

Executive Director's Message

by Karen A. Gould



An Update on Legal Ethics and Unauthorized Practice of Law Opinions at the Virginia State Bar

THE SUPREME COURT OF VIRGINIA made substantial revisions in 2015 and 2016 to Paragraph 10 of Part 6, § IV of the Rules of Court governing the Virginia State Bar. Paragraph 10 deals with the promulgation of legal ethics and unauthorized practice of law opinions, informal staff opinions, and complaints of unauthorized practice of law. This column is to update you on those changes and others.

Legal Ethics Opinions

Members of the Virginia State Bar may request a written legal ethics opinion (LEO) from the Standing Committee on Legal Ethics. A legal ethics opinion applies ethics rules to a hypothetical set of facts and states whether the activity or conduct complies with or violates such ethics rules. This procedure is outlined in Paragraph 10-2. In 2015, the Supreme Court required that all LEOs be forwarded to the Court for review after Council, the VSB's governing body, approves or modifies an LEO.¹ Paragraph 10-3.A. The Court then has an opportunity to approve, modify, or disapprove the LEO. Paragraph 10-4.

On September 30, 2016, the Court approved the first LEO submitted under this new process, Legal Ethics Opinion 1884, entitled "*Conflicts arising from a lawyer-legislator's employment with a consulting firm owned by a law firm.*" LEO 1884 had been unanimously approved by Council at its June 16, 2016, meeting.

LEO 1886, which concerns the duty of partners and supervisory lawyers in a law firm when another lawyer in the firm suffers from significant impairment, was approved by Council

at its October 7, 2016. It is pending before the Supreme Court of Virginia for approval. The petition seeking review and approval can be found on the bar's website via this link: <http://www.vsb.org/docs/prop-1886-petition-101916.pdf>.

On October 31, 2016, the Supreme Court of Virginia approved eight older opinions that had not been approved previously: Legal Ethics Opinions 1329, 1438, 1584, 1606, 1742, 1792, 1856, and 1869.

The Virginia State Bar's Standing Committee on Legal Ethics has withdrawn the following legal ethics opinions:

- 821:** Advertisements
- 835:** Fees—Collections
- 856:** Solicitation of employment—Free estate planning seminars
- 862:** Solicitation letter
- 926:** Lawyer referral services
- 1003:** Attorney—Relationship with financial advisor
- 1290:** Nonlawyer employee: Use of for soliciting prospective clients
- 1348:** Advertising and solicitation—Lawyer referral service: Propriety of nonlawyer screening calls and referring potential claims for attorney members
- 1380:** Fees—Law firms—Aiding unauthorized practice of law—Splitting fees with nonlawyer: Arrangement between multi-jurisdictional offices of law firm
- 1543:** Advertising—Recommendation of professional employment: Attorney paying "referral" service for "exclusive rights" to all prospective clients in four counties
- 1600:** Aiding unauthorized practice of law—Nonlawyer personnel—Misconduct: Level of direct supervision of nonlawyer personnel required

1689: Attorney participation in referral service (legal-friend) that offers legal referrals to members at discount

1743: Virginia law firm forming partnership with a foreign legal consultant (FLC) when the FLC is a nonlawyer under the unauthorized practice rules and is not licensed in the United States.

The status of LEOs can be tracked on the VSB's website under Professional Regulation/Ethics Questions and Opinions/Actions on Legal Ethics Opinions or search on this link: <https://www.vsb.org/site/regulation/leo-status>.

Rule changes continue to be subject to the review and approval of the Supreme Court of Virginia.

Unauthorized Practice of Law

Paragraph 10 requires that unauthorized practice of law complaints be investigated by VSB investigators and then evaluated by VSB staff counsel. As a result of rule changes made by the Supreme Court of Virginia to Paragraph 10 in May of 2016, the initial handling of UPL complaints continues to be the same, but recommendations of case dispositions will then be reviewed independently by the clerk of the Disciplinary System, a lay person. Paragraph 10-6.D. The clerk has the power to veto or modify decisions reviewed, after an independent analysis. Paragraph 10-6.E. The clerk's decisions are final. *Id.* The Standing Committee on the Unauthorized Practice of Law, composed of lawyers and two lay members, was removed from the UPL complaint process.

The UPL Committee withdrew the following opinions on April 12,

2016: 67, 73, 75, 84, 86, 88, 91, 94, 96, 97, 100, 103, 107, 110, 113A, 119, 120, 121, 126, 127, 130, 137, 138, 139, 141, 143, 148, 149, 156, 159, 165, 167, 169, 175, 188. <http://www.vsb.org/site/regulation/upl-opinions-on-line-alpha-index>.

Should you have any questions on these matters or any others involving the Virginia State Bar, do not hesitate to contact me at Gould@vsb.org or Ethics Counsel Jim McCauley at McCauley@vsb.org.

Endnote:

- 1 Prior to this change, the VSB on occasion had forwarded LEOs to the Court asking for their approval.

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offered by companies such as Avvo, for example, may be precluded by current restrictions on fee sharing, paying something of value for referrals, handling of client funds, and fee agreements.

In thinking about the report, a couple of quotes other than Dylan's lyrics came to mind. "The future is now." This apocryphal quote is frequently attributed to the late NFL coach George Allen. It applies in two senses. First, the challenges and issues addressed by the committee are not simply projections of what's coming down the road. The practice has already forever changed and that process is accelerating. For those who thought they would simply ride things out and retire without dealing with the seismic changes; it's too late.

This point was particularly brought home by the committee's discussion of artificial intelligence. The impact of "thinking" robots on the practice of law sounds like a theoretical debate, fit for an upper-class philosophy-of-mind course. But the theoretical debate will soon be buttressed by empirical evidence; as the report notes, law firms are already starting to license IBM's Watson and Ross and are looking at other "learning" computers not just as research tools but to analyze complex and simple legal issues.

Second, George Allen's reference to the future as now was directed to an assembly of players referred to—perhaps lovingly—as the "over the hill gang," players who may have been considered too old but nevertheless continued performing successfully at a high level. Some of us may feel we

belong to such a gang. But we will not be able to rely merely on experience. We must confront and embrace the changes in our profession or face the risk and likelihood that the profession simply will pass us by regardless of training, skill, and ability.

Finally, as Yogi Berra warns, "If you don't know where you're going, you might end up somewhere else." We should not risk this as a profession. The report is not an end in itself. It should be properly seen as the beginning of an ongoing discussion. Reviewing the changes in our profession and in the legal marketplace, gives needed information on where we are going and what we need to do to get there successfully. After all, we don't want to be surprised and end up somewhere else.