

Answering Your Questions about Legal Ethics

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The Virginia State Bar's legal staff includes the ethics unit. The ethics hotline, **(804) 775-0564**, is a service provided to members of the bar and the public that answers questions regarding ethics and the unauthorized practice of law. Below, are some of the most frequently asked questions, along with summary answers. References in these answers are made to the Rules of Professional Conduct (RPCs)¹ the Unauthorized Practice Rules (UPRs)², Legal Ethics Opinions (LEOs) and Unauthorized Practice of Law Opinions (UPLs). The rules and many of the opinions can be found at the Virginia State Bar's Web site: www.vsb.org.

1. The Missing Client

What should a lawyer do when he cannot locate a client, yet has client funds in the trust account and/or a statute of limitations deadline is looming?

As part of the duties in an attorney/client relationship, Rule 1.3 requires that the attorney "act with diligence and promptness" and "not intentionally prejudice or damage a client." The attorney faced with a missing client with unclaimed funds in the trust account should "exercise reasonable diligence" in locating that client. LEO 1644. The attorney can deduct the costs of the search from the client's funds, if the costs incurred are reasonable and do not completely deplete the funds as that would defeat the purpose of the search. LEO 1673. However, unlike those costs, the attorney may not deduct a fee for his services in performing the search, nor may he have a client agree in advance that the attorney may keep any unclaimed property. *Id.* When diligent efforts have failed to locate the client, the attorney can follow the Uniform Disposition of Unclaimed Property Act. Va. Code §55.210.1 *et seq.* The act proscribes that the attorney should consider the funds abandoned five years after the money became distributable. At that point, the attorney can transfer the funds to the commonwealth as outlined in the act.

Under Rule 1.3, as highlighted above, an attorney should never intentionally prejudice a client. Thus, where a client is missing, and reasonable efforts to locate him have proved fruitless, an upcoming statute of limitations deadline must not be ignored by the attorney. The attorney should file the lawsuit needed to prevent the statute of limitations from running; the attorney may also at that time, if he wishes, file a contemporaneous motion to withdraw. LEOs 841, 872, 1088 and 1173.

2. The Witness/Advocate Rule

Can a lawyer represent a client in litigation if a member of that lawyer's firm might testify in the matter?

This question triggers an application of what is commonly referred to as the "witness/advocate" rule. The witness/advocate rule addresses the effect of a lawyer testifying in one of his client's cases. Rule 3.7 (a) directs a lawyer to decline a representation of a client where the lawyer would be a necessary witness, unless the testimony comes within three specific exceptions: where testimony would be related to uncontested

issues, where testimony would be related to the lawyer's provision of legal services and where disqualification of the particular lawyer would prove a hardship for the client. Rule 3.7(b) provides, in effect, an additional exception that may arise when the need to testify is not evident until after the representation has begun: The lawyer is permitted to continue the representation even should he learn, or it is obvious, that the lawyer would be called as a witness other than on behalf of his client in pending or contemplated litigation, unless it becomes apparent that the testimony is or may be prejudicial to the client.

In addition to addressing a lawyer testifying in his own client's case, Rule 3.7 also addresses the propriety of member of a lawyer's firm testifying in the matter. Under the former Code of Professional Responsibility, the witness/advocate rule was imputed to all members of an attorney's firm. Thus, if an attorney could not represent a client because of the attorney's need to testify, no other member of that firm could represent the client. In contrast, Rule 3.7 (c), which became effective January 1, 2000, eliminates the automatic imputing of this conflict to a whole firm. Rather, the new language clarifies that the fact of a firm member's testifying would only prevent the representation if the situation were prohibited for other reasons, specifically, by either Rule 1.7 or Rule 1.9. Thus, the witness/advocate rule alone does not prohibit one attorney from testifying as a witness in the case of a firm member; such testimony would only prevent the representation where the lawyer has either a current conflict of interest or a conflict of interest arising out of representation of a former client.

3. Disclosing Former Client's File

What should a lawyer do if he receives a subpoena seeking either his testimony about a former client or the contents of the file from that representation?

