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## SUPREME COURT OF VIRGINIA APPROVED COMMENT

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### **SUPREME COURT OF VIRGINIA APPROVED PART 6, SECTION II, RULE 4.2, COMMENT [3] OF THE RULES OF THE SUPREME COURT OF VIRGINIA**

On April 13, 2007, the Supreme Court of Virginia approved, effective immediately, amendment to Part 6, Section II, Rule 4.2, Comment [3] of the Rules of the Supreme Court of Virginia. This comment simply codifies a well-settled application of the rule. The purpose of Rule 4.2 is to protect persons represented by counsel, preserve the attorney-client relationship, protect clients from overreaching by other lawyers, and reduce the risk that confidential or damaging information will be disclosed to an adversary. ABA Formal Ethics Op. 95-396 (1995) (Rule 4.2 prohibits such communication even if the represented person initiates the communication); *Polycast Tech. Corp. v. Uniroyal Inc.*, 129 F.R.D. (S.D.N.Y. 1990) (“no contact” rule prevents lawyers from eliciting “unwise statements” from opponents, protects privileged information, and facilitates settlements by allowing lawyers to conduct negotiations).

Given the purpose of Rule 4.2, it does not matter whether the communication is initiated by the lawyer or the represented person. A lawyer who is contacted by a person the lawyer knows to be represented by counsel must immediately advise the represented person that the lawyer cannot communicate directly with the represented person, urge the represented person to contact his or her lawyer, and terminate the communication. The lawyer cannot allow the represented person to

continue talking without the consent of the other lawyer representing that person. *Inorganic Coatings, Inc. v. Falberg*, 926 F. Supp. 517 (E.D. Pa. 1995) (lawyer accepted a telephone call from a represented person his client intended to sue and participated in a ninety-minute conversation during which the caller tried to head off the imminent lawsuit; lawyer disqualified and ordered to produce his notes of the call).

The Comment [3] was also amended to add language that a lawyer who is contacted by a represented person for a “second opinion” or replacement counsel does not violate Rule 4.2 by communicating with that person. This position had been expressed in some earlier advisory opinions interpreting former DR 7-103(A)(1).

#### **Rule 4.2. Communication with Persons Represented by Counsel.**

[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.