VIRGINIA STATE BAR'S STANDING COMMITTEE ON LEGAL ETHICS IS SEEKING PUBLIC COMMENT A PROPOSED AMENDMENT TO RULE 2.11 OF THE RULES OF PROFESSIONAL CONDUCT

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on a proposed amendment to Rule 2.11 of the Rules of Professional Conduct.

RULE 2.11

It came to the attention of the Committee that Rule 2.11 Comment [9] includes a reference to Rule 2.2 which no longer exists. Rule 2.2 was deleted by Supreme Court Order, September 24, 2003; the purpose of the deletion was to remove ambiguity, as first developed in the Ethics 2000 initiative, of coverage and the resulting confusion between Rule 1.7's application to joint representations and Rule 2.2's application to the lawyer's role as intermediary. As the two contexts are indistinguishable, all such situations are now being handled in one rule, i.e., Rule 1.7. Further, the terms "Intermediary" and Intermediation" no longer exist. Therefore, the Committee is proposing an amendment to Rule 2.11 Comment [9], which deletes reference to Rule 2.2 and clarifies the reference to Rule 1.7 and "common representation." The amendment also removes all references to the lawyer's role as intermediary.

Inspection and Comment

The proposed amendment may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed amendment can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed amendment by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **April 14, 2008.**

# # #

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 ~~and Intermediation~~

[9] While a lawyer is cautioned in ~~the Comment to Rule 2.2 not to act as intermediary between clients where contentious litigation or negotiation is expected~~ Rule 1.7 regarding the special considerations in common representation, ~~this~~ these should not deter a lawyer-mediator from accepting clients for mediation. ~~Unlike intermediation, where the lawyer represents all parties~~ 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.

SANCTION BY DISCIPLINARY BOARD SUSPENSION OF ONE YEAR OR LESS WITH OR WITHOUT TERMS

On November 7, 2007, the Standing Committee on Lawyer Discipline approved a proposed amendment which would provide a Suspension of one year or less, with or without terms, as an available sanction by the Virginia State Bar Disciplinary Board.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

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

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I. Board Proceedings

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2. Hearing Procedures

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f. Disposition

(1) 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.

(2) 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:

(a) Admonition, with or without Terms;

(b) Public Reprimand, with or without Terms;

(c) Suspension of the License of the Respondent;

(i) 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

(ii) For a stated period of one year or less, with or without Terms; or

(d) Revocation of the Respondent's License.

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Comments or questions should be submitted in writing to the Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219, no later than May 15, 2008. The Virginia State Bar Council will consider the proposed amendments when it meets on June 19, 2008.

LEGAL ETHICS OPINION

VIRGINIA STATE BAR'S STANDING COMMITTEE ON LEGAL ETHICS SEEKING PUBLIC COMMENT ON LEGAL ETHICS OPINION 1843

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1843, *Whether a Member of the Virginia State Bar Who Practices Patent Law Can be a Partner with a Non-lawyer Patent Agent?*

This hypothetical involves the question of whether a member of the Virginia State Bar who practices patent law can be employed by a firm owned by a non-lawyer patent agent and share legal fees with the non-lawyer patent agent. Traditionally, a lawyer cannot form a partnership with a non-lawyer as per Rule 5.4(b); however, in the specific case of a patent lawyer, that rule is pre-empted by the Supremacy Clause and 37 C.F.R. § 10, which deal with representation of others before the U.S. Patent and Trade Office ("USPTO").

The opinion cites to specific Code of Federal Regulations that regulate the practice of practitioners before the USPTO and that regulate the formation of partnerships and the sharing of fees between practitioners. These regulations permit the formation of partnerships and the sharing of fees between attorneys and patent agents to the extent the shared fees arise from the practice of patent, trademark, and other law before the USPTO. As a result, the opinion finds that the requestor can join the practice of a non-lawyer patent agent either as a registered active Virginia lawyer or an associate member of the Virginia State Bar, as long as that practice is devoted solely to patent and trademark law before the UPSPTO.

Inspection and Comment

The proposed advisory opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **April 14, 2008**.