STANDING COMMITTEE ON LEGAL ETHICS

Marni E. Byrum, chair

The Legal Ethics Committee is responsible for issuing advisory ethics opinions to Virginia State Bar members concerning contemplated or actual conduct. Requests for opinions are required to be stated as a hypothetical on committee-approved forms that are available from the VSB office. The committee is permitted to decline issuing an opinion on any matter that is currently the subject of any disciplinary proceeding or litigation.

During the fiscal year ending June 30, 2004, the committee docketed twenty requests for opinions. Two opinions were carried over from FY 2003, with one issued and one withdrawn; twelve opinions requested in FY 2004 were issued; one opinion was withdrawn; and five requests will be carried over to FY 2005. Additionally, seventeen requests were answered by Legal Ethics Inquiry letters from staff ethics counsel by reference to prior opinions. The bar's ethics telephone line continues to be an important resource for attorneys throughout the state. During the past year, bar staff handled approximately 4,135 calls, which is up by approximately 472 calls from the previous fiscal year.

This year the committee was called upon to address the following issues:

A. Legal Ethics Opinion 1783—Sharing Fee with Client

May Lender's attorney disburse to Lender that portion of the collected attorney's fees in excess of the amount necessary to reimburse Lender for the actual cost of the legal services?

This opinion request presents a hypothetical where Lender retains an attorney to assist with the collection of a promissory note. The attorney expects to collect all amounts owed under the note, including the 25 percent attorney's fees provided for under the note. Rule 5.4(a) directs that "a lawyer or law firm shall not share legal fees with a non-lawyer." Under this hypothetical, for efficiency, Lender and Borrower had chosen not to require an itemization from the Lender of the actual cost of legal services necessary for collection. The adjustment of funds related to an attorney's fee under this hypothetical are a matter appropriately to be determined by agreement between the attorney and the client, so long as the resulting fee actually received is reasonable, as required under Rule 1.5. Furthermore, the setting of an appropriate fee for particular work by an attorney with his client is not the sort of improper sharing of attorney's fees with a non-attorney addressed in Rule 5.4. Therefore, the committee opined that for this attorney to distribute to his client the excess of the fee paid by the Borrower over the actual cost of those services does not compromise the purpose of Rule 5.4(a) to prohibit improper interference with the independent exercise of professional judgment. Therefore, the contemplated fee distribution does not violate the rule.

B. Legal Ethics Opinion 1785—County Attorney Representing Board of Supervisors in a Suit Against the Board of Zoning Appeals (BZA)

1) Is there a conflict of interest for the County Attorney to continue to represent the Board of Supervisors in a petition naming as defendants both the BZA and the corporation who had obtained a variance from the BZA?; 2) Can the conflict be cured?; 3) Does the corporation's attorney have a duty to file a complaint against this County Attorney and, if so, whether he must file that complaint immediately or after the end of this litigation?

In answering the first question, when considering the BZA a former client, the opinion notes that while the attorney had not advised the BZA on the substance of the variance, he had advised the BZA regarding the notice to be issued for that variance. The opinion, due to unclear facts, analyzes the conflict first as if the BZA is a former client, and then, alternatively, as if the BZA were a current client. The committee opines that if the BZA is a former client, then as the notice for the variance is substantially related to the variance itself then the attorney has a conflict of interest under Rule 1.9 in filing a petition involving the same variance discussed with the BZA in the past. However, if the County Attorney's representation of the BZA is on-going, with no termination occurring between various instances of advice, then the BZA is a current client and Rule 1.7 would govern this conflicts question. Under Rule 1.7, by naming the BZA in the petition, the County Attorney made the BZA a party and has, therefore, triggered a conflict of interest. In response to the second inquiry, the committee analyzes the situation under two alternatives. The first alternative being that, if the conflict stems from adversity to a former client under Rule 1.9, then consent from the former client (here, the BZA) would "cure" the conflict and allow the County Attorney to represent the Board of Supervisors. In contrast, if the source of this conflict of interest is Rule 1.7's provisions regarding adversity between current clients, consent will be ineffective. In response to the third inquiry, the committee found this determination to be a fact-specific judgment call which would require consideration of more in depth facts than are provided in this hypothetical.

