form lists 12.0 or more CLE credits of which 2.0 or more are ethics or professionalism credits the member does not need to file his form with the MCLE Board. If a member believes that the information reflected on the Board's records is in error or incomplete, then the corrected MCLE END OF YEAR REPORT must be filed and received by the MCLE office no later than December 15.

(f) Certifications of Attendance at an Approved Course or Program filed for credit for the previous completion period after October 31 are accepted for credit only when accompanied by the "MCLE END OF YEAR REPORT."

(g) After December 15, a member who wishes to receive credit for credit hours earned during the previous completion period may forward to the Board a certification on the appropriate forms together with remittance of the late filing fee. Any credits approved shall be recorded for the previous completion period and shall be eligible for the one year carryover into the current completion period in the same fashion as other credits. A member may not apply for credits earned earlier than the next preceding completion period.

REGULATION 109
NONCOMPLIANCE, RESTORATION AND REINSTATEMENT

(a) Noncompliance

(1) An active member who has neither complied with the educational and certification requirements of the Rule and these regulations, nor obtained a waiver or extension for good cause shown by December 15 of each year, shall be subject to suspension of such active member's license to practice law as is provided by Paragraph 13.2 of Section IV, Part Six, Rules of Virginia Supreme Court.

(2) Pursuant to Paragraph 13.2 of Section IV, Part Six, Rules of Virginia Supreme Court, whenever the Board determines that an active member has neither completed the mandatory continuing legal education requirements of the Rule and filed the certification required by Regulation 108 nor obtained a waiver or extension in accordance with Regulation 111, the member shall be deemed to be delinquent.

(b) Restoration and Reinstatement

(1) A delinquent member may be restored to good standing only following (i) his or her certifying to the Secretary-Treasurer of the Virginia State Bar of compliance with the requirements of the Rule in the manner provided by Regulation 108 and a determination by the Board that he or she has completed the mandatory continuing legal education requirements of the Rule and paying any required fees, or (ii) the obtaining of a waiver or extension in accordance with Regulation 111.

(2) A delinquent member who is suspended pursuant to Paragraph 13.2 shall not further engage in the active practice of law until he or she has been reinstated. A suspended member may be reinstated only after paying any required fees and certifying compliance with the Rule as provided in Paragraph 13.2 and these regulations.

(3) Where a default in compliance is cured by earning credit hours in a subsequent completion period, credit hours applied to correct the default shall not be applied to satisfy the requirements of any other period.

(4) A member suspended for an entire completion period must show attendance at 12.0 CLE credit hours including 2.0 ethics credits earned within the previous 12 months. This member cannot rely on credits earned through carryover in the previous completion period.

REGULATION 110
EXEMPTIONS

The Rule exempts from the certification requirement a newly admitted member for the completion period in which he or she is first admitted to practice in Virginia. A newly admitted member will not receive credit under these regulations for attending or teaching any course prior to his or her admission to the Virginia State Bar.

EXAMPLE:

Attorney A is first admitted to practice law in October 2002. Attorney A is not required to comply with the minimum continuing legal education requirement of the Rule and these regulations by taking or teaching approved courses until on and after November 1, 2002. Attorney A also shall not be required to file the certification required by Regulation 108 until December 15, 2003. If Attorney A attends or teaches approved courses between October 2002 and November 1, 2002, he may "carry over" to the next completion period credits in accordance with Regulation 102. Attorney A, beginning on November 1, 2002, will be subject to said requirement as long as he or she is an active member of the Virginia State Bar.

REGULATION 111
WAIVERS AND EXTENSIONS

(a) Waivers

(1) A waiver may be sought by filing with the Board a request, together with any appropriate or required supporting material or documentation (e.g. doctors' letters, medical records). The filing of any waiver request does not toll the running of any time limit set forth in these regulations or the Rule regarding suspension.

(2) A waiver shall be valid for a single completion period, unless renewed or extended by the Board. A waiver will be granted only for good cause.

(3) If the waiver is based on medical reason, condition, illness or hospitalization, then the application for waiver shall be a completed form entitled "Request for Waiver Based on Hospitalization, Illness or Medical Reason." It must be completed and signed by the admitting, family or attending health care provider and it must set forth the medical condition, hospitalization or illness which prevents the member from completing the required MCLE courses for the period for which the Waiver is being requested and have attached to it any appropriate supporting material or documentation.

(4) If the waiver is based on non-medical reasons, then the grounds should be stated in a letter to the Board and any appropriate supporting material or documentation should be attached.

(5) All waiver requests should be promptly submitted when the grounds for the waiver request become known to the applicant or applicant's representative. Failure to file a waiver request in a timely manner may be considered by the Board in determining whether to grant a waiver. A prudent lawyer will use the carryover of credits provision of the Rule to avoid most nonmedical based waiver requests.

(b) Extensions

(1) An extension may be sought by filing with the Board a request, together with any appropriate or required supporting material or documentation (e.g. doctors' letters, medical records). The filing of an extension request does not toll the running of any time limit set forth in these regulations or the Rule regarding suspension.

(2) An extension shall be valid for the specific time period granted by the Board unless renewed or extended. An extension will be granted only for good cause.

(3) If the extension is based on medical reason, condition, illness or hospitalization, then the application for extension shall be a completed form entitled "Request for an Extension Based on Hospitalization, Illness or Medical Reason." It must be completed and signed by the admitting, family or attending health care provider and it must set forth the medical condition, hospitalization or illness which prevents the member from completing the required MCLE courses for the period for which an extension is being requested and have attached to it any appropriate supporting material or documentation.

(4) If the extension is based on non-medical reasons, then the grounds should be stated in a letter to the Board and any appropriate supporting material or documentation should be attached.

(5) All extension requests should be promptly submitted when the grounds for the extension request become known to the applicant or the applicant's representative. Failure to file an extension request in a timely manner may be considered by the Board in determining whether to grant an extension. A prudent lawyer will use the carryover of credits provision of the Rule to avoid most non-medical based extension requests.

REGULATION 112
REPRESENTATIONS BY MEMBERS

A member who makes a materially false statement in any document filed with the Board shall be subject to appropriate disciplinary action.

Virginia MCLE Board
Virginia State Bar
707 East Main Street, 15th Floor
Richmond, VA 23219-2800
(804) 775-0577 • Fax: (804) 775-0544 • Website: http://www.vsb.org

CERTIFICATION OF ATTENDANCE (FORM 2)

Pursuant to Paragraph 17B, C and D of Section IV, Part Six, Rules of the Supreme Court of Virginia. The information provided will be available for inspection by the public under the Freedom of Information Act. Complete all requested information and sign certification.

Contact the Sponsor First for Virginia Approval Information and Form.

When provided, also attach any sponsor generated attendance form. The Virginia certification of attendance and/or Virginia course approval ID# has been provided to the sponsor for all Virginia approved programs.

Member Name: _____ VSB Member Number: _____

Official Address of Record: _____

_____ Daytime Phone (_____)_____

_____ E-Mail Address: _____

City State Zip

Course ID Number:

Sponsor:

Course/Program Title:

CLE (Ethics) Credits: ( ) Ethics

CERTIFICATION

Date(s) Attended: _____ Location(s): _____

Delivery method: _____ Live or Group Video _____ *Live Telephone or live Webcast _____ *Videoconference or Satellite _____*Internet on-demand _____*CD-rom _____ Video/DVD _____ Audio/CD _____ Other_____

Setting: _____Group (with other attendees) _____* Individual attendance at my location

Distance Learning Programs Require Attendance Form Verified and Provided by the Course Sponsor when done in an Individual Setting. Video and Audio programs require at least 2 attorneys in attendance

By my signature below I certify

__ I attended a total of _____ (hrs/mins) of **approved CLE**, of which (_____) (hrs/mins) were in **approved Ethics**.
__ The sessions I am claiming had written instructional materials to cover the subject.
__ I participated in this program in a setting physically suitable to the course.
__ I was given the opportunity to participate in discussions with other attendees and/or the presenter.
__ I have not received credit for this program before. I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.
__ I understand that a materially false statement shall be subject to appropriate disciplinary action.

