

Summary of Recent Revisions to the *Rules of Professional Conduct*

The Virginia State Bar petitioned the Virginia Supreme Court to adopt a package of revisions to the Virginia Rules of Professional Conduct. Those revisions were the result of the Legal Ethics Committee's comprehensive review of the Rules of Professional Conduct. That review had two primary goals: (1) the Legal Ethics Committee reviewed the American Bar Association's Ethics 2000 initiative, which involved revising the Model Rules of Professional Conduct; and (2) the committee reviewed Virginia's current rules to determine, now that they have been in place since January 2000, whether any provisions needed clarification. The Virginia Supreme Court has by order dated September 24, 2003, adopted those changes, with a few departures from the proposed revisions of the petition. The effective date for the new provisions is January 1, 2004. Below is a summary of the adopted revisions. This summary presents the revisions arranged into three categories: major substantive changes, minor substantive changes, and technical changes. Copies of the adopted Rules can be found at the Virginia State Bar's Web site at <http://www.vsb.org>, or can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557.

Major Substantive Changes

Rule 1.8 Conflict of Interest: Prohibited Transactions

The language in paragraph (c), addressing gifts from a client to a lawyer, or to people associated with him, has been clarified. The source of the clarifying language is the Ethics 2000 initiative. New language in the rule now prohibits a lawyer from merely soliciting a substantial gift from a client, regardless of whether the lawyer would need to draft a document for the gift. This is a new prohibition not contained in the original Rules of Professional Conduct or even the old Code of Professional Responsibility.

A significant new paragraph in Rule 1.8 has been added that imputes many of the prohibitions in that rule to all lawyers in the firm. Specifically, prohibitions and/or limitations in the following contexts will be imputed firm-wide:

- business transactions with a client,
- use of client information,
- acceptance of gifts from a client or people associated with the client,
- having an interest in a client's case,
- financial assistance to a client,
- improper third party influence in a case,
- aggregate settlements, and
- limitations on malpractice liability.

The one prohibition in Rule 1.8 that continues to remain personal to the individual attorney, with no firm-wide imputation, are conflicts of interest arising out of attorneys who are closely related representing opposing parties in the same matter. Finally, language has been added in the comments to the rule to clarify that an attorney may use information regarding the

client if the lawyer gained it outside the attorney/client relationship (e.g., by reading the newspaper). Similar language was added to Rule 1.6 as well.

Rule 3.5 Impartiality and Decorum of the Tribunal

The amendment to Rule 3.5 creates an additional restriction on an attorney's contact with jurors after the discharge of the jury. The amendment is intended to further the overall goals of Rule 3.5 regarding the protection of juror independence.

Rule 6.5 Nonprofit and Court-annexed Limited Legal Service Programs

A new Rule 6.5 has been adopted, entitled, "Nonprofit and Court-annexed Limited Legal Services Programs." The language of this rule is part of the Ethics 2000 initiative. The purpose of the rule is to provide slightly less restrictive conflicts of interest rules for lawyers providing services in the context of limited legal service programs in recognition of the unique limited nature of such services and of the potential increase to the public's access to legal services. Specifically, a lawyer working for a qualified program does not have a conflict unless he knows that he or his firm are representing a client whose interests are adverse to the client receiving limited legal services under this rule.

Minor Substantive Changes

Rule 1.2 Scope of Representation

A new paragraph has been added to this rule, which addresses the scope of the attorney/client relationship, clarifying that a lawyer's scope of authority includes actions taken on behalf of the client that are impliedly authorized to carry out the representation. The source of that language is the Ethics 2000 initiative; the provision mirrors existing language in Rule 1.6 regarding confidential information and is intended to strike a balance between an attorney's professional expertise and a client's autonomy.

Rule 1.3 Diligence

The petition requested the addition of a new comment to this rule to clarify that the duty of diligence includes planning for client protection in the event of the attorney's death or disability. The purpose of that provision would have been to highlight the need to address the transition of client matters should the lawyer suddenly be unable to continue the representation. The court did not adopt this amendment; the rule remains unchanged.