A series of LEOs establishes the proper response in this situation. See, LEOs 300, 334, 645, 967, 1352 and 1628. The underlying principle is that an attorney's duty to maintain the confidentiality of his client's information survives both the end of the relationship and even the client's death. Rule 1.6, Comment 22; LEO 1664. Therefore, if an attorney is asked to disclose confidential information about a former client, the attorney must be sure to fulfill his obligation under Rule 1.6 to maintain a client's confidentiality. While there are exceptions in the Rule allowing disclosure in certain situations, receipt of a subpoena is not one of those exceptions. That attorney should first determine whether disclosure of the information would be favorable or prejudicial to his client. If the former, the attorney should seek client consent to disclose. If the latter, the attorney should move to quash the subpoena, informing the court that the attorney's ethical duty precludes him from disclosing the information requested. If the court rules against the motion and orders the attorney to provide the documents or to answer the questions, the attorney then is within one of the exceptions to the general 1.6 duties. Rule 1.6 (b)(1) permits an attorney to disclose information to comply with a court order.

4. Returning File to Client

What if a client wants his file? Does it matter whether he's paid his bill or whether the matter has concluded?

Prior to January 1, 2000, a lawyer had to go searching through the legal ethics opinions for advice on these file questions. However, on that date, Rule 1.16(e) went into effect; that provision directly addresses how to handle the client's file. Rule 1.16(e) breaks the contents into three categories.

The first is "all original, client-furnished documents and any originals of legal instruments or official documents." Those documents are deemed to be the client's property, and the attorney must unconditionally return them to the client upon request.

The second category includes lawyer/client and lawyer/third-party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda and other attorney work product documents, research materials and copies of prior bills. For this second category, a lawyer may charge the client for the expense of making a copy of the items for his own retention.

For both of these categories, an attorney must provide the requested items regardless of whether the client has paid his bill. The old common law lien on the client's file is, essentially, eviscerated by this rule. A lawyer can certainly pursue all normal collection options against a former client for unpaid fees; however, the retention of the file must never be held up in exchange for payment of the bill for fees, the copying cost, or other costs associated with the representation.

A third category presented in Rule 1.16(e) includes 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 with the attorney/client relationship. A lawyer is not required to provide those items to the client. It is important to note that attorney work product is not in this category. An attorney must provide copies of things like his research notes, drafts of documents and outlines of case strategies to the client upon request, as those items are within the second category discussed above.

This provision is a part of the general rule 1.16, addressing an attorney's duties upon the end of the attorney/client relationship. The intent of this rule is that an attorney be required to provide the outlined items at the termination of the representation, upon request of the client, one time.

5. File Retention

How long must an attorney retain the files of former clients?

The only express requirement regarding file retention found in the ethics rules applies to trust account records. Rule 1.15 (e) requires that all records required to be maintained under that rule should be retained for five years after the end of the fiduciary relationship. For all other files, the ethics rules do not direct an exact time period; however, Rule 1.16 does establish a general duty not to prejudice a client upon termination of the relationship. Thus, an attorney should not destroy a former client's file so quickly that the client's interests are prejudiced. LEO 1305 provides detailed suggestions for the destruction of client files. Some considerations to keep in mind are whether files still contain any client property or original legal documents.

Also, consider which documents are worth retaining for malpractice protection and which documents are necessary for conflicts checks. Certainly, any relevant statute of limitations must be kept in mind. The exact retention period for any file will depend on the area of law and nature of the particular matter.

6. Clients of Departing Attorneys

When a lawyer leaves a law firm, who "owns" the clients for which that lawyer had been working?

No one. Clients in no way "belong" to a particular attorney or to the firm. Clients retain the right at all times to fire and/or replace their attorney. This common misconception frequently arises when a lawyer's departure from a firm, or a firm dissolution, is less than amicable. Arguments arise file-by-file regarding which attorney or firm gets to keep which clients. The client gets to choose who will represent them in the future. As recommended in LEO 1332, the preferred way to handle this issue is for the departing attorney and the firm to send a joint letter to each client that the attorney served. That letter should, in a neutral tone, recommend that the client needs to select one of the following options: stay with the firm, go with the new attorney or hire new counsel altogether. The client should be encouraged to make that selection as quickly as possible to ensure a smooth transition. The physical (or electronic) file should follow that choice. As discussed in Question 5 regarding file retention, no attorney or firm should hold the file "hostage." A seemingly obvious, but at times disregarded, point is that the remaining firm must always provide the contact information for the new attorney whenever asked. A firm must not refuse to provide that new address and phone number to clients, potential clients and other attorneys who contact the firm seeking the departed attorney. LEO 1506.