NOTE: Credit is awarded for actual time in attendance rounded to the nearest half hour.

_____ _____

Date Signature

You may certify your MCLE attendance online at http://www.vsb.org.
MCLE Completion Deadline—October 31
Deadline to Certify MCLE Approved Hours—December 15
A $100 fee will be charged for failure to comply with either deadline.

Virginia MCLE Board
Virginia State Bar
707 East Main Street, 15th Floor
Richmond, VA 23219-2800
(804) 775-0577 • Website: http://www.vsb.org

CERTIFICATION OF TEACHING (FORM 3)

Pursuant to Paragraph 17B, C and D of Section IV, Part Six, Rules of the Supreme Court of Virginia. The information provided will be available for inspection by the public under the Freedom of Information Act. Complete all requested information and sign certification.

Contact the Sponsor First for Virginia Approval Information and Form.
When provided, also attach any sponsor generated attendance form. The Virginia certification of attendance and/or Virginia course approval ID# has been provided to the sponsor for all Virginia approved programs.

Member Name: _____ VSB Member Number: _____

Official Address of Record: _____

_____ Daytime Phone (_____)_____

_____ E-Mail Address: _____
City State Zip

Course ID Number:

Sponsor:

Course/Program Title:

CLE (Ethics) Credits: ( ) Ethics

CERTIFICATION

Date(s) of Teaching: _____ Location(s): _____

ONLY SESSIONS WITH WRITTEN INSTRUCTIONAL MATERIALS ARE APPROVABLE FOR CREDIT

❑ My teaching segment was _____ (hrs/mins) of CLE, of which (_____) (hrs/mins) were in Ethics.

❑ In addition, I attended *other* segments totaling _____ (hrs/mins) of CLE, of which (_____) (hrs/mins) were in Ethics.

❑ I spent _____ hours preparing for teaching my segment of the course.

NOTE: No more than four (4) hours of preparation credit may be claimed per one hour of instructional time in your presentation, and no more than eight (8) hours total for any one course.

_____ _____
Date Signature
A materially false statement shall be subject to appropriate disciplinary action.

MCLE Completion Deadline—October 31
Deadline to Certify Attendance at All MCLE Hours Taken During Compliance Period—December 15
A $100 fee will be charged for failure to comply with either deadline.

Virginia MCLE Board
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219-2800
(804) 775-0577
Website: http://www.vsb.org

BOARD USE ONLY

Course ID# _____ **Letter#** _____

CLE hours _____ **Decision** _____

Ethics hours_____ **Decision** _____

_____

ATTORNEY APPLICATION FOR CLE COURSE APPROVAL (FORM 4)
MCLE Deadline October 31

1. Applicant: VSB member # _____ Course Sponsor:_____

   Name: _____ Sponsor Representative:_____

   Address: _____ Address: _____

   _____ _____

   Daytime phone: (_____)_____ Phone: ( )_____

   FAX #: (_____)_____ FAX #: _____

   E-mail Address: _____ E-mail Address: _____

2. Title of Program: _____

3. Total CLE hours: _____ including (____) Ethics hours (Only sessions with written materials are approvable)
   To qualify for credit Ethics components must be clearly identified on the course schedule and total a minimum of 30 minutes.
   A SAMPLE OF THE ETHICS MATERIAL DISTRIBUTED MUST BE ATTACHED.

4. CIRCLE all that apply to this presentation:
   TYPE: LIVE *ON-DEMAND
   SETTING: Group Setting *Delivered to Individuals In-house **ATTENDANCE:** OPEN CLOSED
   DELIVERY METHOD: Speaker in Room *Internet *Telephone/Webcast *CD-Rom Video Audio
   Satellite/Videoconference Other: _____ ****See Opinion 16***

5. Date(s): _____
   Location(City & Venue): _____

6. Course Registration Fee: $ _____ **TARGET AUDIENCE:** CLIENTS _____ ATTORNEYS _____ OTHER _____

7. **REQUIRED ATTACHMENTS: MCLE Board will only consider applications with required attachments.**
   a. Program Time Schedule or Agenda (times are required to compute approvable credit hours)
   b. Table of Contents AND a sample of materials from each session (2-3 pgs each)

8. Description of materials: **Total pages** _____ Printed _____ Other _____
   Materials are distributed: Before program _____ At program _____ Other _____
   I am only requesting credit for sessions which had substantive written materials YES____ Unknown_____

9. Physical Facilities: Conference room _____ Classroom _____ Theater style _____ Writing surface _____

10. Number of attorneys present or anticipated: _____ (Clients: _____) Number of non-attorneys: _____

11. If the program does not cover a recognized legal topic, attach a statement of how this course relates to your practice.

12. **ATTENDANCE CERTIFICATION:**
    I certify that I attended _____ CLE hours, including (_____) Ethics hours, of the above-named course.

13. **Attorneys MUST FILE A $50 FEE ONLY WITH IN-HOUSE AUDIO/VIDEO or CD-ROM APPLICATION.**
    Make payable to Treasurer of Virginia.

Signature _____
(VSB Member Applicant)

FAX & E-MAIL TRANSMISSIONS NOT ACCEPTED
Please allow 4 to 6 weeks for board decision on all applications

A materially false statement shall be subject to appropriate disciplinary action.

DEFINITION OF COURSE TYPES AND EXPLANATION OF VIRGINIA CRITERIA FOR APPROVAL

OPEN—Course advertised and open to all attorneys

CLOSED—Course open only to law firm, in-house law department, government agency, or members of a professional organization.

LIVE—Instructor and attendees participate simultaneously

IN-HOUSE—Program offered to attorneys within a firm, corporation or government agency.

GROUP SETTING—Program offered in group of 2 or more attorneys. (Where individual attendees are conferenced into a program you must meet Opinion 16 standards)

TELECONFERENCE, SATELLITE, VIDEOCONFERENCE, OR LIVE WEBCAST—To meet Virginia regulations the course must
(1) have a means to connect audience with faculty and/or other attendees to allow for live interaction and discussion.
(2) written materials must be available to participants prior to the broadcast.
(3) have attendance tracking - See OPINION 16

VIDEO, AUDIO, CD-ROM—To meet Virginia regulations the course must
(1) have at least 2 attorney participants (not restricted to only VA attorneys)
(2) be conducted in an educational setting (conference room)
(3) have written materials provided to each participant prior to the presentation.

INTERNET, CD-ROM ON-DEMAND programming—(SELF-STUDY NOT APPROVABLE.)
To meet Virginia regulations the course must
(1) be in audio or audio/video format. Text based courses are not approvable
(2) allow the participant to interact with the presenter and/or other attendees
(3) have written materials available to participants for reference during and subsequent to program
(4) have attendance tracking—See OPINION 16

INSTRUCTIONS FOR COMPLETING ATTORNEY APPLICATION FOR CLE APPROVAL (FORM 4)
MCLE DEADLINE—October 31

1. Complete attorney information on left hand side. Complete identifying sponsor information on right hand side of application.
2. Give Title of Program
3. **Total CLE hours** are the number of 60 minute hours of course presentation excluding introductory remarks, breaks, meals, closing remarks. **ONLY SESSIONS WITH WRITTEN INSTRUCTIONAL MATERIALS ARE APPROVABLE.** Keynote, mealtime speakers, judicial presentations or roundtable discussions are considered for CLE credit only when written handout materials are provided to appropriately cover the topic.