C. Legal Ethics Opinion 1787—Requesting an Expert Witness to Maintain Confidentiality

May an attorney prevent a third party from disclosing that attorney work product information to an opposing party and may an attorney enter into a prior agreement with the third party to keep privileged information confidential?

This opinion presents a hypothetical situation in which an attorney prepares a document in anticipation of litigation that he believes is privileged information. The attorney sends the document to an unrepresented expert witness as it contains his mental impression and thoughts about the case. The attorney does not provide the document to the opposing counsel and, instead, provides a privilege log. The attorney is concerned that the opposing counsel could subpoena the documents from the witness without his knowledge. The questions presented involve the lawyer's duty of confidentiality as outlined by Rule 1.6(a). The rule contemplates that an attorney, while working within the parameters of the duty of confidentiality, may need to make disclosures to third parties, such as this expert witness. Rule 5.3(a), however, directs the attorney to take certain precautions when he employs, retains or is associated with a nonlawyer. The attorney is directed in the draft to make "reasonable efforts" to ensure that the expert witness understands the attorney's duty of confidentiality and to ensure that the expert witness protects the confidentiality of the information received. The opinion outlines precautionary steps appropriate for this attorney to ensure as required by Rule 5.3, that the expert witness does nothing to compromise the attorney's duty to protect the confidentiality of information. The opinion concludes that steps proposed in the hypothetical are both permissible and advisable.

D. Legal Ethics Opinion 1788—Restrictions on Attorney's Right to Practice Law—Corp. X Requiring Attorney to Agree Not to File or Cause to be Filed Any Future Lawsuits Against Corp. X in Exchange for Settlement Conditions.

Does the Agreement "broadly" limit a Law Firm's right to practice law and, secondly, as a condition of employment, can a Law Firm require new employees to agree to the terms of the Agreement?

This opinion request presents a hypothetical asking whether a restrictive covenant reached in a 1983 settlement agreement is unethical and constitutes an improper restriction on the right to practice law. The Agreement set forth the terms and conditions upon which Corporation X would consent to settlement with third-party defendants, as well as any future settlements that might be recommended by The Law Firms. The Agreement also imposes certain limitations upon The Law Firms' right to represent certain types of claimants in future litigation against Corporation X. The Agreement, however, includes language that provides the parties with a future opportunity to test the ethical propriety of the provisions where the attorneys would submit the agreement for review by the Ethics Committee of the Virginia State Bar. In regard to the first question, the opinion applies Virginia's Rules DR 2-106(b), the predeces-sor to Rule 5.6(b), and states that the question is a "fact-intensive question and cannot be answered in an all-encompassing fashion." The opinion further states that the committee's role is not one of a fact finder and due to the ambiguous and unclear nature of the facts upon which the hypothetical is based, the committee does not reach a conclusion on whether the subject Agreement imposes a broad restriction on the right to practice law. In considering the second question, the opinion states that the Law Firm could not, as a condition of employment, require new employees to agree to the terms of the Agreement as these restrictive provisions in the employment agreement violate DR 2-106(A) and Rule 5.6(a).

E. Legal Ethics Opinion 1789—Client file—Medical Report

Is a client's medical record, obtained in the course of litigation, part of the "client's file" requiring disclosure to the client pursuant to Rule 1.16(e) and can the insurance carrier and/or the psychologist prohibit the lawyer from providing this report to the client?

This opinion presents a hypothetical situation involving a lawyer representing a client with disabling mental impairments in seeking disability benefits before the Social Security Administration. In the course of this representation, the attorney secured a copy of a report developed by the client's treating psychologist. The psychologist prepared the report for the client's insurance carrier and refuses to authorize release of the report to the client; the attorney cannot ascertain whether this is for medical reasons or due to the carrier's instructions not to release the report. The opinion distinguishes between a request made during the course of representation and one made at the end of the representation. During the representation, Rule 1.4(a)'s duty of communication may or may not require provision of a particular document or of the whole file; it would be a fact-specific determination as to what information an attorney needed to provide and via what means. However, upon termination of the representation, the opinion relies on Rule 1.16 (e) to find that the attorney is required to provide the contents of the file to the client, one time. In further applying paragraph (e)'s categories to the medical report at issue, the opinion finds that this medical report is part of the client file for the purposes of Rule 1.16(e). The request, however, questions whether, either the carrier or the doctor, can prohibit the attorney from providing the client with a copy of the report and the opinion notes that the attorney should not follow the instructions of non-clients when it comes to breaching the attorney's ethical duties owed to the client. On the contrary, the opinion draws attention to the question of whether the psychologist's direc-

tive in the hypothetical was out of concern for the mental health of the client/patient. The opinion directs the requestor to consider Rule 1.14 for guidance on whether the attorney needs to take protective action with regard to his client when the client cannot act in his own interest with respect to the requesting information.