7. Malpractice Liability

What advice is available regarding malpractice avoidance?

The purpose of the Ethics Hotline is to provide interpretation of and advice regarding the Rules of Professional Conduct. Thus, the ethics staff is prepared to answer questions regarding discipline exposure; however, this service is not the appropriate source of advice regarding exposure to civil damages such as malpractice liability. An attorney with questions in that area would be better served by discussing the matter with either his malpractice carrier and/or the Attorney Consultation Service. The Attorney Consultation Service is the Virginia State Bar's risk management service. John Brandt, an attorney in private practice, is the current risk manager for this service. He can be reached at **(800) 215-7854** for free consultation regarding matters of malpractice prevention, law office management, claims repair and liability insurance.

8. Attorneys on Associate Status

What services may an attorney perform if he is on associate status?

A lawyer who wants to retain his license to practice, but whose legal work is on hiatus, may find switching from active to associate status an appropriate option. Attorneys on associate status are "entitled to all 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."³ While on associate status, the member pays reduced dues and does not

need to comply with the usual Continuing Legal Education requirements. If an associate member is going to take an occasional case, he would need to return to active status. However, while on associate status, the lawyer could provide legal work directly to another attorney in a paralegal/law clerk type of arrangement, teach law as an adjunct professor or serve as an expert/consultant for a licensed attorney.

9. Foreign Attorneys Working in Virginia

Is there any sort of legal work that an attorney licensed in another state may perform in Virginia?

The Unauthorized Practice Rules (UPRs) specify that a non-lawyer shall not practice law in Virginia, unless authorized by a statute or rule of court. UPR Preamble (A). The UPRs define “nonlawyer” to include lawyers licensed only in jurisdictions other than Virginia. Such attorneys are commonly referred to as “foreign attorneys.” The simple answer to this question would seem to be that a foreign attorney can never practice law in Virginia without becoming a member of the Virginia State Bar; however, the answer is *not* that simple. A number of provisions provide “safe harbors” for foreign attorneys performing certain activities or in certain contexts.

A fairly new provision is found in the definition of “nonlawyer” in UPR Preamble (C). While generally including foreign attorneys, that definition does provide an exception for foreign attorneys in the following context: The attorney must already represent the client in another jurisdiction, the services to be provided in Virginia must occur only on “an occasional basis,” and the client must be informed that the attorney is not licensed in Virginia. The effect of this provision is to allow attorneys practicing in other states to handle a particular matter for a regular client when such matter happens to occur in Virginia. For example, counsel for a New Jersey corporation could come to Virginia to represent the corporation in purchasing Virginia real estate, so long as such events do not happen more than “occasionally.”

Another safe harbor for a foreign attorney performing services in Virginia is a *pro hac vice* appearance in a Virginia court case. Rule 1A:4 of the Rules of Supreme Court of Virginia allows for a court to grant a motion by a member of the Virginia State Bar for a foreign attorney to appear in a particular matter before the court. It would not be sufficient merely to move for a foreign attorney to substitute for the local attorney as attorney of record; the local attorney must serve as co-counsel on the case. The rule specifies that the court may look to the local attorney for all purposes and that the local attorney must sign all pleadings and other papers that must be served. Whether the local attorney must always be physically present at all proceedings, including depositions, is up to the discretion of the court. Note that there is no equivalent rule for non-litigation matters.

Another safe harbor available for some foreign attorneys is UPR 9, “Administrative Agency Practice.” That provision acknowledges, and defers to, the administrative regulatory provisions of particular practice areas that do not require membership in the local bar. This rule allows foreign attorneys to work in Virginia in a number of areas of law. Common examples include immigration, patents and federal tax. The allowable parameters of such a practice would be determined by the rules of the appropriate agency.

Other areas of permissible practice include matters involving exclusively the law of the lawyer’s licensing jurisdiction and matters before a federal court that involve no Virginia issues (assuming the lawyer has authority to appear before that court). UPL Op. 158.