   Total Ethics hours are the number of 60 minute hours devoted to Ethics as it applies to Attorneys. Ethics relating to other professions, government employees, business professionals or general ethics are not approvable for Ethics credit. The Ethics time segment must be clearly defined on the course schedule and be accompanied by specific ethics materials. A sample of the ethics material must be included with this application. (See Opinion #13 for approvable ethics topics)
4. Indicate type of course, setting and delivery method specific to your application. Presentations resulting from the rental or purchase of video or audio programs require 2 or more attorneys in attendance and accompanied by appropriate written instructional materials. **Please contact the MCLE office for special instructions and forms.**
5. Give all dates and locations. The MCLE completion period is November 1–October 31. Courses are approved for the compliance period they are presented and **must be reported during that period**.
6. Enter the price you paid for course attendance. Target audience: Courses must be directed primarily to attorneys and address a legal topic to be approved. Special approval is given for non-legal courses if pertinent to the attorney's practice. (See #11 below)
7. **Warning!** Application must include the following:
   a. Program time schedule or agenda (TIMES ARE NEEDED TO COMPUTE APPROVABLE CREDIT HOURS)
   b. Table of contents, if available **AND** a sample of the written material for each session (2–3 pages) distributed to the attendees at the program. Ethics materials must be submitted to receive ethics credit. (See Opinion #14 on Written Materials) The MCLE Board reserves the right to request a complete set of materials.
   d. Applicable fees for in-house audio/video or CD-Rom program.
8. **Description of materials**—Give approximate total pages and check type of materials and when distributed. **ONLY SESSIONS WITH WRITTEN INSTRUCTIONAL MATERIALS ARE APPROVABLE**
9. Physical Facilities—select applicable type.
10. Enter approximate number of attorneys and non-attorneys present or anticipated.
11. Attach a statement of how a non-legal course relates to your practice if applicable.
12. Complete certification of attendance. For teaching credit please use the Form #3 Certification of Teaching.
13. In-house Video, Audio or CD-Rom programs require a $50 Application fee. Make payable to Treasurer of Virginia.

CLIENTS' PROTECTION FUND RULES
RESOLUTION OF THE COUNCIL OF THE VIRGINIA STATE BAR

Establishing a Clients' Protection Fund

WHEREAS, it is the desire of the lawyers of Virginia acting through the State Bar to preserve and protect the honor and integrity of the profession, and;

WHEREAS, it is recognized that despite the high standards of ethical conduct required of and generally maintained by the Virginia State Bar, a member of the Virginia State Bar may engage in dishonest conduct and that such conduct may result in losses to clients, and;

WHEREAS, it is the desire of the Virginia State Bar to alleviate the injury to persons so sustaining loss or damage in certain cases.

NOW, THEREFORE, BE IT RESOLVED BY THE VIRGINIA STATE BAR:

1. That there is hereby established a special Board of the Virginia State Bar to be known as the Clients' Protection Fund Board (hereinafter called the "Board") whose function it shall be to receive, hold, manage and distribute, pursuant to the terms herein contained, such funds as may from time to time be appropriated to it by the Council of the Virginia State Bar or through voluntary contribution or otherwise for the purpose of maintaining the integrity and protecting the good name of the legal profession by reimbursing to the extent deemed proper and feasible by the Board losses caused by the dishonest conduct of members of the Virginia State Bar.

2. The Board shall consist of fourteen members, one of whom shall be a nonlawyer, appointed by the Council. One member shall be from each of the ten (10) Disciplinary Districts in Virginia, and four (4) shall be appointed from the State at large. All appointments shall be for a term of three years. No appointees shall serve more than two consecutive full terms until after the expiration of at least one year. Vacancies shall be filled by appointment by the President of the Virginia State Bar for the unexpired term.

3. The Board shall be authorized to consider petitions for reimbursement of losses arising after January 1, 1976 and caused by the dishonest conduct of a member of the Virginia State Bar, acting either as a lawyer or as a fiduciary in the matter in which the loss arose except to the extent to which they are bonded or to the extent such losses are otherwise covered, provided such member has been disbarred or suspended from the practice of law pursuant to any provision of Paragraph 13 of Part 6, Section IV of the Rules of the Supreme Court of Virginia, has voluntarily resigned from the practice of law in Virginia, has died, has been adjudicated incompetent, has been the subject of a bankruptcy case that would stay, reduce or discharge the claims of the lawyer's past or present clients, or whose whereabouts is unknown to the Virginia State Bar. The Board shall be authorized and empowered to admit or reject such petitions in whole or in part, and the Board shall have complete discretion in determining the order, extent, and manner of payment. On establishing the Clients' Protection Fund, the Virginia State Bar does not create or acknowledge any legal responsibility for the acts of individual lawyers in the practice of law. All reimbursements of losses from the Clients' Protection Fund shall be in the sole discretion of the Board and not as a matter of right. No client or member of the public shall have any right in the Clients' Protection Fund as a third party beneficiary or otherwise. No attorney shall be compensated for presenting a petition except as authorized by the Board.

4. The Board shall operate pursuant to rules of procedure approved by the Council of the Virginia State Bar for the management of the Board's funds and affairs, for the presentation of petitions, and the processing and payment thereof.

5. All sums appropriated by the Council of the Virginia State Bar for the use of the Board shall be held and invested as a separate account known as Clients' Protection Fund, subject to the written direction of the Board under written Board rules approved by the Council of the Virginia State Bar; the interest or other income thereby received to be added to and automatically become a part of the Fund.

6. The Board may use or employ the Clients' Protection Fund for any of the following purposes within the scope of the Board's objectives, as heretofore outlined:

   (a) To make payments or reimbursements on approved petitions as herein provided to clients and members of the public;

(b) To purchase insurance to cover such losses in whole or in part, provided that such insurance is obtainable at reasonable costs and is deemed appropriate and provided that the purchase of such insurance is approved by the Council of the Virginia State Bar;

(c) To reimburse to the Virginia State Bar those costs of receiverships initiated by the Virginia State Bar occasioned by the need for the receiver to administer, pursue or defend assets, the recovery or preservation of which would inure to the benefit of one or more clients or other members of the public who have suffered losses as a result of the dishonest conduct of the Virginia State Bar member who is the subject of the receivership, acting as either a lawyer or as a fiduciary in the matter or matters in which the loss or losses occurred.

7. The administrative expenses of the Board shall be paid out of the general fund of the Virginia State Bar in accordance with policies established by the Council. However, the board annually at its discretion may contribute to the cost of administration by designating a sum to be paid out of the Clients' Protection Fund to the Virginia State Bar.

8. The Board shall provide a full report of its activities at least yearly to the Council of the Virginia State Bar, and it shall make such other report of its activities and give only such publicity to same as the Council may deem advisable.

9. The Council at any time may abolish the Board and the Fund. In the event of such abolition, all assets of the Fund shall be and remain the property of the Virginia State Bar to be used for its general purposes, as determined by the Council.

10. The financial condition of the Clients' Protection Fund shall be reviewed annually in conjunction with the State Bar's annual budgeting process. The Council of the Virginia State Bar shall make appropriations adequate to maintain the funding of the Clients' Protection Fund at a reasonable level, provided, however, that no appropriation may be made which will increase the assets of the fund to an amount in excess of $5,000,000.00.

11. Payment shall be made from the Fund only upon condition that the Virginia State Bar receive a *pro tanto* assignment from the payee of the payee's assignable rights against the lawyer or others involved, their personal representatives, heirs, devisees and assigns, and upon condition that the Fund shall be entitled to reimbursement on such terms as the Board may deem proper under the circumstances, including reimbursement of costs incurred in prosecuting a claim against said lawyer, his personal representatives, etc. The net proceeds collected by reason of such assignment shall be for the sole benefit of the Fund and applied thereto, and enforcement of this right shall be within the sole discretion of the Board.'

12. The Board may give such publicity to awards made or to the work, procedures, and existence of the Clients' Protection Fund as it shall deem proper, except that in no case shall the name of the payee be stated in any release to the media. Copies of all releases shall be sent to the Executive Director of the Virginia State Bar to ensure conformity with this rule. No publicity shall be given to pending claims without the express approval of the Council of the Virginia State Bar.