F. Legal Ethics Opinion 1790—Client files—Presentence Report

Does an attorney have a duty to provide the pre-sentence report to the client?

This opinion presents a hypothetical situation involving a client requesting a copy of his file from an attorney. Specifically, the attorney represented a client who was convicted in a criminal matter. After the sentencing hearing, the client requested a copy of his file, including the presentence report, to use in his petition for writ of *habeas corpus*. The pertinent provision the committee applies is Rule 1.16(e), which specifically requires that the attorney provide the client the entire file upon termination of representation, except for materials that fall in a narrow exception. This exception includes billing records and documents intended only for internal use by the lawyer. The opinion concludes that a presentence report is not the sort of internal document described by the exception. However, Rule 1.16's general requirement of file provision has one important limitation. Comment 11 establishes that "the requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law." The request identifies Attorney General Jerry W. Kilgore's Advisory Opinion, dated March 31, 2003, which interprets Virginia Code § 19.2-299, as addressing the legal issue of whether disclosure of presentencing reports by attorneys to their clients is prohibited by law. The opinion concludes it would be outside the purview for the committee to analyze that legal authority regarding disclosure of presentence reports and declines to opine on that question.

G. Legal Ethics Opinion 1791—Failure to Meet Face-to-Face With Client

Is electronic communication, without in-person meetings, sufficient to fulfill an attorney's duties of communication and competence?

This opinion presents a hypothetical in which an attorney has a bankruptcy practice. The attorney begins most representations by actually meeting with the client; however, in a number of instances, clients may not be able to come into the attorney's office for a face-to-face meeting. In those instances, the attorney provides review and advice via various forms of electronic communication: fax, telephone, and e-mail. In these cases, the first face-to-face meeting between the attorney and the clients may be at the § 341 hearing. The opinion applies Rules 1.1 and Rule 1.4. The first ethical duty at issue is whether the attorney is being sufficiently thorough and is properly prepared with respect to the "electronic communication" portion of his practice. The opinion finds that neither the rule, nor the comments, prescribes precise means for the provision of legal services so long as the requisite information is given, received, analyzed and acted upon, and so long as the attorney has met the competency duty. A second ethical duty at issue is the duty of communication and, in order to fulfill that duty, the attorney must ensure that the client has "sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be imputed." Rule 1.4, Comment 1. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is what information was transmitted, not how. The committee finds no per se requirement in the rules that information be provided to a client in person. Accordingly, the opinion concludes that the procedures outlined in this hypothetical do not on their face create an ethics violation for this attorney.

H. Legal Ethics Opinion 1794—Confidentiality of Initial Consultations.

Does a potential client have an expectation of confidentiality when he/she shares information in consultation with a lawyer?

This opinion presents a hypothetical situation in which a husband and wife are planning to divorce. The husband wishes to prevent his wife from obtaining adequate counsel and visits each family law attorney in the area with no intent to hire them. He already plans in fact to retain Attorney A. The wife seeks representation from one of the visited attorneys, Attorney B. Prior to hiring her attorney the wife first visited Attorney A. He had the wife sign a disclaimer and then the wife proceeded to share information regarding her finances and her personal life. After the interview, Attorney A did a conflicts check and discovered he represented the husband. The opinion addresses the question of whether either attorney needs to withdraw from this matter. The opinion applies Rule 1.6(a), which establishes the basic duty of client confidentiality and specifically relies upon Comment 2 to Rule 1.6 regarding how the ethical obligation to hold inviolate confidential information of the client "encourages people to seek early legal assistance." For that purpose of this rule to be met, people must be comfortable that the information imparted to an attorney to seek legal assistance will not be used against them. Therefore, the committee opines that in the present scenario, Attorney A received confidential information that is pertinent to his representation of the husband against the wife, and this attorney may not represent the husband unless the wife consents to his use of the information in this case. The committee further opines that the particular disclaimer used by Attorney A failed