Finally, throughout the UPRs there is reference to work done for one’s regular employer.⁴ That language creates what is commonly referred to as the “in-house counsel exception.” In effect, a foreign attorney may provide legal advice and draft legal documents for the attorney’s regular employer. The exception does not, however, permit work done for an employer’s customers, nor does it extend to representing the employer in court. Note that the “in-house counsel exception” is available not only to foreign attorneys, but to all nonattorneys.⁵

10. Recent Law School Graduates

What can a recent law school graduate do while waiting for bar admission?

Law school graduation alone does not provide any authority to practice law. The law degree does not change the person’s status as a nonlawyer under the UPRs. As such, the graduate can only work in a law clerk status with all of his work being provided to a lawyer to review, and not directly to clients, opposing counsel or a court. The graduate will be deemed a member of the Virginia State Bar and, therefore, able to practice law when the membership staff at the bar has assigned that person a membership number. That bar membership authorizes the person to practice law; however, to appear in court, the lawyer would also need to be properly sworn in.

11. In-House Counsel

Must a corporation’s in-house counsel be licensed to practice in Virginia?

UPL Op. 178 outlines the permissible parameters of the role of nonattorneys as in-house counsel.⁶ The opinion notes that the UPRs define the “practice of law” to exclude most legal work done for one’s regular employer. UPR (B). That language creates what is commonly referred to as the “in-house counsel exception.” In short, an in-house counsel who is not an active member of the Virginia State Bar may provide legal advice to his regular employer and draft legal documents for his regular employer. However, a non-attorney in-house counsel may not provide legal advice or documents to members of the public, such as customers of the employer.

The UPRs are more restrictive regarding a nonattorney in-house counsel’s ability to represent his employer in court. Specifically, UPR (B)(3) allows that counsel present “facts, figures or factual conclusions as distinguished from legal conclusions.” Furthermore, UPR 1-101(B) states, in pertinent part, that

A nonlawyer 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.

Note that the in-house counsel exception is available to employees working for their regular employers; it is not available for nonattorneys working as independent contractors. A final point noted in UPL OP. 178 is that a nonattorney serving

as in-house counsel for his regular employer may use the title “General Counsel.”

12. Initial Consultations

Does an attorney owe any duty of confidentiality to someone who meets with, but never retains, the attorney?

A frequent scenario is one in which, for example, a wife comes in to meet with a potential divorce attorney. After discussion of the matter, the wife does not retain this attorney. Later, the husband comes in and wants the same attorney to represent him in the same divorce. The attorney most likely has a conflict of interest even though an attorney/client relationship was never entered into with the wife. While the provisions of Rule 1.9 addressing conflicts involving former clients would not apply, this attorney must still consider the matter in light of the general duty of confidentiality created by Rule 1.6. Legal Ethics Opinions have consistently concluded that where a person comes in and shares information with an attorney in order to seek representation, the attorney must maintain the confidentiality of the information even where the attorney is not retained; the person clearly provides the information to the attorney with a reasonable expectation that confidentiality will be protected. *See* LEOs 1453, 1546 and 1642.7 Thus, in the scenario outlined above, if the attorney received any information from the wife that would be pertinent to the representation, then consent from the wife to use that information would be required for this attorney to be able to represent the husband.

13. Chinese Walls/Screens

When can a law firm use a “Chinese wall” to screen an attorney to avoid a conflict of interest?

A common misconception regarding conflicts of interest is that a law firm can “cure” a conflict of interest stemming from one lawyer’s work by screening that attorney from the rest of the firm with regard to that matter. Actually, the ethics rules do not allow for a screen, or Chinese wall, to cure conflicts of interest in most contexts. Specifically, most conflicts involve an attorney’s work for a current or former client. Rule 1.7 addresses conflicts regarding current clients and Rule 1.9 addresses conflicts triggered by work done for former clients. Both of those types of conflicts are imputed to all members of the lawyer’s firm under Rule 1.10. Thus, if an attorney must decline or withdraw from a case because of work he’s done for a current or former client, all members of his firm face the same conflict. The “cure” for such conflicts, for the lawyer or any member of his firm, is not a screen, but rather consent from the former and/or the current client. Note that for conflicts under Rule 1.7, consent is not sufficient in certain instances.