RULES OF PROCEDURE
OF THE CLIENTS' PROTECTION FUND OF THE VIRGINIA STATE BAR

I. Definitions

For the purpose of these Rules of Procedure, the following definitions shall apply:

1. The "BOARD" shall mean the Clients' Protection Fund Board.

2. The "FUND" shall mean the Clients' Protection Fund of the Virginia State Bar.

3. A "LAWYER" shall mean one who, at the time of the act complained of, was a member of the Virginia State Bar, was domiciled in Virginia, and was actually engaged in the practice of law in Virginia. The fact that the act complained of took place outside of the State of Virginia does not necessarily mean that the Lawyer was not engaged in the practice of law in Virginia.

4. A "PETITIONER" or "CLAIMANT" shall mean a person or entity that applies to the Clients' Protection Fund Board for payment pursuant to the rules applicable to the Fund.

5. "REIMBURSABLE LOSSES" are limited to actual, out-of-pocket or quantifiable losses, supported by documentation, of money or other property that meet the following tests:

(a) The conduct which occasioned the loss occurred on or after January 1, 1976.

(b) The loss must be caused by the dishonest conduct of the Lawyer and shall have arisen out of and by reason of a lawyer-client relationship or a fiduciary relationship between the Lawyer and the Claimant.

(c) The Lawyer has been disbarred or suspended from the practice of law pursuant to any provision of Paragraph 13 of Part 6, Section IV of the Rules of the Supreme Court of Virginia, has voluntarily resigned from the practice of law in Virginia, has died, has been adjudicated incompetent, has been the subject of a bankruptcy case that would stay, reduce or discharge the claims of the Lawyer's past or present clients, or whose whereabouts is unknown to the Virginia State Bar.

5.1 The following shall be excluded from "REIMBURSABLE LOSSES":

(a) Losses of spouses, other close relatives, partners, associates and employees of Lawyers causing the losses;

(b) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated;

(c) Losses of any financial institution which are recoverable under a "banker's blanket bond" or similar commonly available insurance or surety contract;

(d) Losses by any business entity controlled by the Lawyer;

(e) Losses incurred by any governmental entity or agency;

(f) Losses occasioned by a loan or an investment transaction with a Lawyer, unless it arose out of and in the course of the attorney-client relationship and but for the fact that the dishonest attorney enjoyed an attorney-client relationship with the Claimant such loss could not have occurred. In considering whether that standard has been met, the following factors will be considered:

1. The disparity in bargaining power between the attorney and the client and their respective educational backgrounds and business sophistication.

2. The extent to which the attorney-client relationship overcame the normal prudence of the applicant.

3. The extent to which the attorney, by virtue of the attorney-client relationship with the applicant, became privy to information as to the applicant's financial affairs.

4. Whether a principal part of the service arose out of a relationship requiring a license to practice law.

(g) Claims by a Petitioner for damages for a cause of action in which a Lawyer represented a Petitioner and that never resulted in a settlement or judgment;

(h) Claims for interest, late fees, penalties, surcharges or other consequential damages, even if such damages arise out of Reimbursable Losses.

6. "DISHONEST CONDUCT" may include, but is not necessarily limited to

(a) Any act committed by a Lawyer in the nature of theft, conversion embezzlement or withholding of money or property from its rightful owner, recipient or person entitled to receive such money or property;

(b) Any act committed by a Lawyer in the nature of failure, refusal or inability to refund unearned fees received in advance where the Lawyer performed no legal services or such an insignificant service that the failure, refusal or inability to refund the unearned fees constitutes a wrongful taking or conversion.

6.1 The Board shall exercise its discretion in deciding whether a Lawyer committed Dishonest Conduct. In making its determination, the Board may consider as compelling evidence of such Dishonest Conduct, in addition to other factors:

(a) an order from any court or disciplinary tribunal disciplining a Lawyer for the same act or conduct alleged in a Petition or otherwise finding that a Lawyer committed Dishonest Conduct; or

(b) a final judgment imposing civil or criminal liability upon a Lawyer for such conduct.

II. Application for Reimbursement

1. The Board shall prepare a form of Petition for reimbursement; in its discretion the Board may waive a requirement that a Petition be filed on such form.

2. At a minimum, the form shall require the Petitioner to state:

   (a) The name, address and telephone number of the Petitioner.

   (b) The name and last known address of the Lawyer allegedly responsible for the claimed loss.

   (c) The amount of the loss claimed

   (d) Documentation supporting the loss, including proof of payment for monies the Petitioner or anyone on his behalf paid directly to the Lawyer.

   (e) The date or period of time the alleged loss occurred.

   (f) A description of the efforts by the Petitioner to recover the alleged loss from the Lawyer or from other sources of payment besides the Virginia State Bar.

   (g) The notarized signature of the Petitioner.

3. The Petition shall contain the following statement in bold type:

   "IN ESTABLISHING THE CLIENTS' PROTECTION FUND, THE VIRGINIA STATE BAR DID NOT CREATE OR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL LAWYERS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENTS' PROTECTION FUND SHALL BE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT AS A MATTER OF RIGHT. NO CLIENT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENTS' PROTECTION FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE."

4. Petitions shall be submitted to the central office of the Virginia State Bar in Richmond, Virginia. If the staff of the Virginia State Bar determines that the Petition complies with the minimum requirements of these Rules, the Petition or informative summary thereof shall be transmitted to the Chair of the Board and each member of the Board.

III. Processing Petitions

1. The Chair of the Board or such bar staff as the Chair designates shall cause each Petition to be sent to a member of the Board or other member of the Virginia State Bar for investigation and report. A copy shall be sent to the Lawyer at his address of record maintained by the membership department of the bar. An additional copy of the Petition may also be sent to the Lawyer at an address other than the Lawyer's address of record. The Lawyer or his representative may respond to the Petition within thirty (30) days of the date of the letter or letters transmitting the Petition to him.

   Petitions shall be assigned considering the workload of each Board member, and, when possible, by giving preference for assignment to a Board member who works or lives in the jurisdiction in which the Lawyer maintained his office, place of employment, or address of record with the Virginia State Bar.

2. A member to whom a Petition is referred for investigation shall conduct such investigation as to him seems necessary and desirable in order to determine whether the same is for a Reimbursable Loss and in order to guide the Board in determining the extent, if any, to which the loss should be reimbursed from the Fund. The Clerk of the Disciplinary System, District Committees, Disciplinary Board, and Office of Bar Counsel of the Virginia State Bar shall allow such member to have access, during such investigation, to the files and records, if any, pertaining to the Petition. Any information obtained by the member from these files and records shall be used solely by or for the Clients' Protection Fund Board.

3. When, in the opinion of the member to whom the Petition has been referred, the Petition is clearly not for a reimbursable loss, no further investigation need be conducted, but a report with respect to such Petition shall be made by the member to whom the Petitioner was referred, as hereinafter specified.

4. Reports with respect to Petitions shall be submitted by the members to whom they have been referred for investigation to the Chair of the Board. Copies of all reports shall be distributed to all Board members for review prior to each meeting.

5. No Petition with respect to which an inadequate opportunity for investigation has been afforded need be considered by the Board for reimbursement in the year in which such claim is presented.

6. In those instances where the reporting member in his report suggests or any other member of the Board, after studying the reports of Petitions to be processed, requests that the Board hear evidence, the Board shall hear the Petitioner, the attorney complained of and such other evidence as may be presented. Absent such recommendation or request, Petitions may be processed on the basis of information contained therein and in the report of the member who investigated such Petitions. In all cases, the attorney complained of or his personal representative will be given an opportunity to be heard by the Board if he so requests. The Petitioner shall be given an opportunity to be heard by the Board if the attorney complained of exercises his right to be heard by the Board.