Rule 1.5 Fees

The amendment to Rule 1.5, concerning fee-sharing, provides two additional exceptions to the usual requirements for fee-sharing between two separate law firms or lawyers. Specifically, exceptions to those requirements have been added for when an attorney leaves a firm for a new office and for successive attorneys in the same matter. The purpose of the amendment is to exempt these particular contexts from the current requirement of client consent at the outset of the matter as

personnel changes are not always foreseeable. This rule change effectively overrules LEO #1732, holding that such fee divisions between the departing lawyer and the law firm were improper. Also, the change brings the Rules in line with a Richmond Circuit Court decision on this point. *See, Marks & Harrison v. Nathanson* (Hughes) Nos. LE-2441-4, HJ-1887-1, April 7, 1999; Richmond Cir. Ct..

Rule 1.6 Confidentiality of Information

This rule has been revised to allow for an additional circumstance in which a lawyer could disclose confidential client information. The amendment permits disclosure made to protect a client's interests in the event of the lawyer's death or disability. The purpose of the amendment would be to allow a new lawyer to step in to close down the first lawyer's practice, with such activities to include the new lawyer's review of client files. A proposed comment elaborating upon this context was not adopted by the court.

Clarifying language was added to Rule 1.6 regarding the relationship between the duty to protect a client's confidentiality and the duty to report misconduct of another lawyer. The purpose of the language is to limit the circumstances when a lawyer needs client consent to report misconduct to include only those instances where the information to be reported is within the confidentiality protections outlined elsewhere in the rule.

An additional comment has been added to this rule that clarifies the relationship between the duty to protect a client's confidentiality and the responsibilities triggered in representing a client under impairment. The new comment establishes that an attorney is not violating Rule 1.6 when following Rule 1.14, regarding clients under impairment. For example, Rule 1.14 allows a lawyer to discuss an impaired client's condition with a health care provider if the lawyer reasonably believes that it is necessary to protect or advance the client's interests. Consent from the client would not be required in order for the lawyer to make such a disclosure.

In addition, new Comment [8a] incorporates the conclusions drawn in LEO #1723. LEO #1723, which was approved by the Virginia Supreme Court in 1999, establishes parameters for an attorney's relationship with an insurance company while representing an insured.

An additional amendment to the Comments of this rule clarifies that the confidentiality obligations triggered by this rule do not apply to information about a client gained outside the attorney/client relationship.

Finally, the petition requested an additional comment to this rule to confirm that the duty of confidentiality outlined in Rule 1.6 is triggered during an initial consultation between an attorney and a client, regardless of whether the decision is made to enter into an attorney/client relationship. The court did not adopt that new comment.

Rule 1.10 Imputed Disqualifications: General Rule

This rule has been amended to remove the imputation of Rule 1.8 (c) from Rule 1.10 and place it within Rule 1.8, itself. The purpose of this change is that, as outlined above, Rule 1.8 has been amended to impute many of its provisions, not all of which fit within the parameters of Rule 1.10, which deals exclusively with disqualifications. For clarification, language has been added to Rule 1.10 directing the reader to Rule 1.8 for imputation of prohibitions under that rule. The general list of

imputed disqualifications in Rule 1.10 has been expanded to include Rules 1.6 and Rule 2.10(e). That expansion confirms that all members of a firm are deemed to have access to confidential information gained by any firm member and prohibits any member of a mediator's firm from representing a participant from the mediation in the same matter, absent consent from the other participant.

Also included in the revisions to this rule are "road map" paragraphs directing the reader to Rules 1.8 and 1.11 for potential imputation of those provisions.

Rule 1.12 Former Judge or Arbitrator

Minor revision has been made to the language of this rule, which concerns the private practice of former judges and arbitrators. The source of the changed language is the Ethics 2000 initiative. The purpose of the language is to clarify the screening requirement of paragraph (c). Also stemming from the Ethics 2000 project, several new comments have been added to the rule. The purpose of the new comments is to clarify the requirements of this rule

Rule 1.14 Client With Impairment

The revisions to this rule provide more detailed direction for the challenges faced by a lawyer with an impaired client. The source of the new language is the Ethics 2000 initiative. The additional language elaborates upon appropriate steps to protect such a client and addresses the duty of confidentiality in this context. An increased need for such guidance had been identified, in particular in the field of elder law.