There are two exceptional contexts in the rules where a screen is an acceptable conflicts cure: situations involving government attorneys and situations involving former judges and arbitrators. Rule 1.11 addresses attorneys switching from government practice to private practice, and vice versa. Paragraph (b) of that rule outlines a screening procedure for an attorney in a private firm who had worked “personally and substantially” on a matter where another member of that firm now will represent a party “in connection with” that matter. Rule 1.12 addresses the private practice of former judges and arbitrators. Paragraph (c) outlines a screening procedure for an attorney in a private firm who had participated in a matter as judge or arbitrator where another member of the firm will now represent a party in that

same matter. Outside the scenarios addressed by Rules 1.11 and 1.12, a screen is not a sufficient cure for conflicts of interest triggered by the ethics rules.

14. Executor

When a lawyer is hired by the executor of an estate, who is the client?

Attorneys hired by executors are not always clear to whom they owe duties of loyalty and confidentiality. Both the executor and beneficiaries may interact with the attorney as if he represents the interests of everyone involved. However, as outlined in LEOs 1452, 1599 and 1720, when an attorney is hired by the executor, he represents that person in that role. He does not represent the beneficiaries. Nonetheless, beneficiaries are not always knowledgeable on that point and may look to the attorney for advice and share personal information with the attorney. An attorney always has a duty to clarify his role whenever dealing with an unrepresented person when that person is confused on the point. Rule 4.2. Accordingly, where a beneficiary is under the impression that the attorney is protecting that beneficiary’s individual interest, the lawyer has an affirmative duty to clarify the matter. Also, while the executor’s attorney does not represent the beneficiary personally, he must, nonetheless, maintain awareness of the executor’s fiduciary duty to the beneficiaries and never assist in a breach of that duty. LEO 1599.

15. Second Opinions

May an attorney provide a second opinion to a client of another attorney?

Clients at all times retain the right to counsel of their own choosing. That right includes the right to fire and replace their attorneys at any time. As part of that right, a client may need to consult another attorney regarding the case to be able to make an informed decision as to whether a change in attorney is warranted. Accordingly, it is not improper for an attorney to speak with a represented party regarding that person’s legal matter. Of course, an attorney would be prohibited from such contact if he represented any other party in the matter. While an attorney may provide a consultation in the manner of a second opinion, he should take no action in the matter and decline actual representation of the person unless and until the original lawyer is fired, withdraws or agrees to joint representation as co-counsel. *See*, LEOs 369 & 1328.

16. Guardians Ad Litem

Are there any special considerations regarding conflicts of interest for guardians ad litem?

Two fairly recent LEOs provide guidance for attorneys serving as guardians *ad litem*. In LEO 1725, the question is whether one attorney can serve both as guardian *ad litem* in matters involving the Department of Social Services and, in other matters, represent the Department of Social Services. The opinion points out that as the attorney can not obtain effective consent from a minor, the attorney must look to the court for consent regarding a potential conflict of interest. The attorney should disclose the pertinent information to the appointing court necessary for that court to determine the appropriateness of that attorney serving as guardian *ad litem*.

In LEO 1729, the issue raised is whether one attorney may serve as guardian *ad litem* in a matter and also testify as a witness

(having been the visitation supervisor) in that same matter. The opinion concludes that as the testimony to be given is part of the statutory duties of a guardian ad litem, (i.e., to present a report to the court), the usual witness/advocate rule does not apply. The opinion establishes as a basic principle that, “where fulfilling a specific duty of a guardian *ad litem* conflicts with traditional duties required of an attorney under the [ethics rules], the specific duty of the guardian *ad litem* should prevail.”

17. Contingent Fee Where Representation Terminates Prior to Matter’s End

What right to his fee does an attorney have under a standard contingent/percentage fee agreement, when that attorney’s representation is terminated prior to the end of the case?

LEO 1606 squarely addresses the rightful compensation of an attorney who is fired or who withdraws prior to the end of a case where the original agreement had been for a contingent fee. As explained in that opinion:

When the attorney is discharged prior to the completion of the representation he may only recover the reasonable value of the services which he has rendered . . . and in instances where the fee is contingent upon the outcome of the matter, the attorney may not recover the full agreed upon fee. He is entitled only to a recovery in *quantum meruit* for services actually rendered.