7. The Board shall, in its sole discretion, determine the amount of loss, if any, for which any Petitioner shall be reimbursed from the Fund. In making such determination, the Board shall consider *inter alia*, the following:

   (a) Any conduct of the Petitioner which contributed to the loss.

   (b) The loss to be paid to any one Petitioner shall not exceed $50,000 for losses incurred on or after July 1, 2000, or $25,000 for losses incurred prior to July 1, 2000. For purposes of this provision, the Board may regard two or more persons, firms or entities as one Petitioner with respect to a Lawyer's dishonest conduct in handling a given matter where the facts and entities are found to justify such a conclusion.

   (c) The total amount of losses reimbursable hereunder on account of the misconduct of any one lawyer or association of lawyers (including, without limitation, a law firm, professional corporation, or an office-sharing arrangement among lawyers) shall be limited to ten percent (10%) of the net worth of the Clients' Protection Fund at the time the first claim is made. In the event of multiple claims on account of the misconduct of any one lawyer or association of lawyers, claims may be considered in any order or grouping which the Board, in its discretion, finds appropriate, taking into account the equities and timeliness of each claim, and no further payment shall be made in respect to misconduct of any one lawyer or association of lawyers once the ten percent limit has been reached.

   (d) The total amount of reimbursable losses in previous years for which payment has not been made and the total assets of the Fund.

   (e) The Board may, in its sole discretion, allow further payment in any year on account of a reimbursable loss allowed by it in prior years which has not been fully paid; provided such further payment would not be inconsistent or in conflict with any previous determination with respect to such loss.

   (f) No payment shall be made upon any Petition, a summary of which has not been submitted to the members in accordance with these Rules of Procedure. No payment shall be made to any Petitioner unless said payment is duly approved by the Board.

   (g) No claim shall be considered by the Board unless the same shall have been filed within seven years from the date of the occurrence giving rise to the claim, or within one year after the first occurrence of one of the events set forth in Paragraph I.4.(c), whichever date is later.

   (h) The Board may make a finding of dishonest conduct for purposes of adjudicating a claim. Such a determination is not a finding of dishonest conduct for purposes of professional discipline.

8. A member who has or has had a lawyer-client relationship or financial relationship with a Claimant or Lawyer who is the subject of a claim shall not participate in the investigation or adjudication of a claim involving that Claimant or Lawyer. A member with any other past or present relationship with a Claimant or the Lawyer whose alleged conduct is the subject of the claim, shall disclose such relationship to the Board and, if the Board deems appropriate, that member shall not participate in any proceeding relating to such claim.

9. No person shall have the legal right to reimbursement from the Fund. The claimant or respondent may request reconsideration in writing within 30 days of the denial or determination of the amount of a claim. If the claimant or respondent fails to make a request or the request is denied, the decision of the Board is final. There shall be no appeal from a decision of the Board.

10. A Lawyer whose dishonest conduct has resulted in reimbursement to a claimant shall make restitution to the Fund including interest and the expense incurred by the Fund in processing the claim.

IV. Assignment When Payment Made

In the event payment is made from the Fund to a Petitioner, the Fund shall require an assignment from the Petitioner of such claim as he may have against the Lawyer complained of and may bring such action thereon in the name of the Petitioner as is deemed advisable against the Lawyer, his assets or his estate. The Petitioner shall be required to execute such an assignment. Prior to the commencement of an action by the Board, it shall advise the Petitioner thereof at his last known address. The Petitioner may then join in such action to press a claim for his loss in excess of the amount of the payment made by the Fund or for any other claims. The Board may impose such other conditions and requirements as it may deem appropriate in connection with payment to any Petitioner.

V. Payment of Receivership Costs

Costs of any Virginia State Bar receivership occasioned by the need for the receiver to administer, pursue or defend assets, the recovery or preservation of which would inure to the benefit of one or more clients or other members of the public who have suffered losses as a result of the dishonest conduct of the Virginia State Bar member who is the subject of the receivership, acting as either a lawyer or as a fiduciary in the matter or matters in which the loss or losses occurred, shall be documented and certified to the Board by the Virginia State Bar staff for consideration of payment from the Fund by the Board as an agenda item at a meeting of the Board.

VI. Meeting of the Board

1. The Board shall meet annually after the close of the fiscal year, but not later than September. In addition, the Board shall meet from time to time upon call of the Chair, or of any two members of the Board.

2. The members shall be given not less than 15 days' written notice of the time and place of the annual meeting and not less than 5 days' written notice of each special meeting. Notice of any meeting may be waived by a member either before or after the meeting.

3. A quorum at any meeting of the Board shall be six (6) members. No action shall be taken by the Board in the absence of a quorum; except that any action which might be taken at a meeting may be taken without a meeting if a consent in writing, setting forth the action so to be taken, shall be signed before such action by all the members of the Board.

4. Written minutes of each meeting shall be prepared and permanently maintained.

5. The Chair of the Board shall be elected by a majority of the Board at each annual meeting; his term shall extend until the next annual meeting of the Board and until his successor is elected and qualified. Should a vacancy occur in the office of Chair, such vacancy shall be filled by like vote of the members of the Board at the meeting next following the occurrence of the vacancy.

VII. General Purposes

These Rules of Procedure shall be liberally interpreted and, in any given case, the Board may waive technical adherence to these Rules of Procedure in order to achieve the objectives of the Fund, as contained in the enabling Resolution establishing the Fund.

VIII. Authorized Investments

Investment of monies of the Clients' Protection Fund shall be restricted to the following:

(a) Interest-bearing deposits (including as well certificates of deposit) in federally insured banks and savings institutions located in the state of Virginia.

(b) Direct obligations of the Commonwealth of Virginia and the United States Government, and securities of entities created by Congress and authorized to issue such securities; provided that no such deposit, certificate or obligation shall have a maturity beyond ten years from the date of the investment; and provided further that the interest, discount or other gain or income realized from any such investment, net of any bank or brokerage charges incurred in connection therewith, shall automatically become a part of the Fund.

IX. Amendments

These Rules may be changed at any time by a majority vote of the Board at a duly held meeting at which a quorum is present, and subject to the approval of the Council of the Virginia State Bar.

Regulations for the Approval of Financial Institutions as a Depository for Attorney Trust Accounts in Virginia

Purpose

The Virginia Supreme Court has adopted a requirement that all attorneys who practice law in the Commonwealth of Virginia maintain trust accounts for the deposit of client funds in financial institutions approved by the Virginia State Bar. *See* Rules of Virginia Supreme Court, Part 6, § II, Virginia Rule of Professional Conduct 1.15, and any successor provisions. The Virginia Supreme Court has directed the Virginia State Bar to adopt rules and regulations governing the approval and termination of financial institutions' approved status as depositories for attorney trust accounts. Pursuant to this authority, the Virginia State Bar has adopted the following regulations.

Regulation 101: Definitions

"Financial institution" includes regulated state or federally chartered banks, savings institutions and credit unions that are properly licensed and authorized to do business, have federal insurance on deposits, and have entered into a Trust Account Notification Agreement with the Virginia State Bar.

"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 are available.

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a drawee bank before its midnight deadline.

"Attorney trust account" or "trust account" means an account, including an escrow account, maintained in a financial institution for the deposit of funds received or held by an attorney or law firm on behalf of a client, an estate or a ward.

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

"Law firm" includes a partnership of attorneys; a professional limited liability or nonprofit corporation formed for the purpose of practicing law; and any combination of entities engaged in the practice of law. In the case of a law firm with offices in this Commonwealth and other jurisdictions, these regulations apply only to the offices in this Commonwealth, to trust accounts in other jurisdictions holding funds of clients who are located in this Commonwealth, and to trust accounts in other jurisdictions holding client funds from a transaction arising in this Commonwealth.

"Insufficient funds" refers to a state of affairs in which there is an insufficient collected balance in an account as reflected in the financial institution's accounting records, so that an otherwise properly payable item presented for payment cannot be paid without creating an overdraft in the account.