Rule 1.15 Safekeeping Property

This rule now contains new Comment [5], confirming that a lawyer may use electronic checking for his trust account so long as all requirements of the rule are met. The purpose of this amendment is to allow for the use of efficient technology where such use does not undermine the security of the trust account.

Rule 1.16 Declining or Terminating Representation

The revision to this rule involves several amendments to paragraph (e), which deals with the contents of the client's file. Several questions regarding interpretation of this provision have arisen from both a compliance and an enforcement perspective. The purpose of the changes is to rid the provision of ambiguity. Clarity has been added regarding which contents must be provided and when such provision should be made. Specifically, the following points are addressed:

- the provision only is triggered at termination of the relationship and upon request,
- a request from a former client's new counsel should be treated the same as if the request came from the former client,
- transcripts kept in the client's file must be provided as part of this provision,
- a lawyer must provide not only products he *produced* for the client, but also products he *collected* for the client (such as medical records), and
- the lawyer only has to provide the file one time, but regular use of a "cc" to the client during the course of the case is not sufficient.

Additionally, a comment has been added stating that the disclosure required under paragraph (e) does not require any disclosure of material by the lawyer that is otherwise prohibited by law.

Rule 2.2 Intermediary

This rule is deleted by this order. The purpose of this change, as first developed in the Ethics 2000 initiative, is to remove ambiguity of coverage. Currently, there could be 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 will now be handled in one rule, i.e., Rule 1.7.

Rule 3.4 Fairness to Opposing Party and Counsel

Language has been added to this rule prohibiting the intentional or habitual violation of rules of procedure or evidence, where such conduct is disruptive. The purpose of this amendment is to restore language that previously appeared in the Virginia Code of Professional Conduct but was inadvertently left out of the newer Virginia Rules of Professional Conduct. That prohibition continues to be a needed component of enforcement in a number of discipline cases.

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer

The amendment adds clarifying language to this rule and its comments. The purpose of these changes is to adopt revisions made by the Ethics 2000 initiative that provides an improved statement of the underlying concepts regarding attorneys' supervision of other attorneys.

Rule 5.3 Responsibilities Regarding Non-lawyer Assistants

The amendment to Rule 5.3 clarifies language in this rule without any intended significant substantive change to the rule's content. Rather, the amendment is intended merely to clarify the rule's general applicability to all lawyers.

Rule 5.4 Professional Independence of a Lawyer

An additional exception has been added to the prohibition against sharing a legal fee with a non-lawyer. Specifically, an exception is now made for arrangements with a credit card company to afford clients the opportunity to pay legal bills with credit cards. The purpose of this additional exception is to allow a practice that in many instances may increase the public's access to legal services with little risk of improper interference with the attorney-client relationship.

Rule 5.6 Restrictions on Right to Practice

The language of the first comment in this rule, regarding restrictions on the right to practice, has been revised to clarify the comment's general applicability to all lawyers.

Technical Changes

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

This rule has been retitled to reflect more accurately the content of the rule; the new title will be, "Special Conflicts of Interest for Former and Current Government Officers and Employees."

Rule 1.13 Organization as Client

Only a technical change has been made to this rule, improving the language of subparagraph (b)(1). The change is not intended to be substantive, but merely stylistic.

Rule 1.17 Sale of Law Practice

The revision to this rule moves exceptions to the requirement of paragraph (a), regarding the sale of a law practice, from the comments to the rule. The purpose of this change is to ensure that a reader will find these exceptions when reading the rule.

Rule 2.10 Third Party Neutral

Reference to Rule 2.2 in paragraph (h) of this rule has been deleted. See discussion of the elimination of Rule 2.2, above.

Also, a new comment directs the reader to Rule 1.10, regarding the imputing of certain conflicts arising under this rule. The purpose of that amendment is solely to provide helpful direction to the reader; no substantive change is intended.

Rule 8.1 Bar Admission and Disciplinary Matters

Minor clarifying revision has been made to the introductory language to this rule, regarding bar admission, in order to provide a clearer articulation of the outlined prohibitions.