While that opinion was issued prior to the current ethics rules, the committee has endorsed that conclusion more recently in LEO 1766. The basic principle in these opinions comes from *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958 (1977).

18. Representation of Former Client in Divorce

Can an attorney represent a spouse in a divorce where the attorney previously represented the couple jointly in some other legal matter?

Satisfied clients usually return to former counsel when new matters arise. This is generally a good thing. However, potential conflicts of interest must be considered where the prior representation was part of joint representation of spouses. Frequently, an attorney will have done estate planning, bankruptcy or real estate work for a couple only to be contacted by one of the spouses when the marriage is dissolving. Each of these new representations must be analyzed regarding two rules: 1.6 governing client confidentiality and 1.9 regarding former clients. Rule 1.9(a) prohibits an attorney from representing a party adverse to a former client in a matter substantially related to the prior representation. This prohibition is often not the hindrance to accepting these new representations, as while the divorce certainly is adverse to the former client, it is not usually “substantially related” to the prior matter. Nevertheless, Rule 1.9(b), together with Rule 1.6, may be the source of a conflict in many of these instances. Rule 1.9(b) prohibits a lawyer from using confidential information obtained during a prior representation to the disadvantage of the former client. Attorneys must consider whether any of the information obtained during the first matter would be pertinent in the divorce. If such information was received, then, under Rules 1.6 and 1.9(b), the attorney may only represent one spouse in the divorce if the other spouse consents to the use of that information against him or her. *See*, LEOs ## 569, 677, 707, 774,

792, 1032 and 1181, reaching the same conclusions under the former Code of Professional Responsibility.

19. Trust Accounts

How does an attorney handle bank fees for his trust account?

Under Rule 1.15, an attorney must place all client funds in a trust account, operated according to the specific requirements of that rule. The attorney’s own funds are not to be in that account; thus, the normal arrangement is for each attorney or each law firm to have a trust account and an operating account. Client funds should only be moved from the trust account to the operating account when those funds have been earned. *See*, LEO 1606. While Rule 1.15 does require this separation of client funds from attorney funds, paragraph (a)(1) of that rule permits an attorney to deposit into his trust account, “funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution.” This provision permits the trust account to contain attorney funds to cover both traditional service fees as well as the fees charged by credit card companies.

20. Clients with a Disability

How should an attorney provide legal services to a client who appears to have less than full mental capacity?

Particularly in the practice area of elder law, attorneys frequently face difficult issues as the mental competency of some clients may be in decline. Rule 1.14 provides specific guidance to attorneys in that situation. Entitled, “Client under a Disability,” that rule discusses both the situation where a client’s abilities are merely limited and where that client just cannot act in his or her own best interest. The comments to Rule 1.14 provide helpful direction to an attorney making the difficult decision as to what, if any, protective action he needs to take on behalf of his client. Note that the rule does contemplate that such protective action may include, where appropriate, seeking the appointment of a guardian for the client. However, the attorney should not represent some third party in bringing that guardianship petition but instead should himself serve as petitioner. LEO 1769. An attorney dealing with his client’s possible incapacity should, throughout the course of the representation, be mindful of Rule 1.14’s directive that the attorney “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

ENDNOTES

- 1 Rules of the Supreme Court of Virginia, Part 6, §II.
- 2 Rules of the Supreme Court of Virginia, Part 6, §I.
- 3 Rules of the Supreme Court of Virginia, Part 6, §IV, Para. 3.
- 4 Note that, at the time of publication, there is a proposed rule currently before the Supreme Court of Virginia regarding corporate counsel that, if adopted, would impact this information regarding work done for an employer.
- 5 Note that more information regarding permissible activities for non-attorneys can be found at question 10.
- 6 Note that, at the time of publication, there is a proposed rule currently before the Supreme Court of Virginia regarding corporate counsel that, if adopted, would impact this information regarding work done for an employer.
- 7 Note that a rule change is currently pending before the Supreme Court of Virginia that, if adopted, would state this proposition in the Comments to Rule 1.6.