"Dishonored" shall refer to instruments that have been dishonored because of insufficient funds as defined above.

Regulation 102: Approval of Financial Institution

The Virginia State Bar shall approve as a depository for attorney trust accounts any financial institution that meets the requirements stated in these regulations and executes the Trust Account Notification Agreement, which is attached hereto and made a part of these regulations.

Regulation 103: Cancellation of Trust Account Notification Agreements

No Trust Account Notification Agreement filed by a financial institution under these regulations shall be canceled except upon thirty (30) days written notice to the Virginia State Bar. Notice shall be sent by certified mail addressed to Bar Counsel, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, Virginia 232192800.

These regulations were approved by the Virginia State Bar on the 17th day of June, 1999, to become effective July 1, 1999.

Trust Account Notification Agreement

This Trust Account Notification Agreement ("Agreement") is made this _____ day of _____ , by and between the Virginia State Bar and _____ , ("Financial Institution").

WITNESS:

The undersigned, an officer of the Financial Institution executing this Agreement, being duly authorized to bind said institution by this Agreement, hereby applies to be approved as a depository to receive escrow, trust, or client funds, as defined in Virginia Rule of Professional Conduct 1.15, or any successor provision(s), from attorneys for deposit in what are hereinafter referred to as "Trust Accounts." The Financial Institution agrees to comply with the requirements of RPC 1.15, or any successor provisions, as more specifically set forth below:

1. **Notification to Attorneys or Law Firm.** To notify the attorney or law firm promptly of an overdraft in any Trust Account or the dishonor for insufficient funds of any instrument drawn on any Trust Account held by it.

2. **Notification to Bar Counsel.** To report the overdraft or dishonor to Bar Counsel of the Virginia State Bar, as set forth in Paragraph 4 of this Agreement.

3. **Audit of Trust Account.** To provide reasonable access to all records of the Trust Account if an audit of such account is ordered pursuant to court order, or upon receipt of a subpoena therefor.

4. **Form of Report.** That all such reports shall be substantially in the following format:

   (a) In the case of a dishonored instrument, the report shall be identical to the notice of dishonor customarily forwarded to the depositor and shall include the name and address of the depositor notified, as well as a copy of the dishonored instrument, if such copy is normally provided to the depositor. The report shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor.

   (b) In the case of instruments that are presented against insufficient funds in a Trust Account, but are honored by the financial institution, the report shall be in writing and in the form titled "Report of Attorney Trust Account Overdraft," which is attached to and made of part of these regulations, and identifies the financial institution reporting the overdraft, the account number, the name and address of the lawyer or law firm account holder on which the check was drawn, the date of the overdraft, the amount of the overdraft, the name of the person making the report, their address and telephone number and the date. The report shall be mailed within five (5) banking days after the date of presentation for payment against insufficient funds.

5. **Consent of Attorneys or Law Firms.** The Financial Institution may require, as a condition to opening an attorney Trust Account, the written consent of the attorney or law firm opening such account to the notification to Bar Counsel of the Virginia State Bar as set forth in Paragraph 2 of this Agreement.

6. **Change of Name or Corporate Form.** If a Financial Institution changes its name, merges or otherwise affiliates with, or is acquired by another entity, the successor Financial Institution shall promptly notify Bar Counsel of the change and whether the successor institution wishes to serve as an approved depository for attorney Trust Accounts.

7. **Termination of Agreement.** This Agreement may terminate upon thirty (30) days notice from the Financial Institution in writing to Bar Counsel that the institution intends to terminate the Agreement on a stated date and that copies of the termination notice have been mailed to all attorneys and law firms that maintain Trust Accounts with the Financial Institution or any branch thereof. Notice to the Bar Counsel shall be sent by certified mail to the Virginia State Bar, Attention: Bar Counsel, 707 E. Main Street, Suite 1500, Richmond, Virginia 23219 2800.

8. **Binding Effect.** This Agreement shall be binding upon the Financial Institution and any branch thereof receiving Trust Accounts.

9. **Inclusion of Rules and Regulations by Reference.** The Rules of the Virginia Supreme Court and the regulations adopted by the Virginia State Bar governing the approval and termination of financial institutions' approved status as depositories for attorney Trust Accounts are included herein by reference and made a part of this Agreement.

IN WITNESS WHEREOF, the Financial Institution has executed this Agreement on the date and year written above.

ATTEST:

_____

Name of Financial Institution

_____

Address of Financial Institution

_____

By_____

Officer's Name

(Please print)

_____

Officer's Signature

_____

Corporate Office Held

Virginia State Bar
Regulations under the Virginia Consumer Real Estate Settlement Protection Act

15 VAC 5-80-10. Authority; Applicability, Scope.

These Regulations are issued, effective July 1, 1997, by the Virginia State Bar pursuant to and under the authority of the Virginia Consumer Real Estate Settlement Protection Act, Title 6.1, Chapter 1.3, *Code of Virginia*, as enacted by the 1997 session of the General Assembly of Virginia. The Act does not apply to licensed attorneys who provide escrow, closing or settlement services solely for public bodies, as defined in §§ 11-37, *Code of Virginia*; thus, such attorneys are exempt from the registration, certification and separate fiduciary trust account requirements set forth in these Regulations.

CRESPA, and therefore these Regulations, applies to transactions involving the purchase of or lending on the security of real estate located in Virginia containing not more than four residential units. In addition, effective July 1, 1999, a lay settlement agent may provide escrow, settlement and closing services for transactions involving any real property located in Virginia, provided the agent is registered under and in compliance with CRESPA. See the Real Estate Settlement Agent Registration Act, *Va. Code* §§ 6.1-2.30 through 6.1-2.32 (1999). Lawyer settlement agents are not required to register under CRESPA unless the transaction involves the purchase of or lending on the security of real estate located in Virginia containing not more than four residential dwelling units.

15 VAC 5-80-20. Definitions.

The following words and terms when used in these Regulations shall have the following meanings, unless the context clearly indicates otherwise.

"*Attorney*" means a person licensed as an attorney under Chapter 39 (§§ 54.1-3900 et. seq.), of Title 54.1 of the *Code of Virginia*, and who is an active member of the Virginia State Bar in good standing under the Rules of the Virginia Supreme Court.

"*Bar*" means the Virginia State Bar.

"*Board*" means the Virginia Real Estate Board.

"*CRESPA*" means the Virginia Consumer Real Estate Settlement Protection Act. Unless otherwise defined herein, all terms in these Regulations shall have the meanings set forth in CRESPA.

"*Disciplinary Board*" means the Virginia State Bar Disciplinary Board.

"*First dollar coverage*" means an insurance policy which obligates the company issuing the policy to pay covered claims in their entirety, up to the policy limits, regardless of the presence of a deductible amount to which the company may be entitled as a reimbursement from the insured.

"*SCC*" means the Virginia State Corporation Commission.

"*These regulations*" means 15 VAC 5-80-10 et seq., Regulations under the Virginia Consumer Real Estate Settlement Protection Act.

15 VAC 5-80-30. Registration; Reregistration; Required Fee.

Every licensed attorney now providing or offering, or intending to provide or offer, escrow, closing or settlement services as a settlement agent with respect to real estate transactions in Virginia shall register with the Bar using the registration form available from the Bar for that purpose. Settlement agents beginning to provide or offer such services shall register with the Bar prior to doing so. The registration requirement in this paragraph shall not apply to attorney settlement agents unless they provide or offer to provide escrow, settlement and closing services for real estate subject to CRESPA, i.e., real estate containing not more than four residential dwelling units. Thus, for example, attorneys who handle only commercial real estate transactions are not subject to these Regulations.

Every settlement agent shall thereafter reregister after notice on a schedule established by the Bar, providing updated registration information. Every settlement agent shall have a continuing duty to advise the Bar of any change in name, address or other pertinent registration data that occurs between registrations.

The fee for each registration and reregistration shall be $35 for an attorney settlement agent. The Bar reserves the right to adjust the fee as necessary within the statutory limit of $100. The prescribed fee shall accompany each registration or reregistration in the form of a check made payable to the Treasurer of Virginia.

Registration is subject to revocation or suspension if the Bar or other appropriate licensing authority finds the settlement agent out of compliance with CRESPA or Regulations issued thereunder.

15 VAC 5-80-40. Unauthorized Practice of Law Guidelines; Investigation of Complaints.

The Bar will issue guidelines under CRESPA and in consultation with the SCC and the Board to assist settlement agents in avoiding and preventing the unauthorized practice of law in connection with the furnishing of escrow, closing or settlement services. In conformity with CRESPA, the Rules of the Virginia Supreme Court and the Bar's UPL opinions, these guidelines will delineate activities which can and cannot be carried out by registered non-attorney settlement agents in conducting settlements. The guidelines will be revised from time to time as necessary.

The guidelines will be available on the bar's website and provided by the appropriate licensing authority to each registered settlement agent at the time of initial registration and at each reregistration. The guidelines will also be furnished to the SCC, the Board, and all other state and federal agencies that regulate financial institutions, as well as to members of the general public upon request. The guidelines may be photocopied as necessary.

The Bar will continue to receive and investigate unauthorized practice of law complaints in the real estate settlement area, as well as in other fields, under its unauthorized practice of law rules and procedures.

If the Bar receives complaints against nonattorney settlement agents that do not allege the unauthorized practice of law, it will refer the complaints to the appropriate licensing authority that has jurisdiction over the subject of the complaint. If the complaint involves an attorney settlement agent's noncompliance with 15 VAC 5-80-30, the Bar will conduct an informal investigation. If the Bar believes a violation has occurred, it will notify the attorney settlement agent in writing. If the apparent violation is not rectified within thirty (30) days, the Bar will investigate the alleged violations pursurant to 15VAC5-80-50(D).

15 VAC 5-80-50. Attorney Settlement Agent Compliance.

A. Attorney Settlement Agent Certification.

Each attorney settlement agent shall, at the time of initial registration and each subsequent reregistration, certify on the form available from the Bar for that purpose, that the attorney settlement agent has in full force and effect the following insurance and bond coverages, and that such coverages will be maintained in full force and effect throughout the time the attorney settlement agent acts, offers or intends to act in that capacity:

1. A lawyer's professional liability insurance policy issued by a company authorized to write such insurance in Virginia providing first dollar coverage and limits of at least $250,000 per claim covering the licensed attorney acting, offering or intending to act as a settlement agent. The policy may also cover other attorneys practicing in the same firm or legal entity.

2. A blanket fidelity bond or employee dishonesty insurance policy issued by a company authorized to write such bonds or insurance in Virginia providing limits of at least $100,000 covering all other employees of the attorney settlement agent or the legal entity in which the attorney settlement agent practices.

3. A surety bond issued by a company authorized to write such bonds in Virginia, on a form approved by the Virginia State Bar, providing limits of at least $200,000 covering the licensed attorney acting, offering or intending to act as a settlement agent. A copy of the approved bond form is available from the Bar. The bond may also cover other attorney settlement agents practicing in the same firm or legal entity. The original surety bond must be attached to the attorney settlement agent's certification form and furnished to the Bar; a surety bond on which a law firm is named as principal may be furnished by the firm or any one attorney settlement agent in the firm, with other such attorney settlement agents in the same firm attaching a copy to their forms.

The Bar reserves the right to require other evidence of the above insurance and bond coverages beyond the attorney's certification and surety bond, at its discretion.

An attorney settlement agent who has no employees other than the attorney settlement agent or other licensed owner(s), partner(s), shareholder(s), or member(s) of the legal entity in which the attorney settlement agent practices may apply to the Bar for a waiver of the coverage required in Section A.2. above, using the waiver request form available from the Bar. Such waiver requests will be acted on by the Executive Committee of the Bar, whose decision shall constitute final action by the agency.

B. Separate Fiduciary Trust Account.

Each attorney settlement agent shall maintain one or more separate and distinct fiduciary trust account(s) used only for the purpose of handling funds received in connection with escrow, closing or settlement services. Funds received in connection with real estate transactions not covered by CRESPA may also be deposited in and disbursed from such account(s). All funds received by an attorney settlement agent in connection with escrow, closing or settlement services shall be deposited in and disbursed from the separate fiduciary account(s) in conformity with both the Bar's disciplinary rules and CRESPA. These separate fiduciary trust accounts shall be maintained in the same manner and subject to the same rules as those promulgated by the Bar for other lawyer trust accounts, as well as in conformity with CRESPA. One separate fiduciary trust account may be maintained and used by all attorney settlement agents practicing in the same firm or legal entity.

C. Settlement Statements.

All settlement statements for escrow, closing and settlement services governed by CRESPA and these Regulations shall be in writing and identify, by name and business address, the settlement agent.

D. Complaints Against Attorney Settlement Agents.

The Bar shall receive complaints and investigate alleged violations of CRESPA and/or these Regulations by attorney settlement agents.

If, after investigation, the Bar does not have reasonable cause to believe that one or more violations of CRESPA and/or these Regulations have occurred, the Bar may dismiss the complaint as unfounded.

If, after investigation, the Bar has reasonable cause to believe that one or more violations have occurred, the following procedures shall apply:

1. The attorney settlement agent shall be notified in writing of the alleged violation(s).
2. The attorney settlement agent shall have thirty (30) days from the date of such notification to respond in writing to the alleged violations. If, after receipt of the response, the Bar no longer has reasonable cause to believe that one or more violations of CRESPA and/or these Regulations have occurred, the Bar may dismiss the complaint as unfounded.
3. If the Bar believes the alleged violation presents or presented a risk to consumers protected under CRESPA, the Bar may request a hearing and issue an order requiring the attorney settlement agent to appear at the hearing, whether or not the attorney settlement agent has responded in writing to the notice of alleged violation(s) or the thirty day time period has lapsed.
4. In conducting investigations of alleged violations of CRESPA and/or these Regulations by attorney settlement agents the Bar, by Bar Counsel, shall have the authority to issue summonses or subpoenas to compel the attendance of witnesses and the production of documents necessary and material to any inquiry.
5. The following shall be applicable to hearings on alleged violations of CRESPA and/or these Regulations:
    a. Hearings shall be held before the Disciplinary Board within sixty (60) days of the issuance of the Bar's order to appear.
    b. The standard of proof of violations of CRESPA or these regulations shall be clear and convincing evidence.
    c. Hearings shall be conducted in the same manner as attorney misconduct hearings as set out in Rules of Court, Part Six, Section IV, Paragraph 13.
    d. Agreed dispositions may be entered into in the same manner as agreed dispositions at the Disciplinary Board in attorney misconduct cases.
    e. The attorney settlement agent's prior disciplinary record and prior record of violations of CRESPA and/or these Regulations shall be made available to the Disciplinary Board during the sanction stage of a hearing. The prior record of violations of CRESPA and/or these Regulations may be made available to Bar subcommittees, district committees, the Disciplinary Board or a three-judge circuit court prior to the imposition of any sanction for attorney misconduct.
    f. If the attorney settlement agent is found to have violated CRESPA and/or these Regulations, the attorney settlement agent may be subject to the following penalties, at the Disciplinary Board's discretion:

(1) A penalty not exceeding $5,000 for each violation;

(2) Revocation or suspension of the attorney settlement agent's registration; and

(3) Any other sanction available to the Disciplinary Board in attorney disciplinary proceedings under the Rules of the Virginia Supreme Court, including, but not limited to, revocation or suspension of the attorney settlement agent's license practice law.

6. The Disciplinary Board shall assess costs in accordance with the same rules and procedures which apply to the imposition of costs in attorney misconduct cases.

7. All matters and proceedings pertaining to alleged violations of CRESPA and/or these Regulations are public. Related attorney misconduct cases shall be heard by the Disciplinary Board together with alleged violations of CRESPA and/or these Regulations. Any related disability issues shall be heard by the Disciplinary Board separately.

8. The Clerk of the Disciplinary System of the Bar shall maintain files and records pertaining to ended cases involving alleged violations of CRESPA and/or these Regulations. The Clerk shall follow the same file destruction policies which are utilized in attorney misconduct cases.

9. The Bar may proceed against an attorney settlement agent for alleged violations of CRESPA and/or these Regulations notwithstanding the attorney settlement agent has resigned from the practice of law, surrendered his or her license to practice law in the Commonwealth of Virginia or had his or her license to practice law in the Commonwealth of Virginia revoked.

10. An appeal from an order of the Disciplinary Board imposing sanctions under CRESPA and/or these Regulations shall be conducted in accordance with the provisions of Rules of Court, Part Six, Section IV, Paragraph 13 pertaining to an appeal of an order of the Disciplinary Board imposing sanctions upon findings of attorney misconduct.

FORMS

Settlement Agent Official Registration Form for an Individual Attorney (eff. 1/98).

Settlement Agent Official ReRegistration Form for an Individual Attorney (eff. 2/98).

Virginia Attorney Real Estate Settlement Agent Financial Responsibility Certification (eff. 2/98).

Bond for Attorney Settlement Agents (eff. 5/97).

VIRGINIA LEGAL AID SOCIETY REGULATIONS

15VAC5-10-10. Function and operation of licensed legal aid societies

The bar recognizes the need to provide equal access to the system of justice in the Commonwealth for individuals who seek redress of grievances, to provide high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel, to preserve attorney-client relationships and to protect the integrity of the adversary process.

1. A non-profit organization qualifying as a tax exempt entity under section 501(c)(3) of the Internal Revenue Code may apply to be a licensed legal aid society in the Commonwealth if its primary purpose is to provide free legal assistance exclusively to those requiring such assistance but who are unable to pay for it.

2. No person, organization or corporation shall define itself or hold itself out to the public as a legal aid society in the Commonwealth without being licensed by the Secretary-Treasurer of the Virginia State Bar.

3. Upon application of a non-profit organization seeking to become a licensed legal aid society, with supporting documents, the Secretary-Treasurer of the Virginia State Bar shall issue a license if:

   a. The State Corporation Commission has issued a certificate of incorporation to the applicant.

   b. A majority of the members of the applicant's board of directors are active members of the Virginia State Bar.

   c. No member of the Virginia State Bar devoting his or her full time to, or receiving any compensation from, the applicant shall be a voting member of its board.

   d. The provisions of subdivisions 3 b and c shall be included in the bylaws of the applicant at all times.

   e. The applicant has submitted a copy of its IRS determination letter.

   f. The applicant provides, for the prior fiscal year, if applicable, an acceptable audit conducted under standards set by the American Institute of Certified Public Accountants.

   g. The applicant provides proof of acceptable professional liability insurance coverage for its operations that meets or exceeds an aggregate sum determined annually by the Virginia State Bar inclusive of coverage in the amount of $250,000 per claim for lawyers who provide client legal services under the auspices of the program.

4. No fee for the provision of legal assistance shall be requested or received from clients by the licensed legal aid society or its employees, except for necessary expenses or costs.

5. Guidelines and procedures shall be established and maintained to insure that legal assistance is provided only to those who are unable to pay for it. Legal assistance to persons meeting standards of eligibility under authorizing legislation and regulations is deemed consistent with this requirement.

6. A licensed legal aid society may appear before and practice in all the courts, administrative agencies and legislative bodies of the Commonwealth and all political subdivisions thereof, only through attorneys who are members of the Virginia State Bar or other persons who are permitted by law to so appear and practice.

7. A legal aid society holding a license issued by the Secretary-Treasurer of the Virginia State Bar is deemed to be an approved licensee. Each licensee shall make an annual report and file it with the Secretary-Treasurer of the Virginia State Bar within 90 days of the conclusion of the bar's fiscal year. The annual report shall contain the following information:

   a. Source of funding

   b. Cost of operation

   c. Number of cases handled

   d. Type of cases handled

   e. Staffing providing the number and title of all employees, and the number of volunteer attorneys assisting within the period covered by the report.

   f. Any changes in the Articles of Incorporation or bylaws made since the last annual report.

   g. A current roster of the members of the board of directors indicating vacancies, names of appointing authorities, and members' bar or lay status.

h. An audit conducted in accordance with generally accepted auditing standards of the American Institute of Certified Public Accountants, which shall be submitted within 180 days of the conclusion of the licensee's fiscal year.

i. Proof of required professional liability coverage and timely notice to the bar during the course of the year of any lapse or denial in coverage.

j. Client eligibility guidelines.

8. A license shall be revoked by the Secretary-Treasurer of the Virginia State Bar on his or her own motion or on the motion of any other person if it is found, after investigation and after giving the licensee reasonable notice and an opportunity to be heard, that the licensee has committed a substantial and material violation of law or of its charter or bylaws or these regulations, or has been inactive for a period of one year or more.

9. From any decision of the Secretary-Treasurer of the Virginia State Bar in granting, or refusing or revoking or refusing to revoke a license, any interested person may appeal to the Council of the Virginia State Bar under procedures established by the Council for such purpose.

10. The Council of the Virginia State Bar reserves the right to amend these regulations from time to time.

Statutory Authority

§ 54.1-3916 of the Code of Virginia.

PREFACE

"The Supreme Court of Virginia endorses the attached Principles of Professionalism for Virginia Lawyers prepared by the Virginia Bar Association Commission on Professionalism. Having been unanimously endorsed by Virginia's statewide bar organizations, the Principles articulate standards of civility to which all Virginia lawyers should aspire. The Principles of Professionalism shall not serve as a basis for disciplinary action or for civil liability. We encourage the widest possible dissemination of these Principles."

Leroy Rountree Hassell, Sr.
Chief Justice, Supreme Court of Virginia

PRINCIPLES OF PROFESSIONALISM FOR VIRGINIA LAWYERS

Preamble

Virginia can take special pride in the important role its lawyers have played in American history. From Thomas Jefferson to Oliver Hill, Virginia lawyers have epitomized our profession's highest ideals. Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves "professionally and courteously." Lawyers help their clients, the institutions with which they deal and themselves when they treat everyone with respect and courtesy. These Principles of Professionalism serve as a reminder of how Virginia lawyers have acted in the past and should act in the future.

Principles

In my conduct toward everyone with whom I deal, I should:

- Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.
- Act at all times with professional integrity, so that others will know that my word is my bond.
- Avoid all bigotry, discrimination, or prejudice.
- Treat everyone as I want to be treated — with respect and courtesy.
- Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.
- Contribute my skills, knowledge and influence in the service of my community.
- Encourage those I supervise to act with the same professionalism to which I aspire.

In my conduct toward my clients, I should:

- Act with diligence and dedication — tempered with, but never compromised by, my professional conduct toward others.
- Act with respect and courtesy.
- Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward courts and other institutions with which I deal, I should:

- Treat all judges and court personnel with respect and courtesy.
- Be punctual in attending all court appearances and other scheduled events.

- Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants.
- Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions.

In my conduct toward opposing counsel, I should:

- Treat both opposing counsel and their staff with respect and courtesy.
- Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.
- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.
- Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.
- Cooperate in scheduling any discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsel's schedules whenever possible.
- Agree whenever possible to opposing counsel's reasonable requests for extensions of time that are consistent with my primary duties to advance my clients' interests.
- Notify opposing counsel of any schedule changes as soon as possible.
- Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.
- Be punctual in attending all scheduled events.
- Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.