to eliminate the duty of confidentiality as the disclaimer addressed creation of an attorney/client relationship rather than confidentiality of info. The opinion then goes on to address the potential for a conflict of interest for Attorney B which is distinguishable from that for Attorney A. The opinion maintains that when most members of the public contact a lawyer to discuss obtaining legal services from that lawyer, they assume the details of the conversation will remain private. However, the husband, in visiting Attorney B was not so situated. The husband's primary purpose in meeting with Attorney B was to preclude him from representing the wife; that purpose does not create the sort of "reasonable expectation of confidentiality" that Rule 1.6 exists to protect. Accordingly, no duty of confidentiality is created for Attorney B out of the visit with this husband who misrepresented his purpose for the appointment. The committee opines that Attorney B is not required to withdraw because Attorney B has no duty to maintain the confidentiality of information received from the husband and no conflict of interest was triggered by that initial consultation.

I. Legal Ethics Opinion 1795—Advise to Witness

Is it ethical for a criminal defense attorney to discourage a witness from speaking with the Commonwealth's Attorney?

This opinion presents a hypothetical situation involving a lawyer's representation of a criminal defendant charged with felony unauthorized use of a vehicle where the victim mother reported the crime. At the court house, before the Commonwealth's Attorney ("CA") attempted to interview the mother, he was interrupted by the defense attorney who told the mother that she did not have to speak with the CA. When the CA did interview the mother, it was determined that while the mother was the primary driver of the vehicle, the defendant's father was the owner. The victim father also came to the courthouse to discuss the matter with the CA prior to the trial. The CA observed the defense attorney speaking with the two victims/parents. Later, the CA realized that while the mother was waiting in the courtroom, the victim father was not. At that time, the defense attorney admitted he had instructed the father to leave as he was not under subpoena. The defense attorney also told the father that since he was a necessary witness to prove ownership of the vehicle, if he left the courthouse, the Commonwealth would lose the case. The defense attorney later explained he had checked the file for the subpoena as the father had told him he did not know why he had to be there. Under the facts presented, the focus of this opinion is twofold: 1) whether the attorney was improperly giving advice to an unrepresented person whose interests conflict with those of the client; and 2) whether the attorney was improperly requesting a person to refrain from providing information to another party. The opinion analyzes the comments by the defense attorney in light of Rule 3.4(g), which greatly restricts when an attorney may request that someone decline to provide relevant information to another party and Rule 4.3(b), which restricts an attorney's communications with an unrepresented person, such as a witness. The draft concludes that as the attorney had not clarified the interests of the victim/parents prior to his remarks, the attorney improperly provided advice to unrepresented persons of interest. Therefore, the opinion concludes that the lawyer's advice did not go so far as to request that the person withhold information from the prosecution.

J. Legal Ethics Opinion 1796—Conflict of Interest—Defense Attorney Representing Defendants in Related Cases

Does an attorney have an impermissible conflict of interest under the Rules by representing two defendants in related matters?

This opinion presents a hypothetical situation involving a court appointed defense attorney defending two criminal defendants in separate cases. Defendant #1 retained the attorney to represent him on a charge of possession of a firearm as a convicted felon in state court. Defendant #2 hired the same attorney to represent him in state court on charges of first degree murder, abduction, conspiracy to commit murder, possession of a firearm by a convicted felon, and use of a firearm in the commission of a felony. Defendant #1 told the attorney he did not want to plead guilty to the firearms charge because he had the gun solely to protect himself from Defendant #2. The case was set for trial. The attorney did not disclose to either client or either court that he represented both Defendant #1 and #2. Both defendants were convicted and the attorney then accepted the court appointment to represent Defendant #1 in his appeal; he again did not disclose to the clients or the court that he represented each of these defendants. Defendant #1's conviction and sentence were affirmed. The pertinent authority regarding this issue is Rule 1.7(b), which addresses conflicts between current clients. Paragraph (b) addresses those situations where the representation of a client "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." The Committee finds that the facts do not support that the lawyer "reasonably believes" the representation of the two clients will not be "adversely affected." The Committee also notes that this attorney failed to meet the second criterion in that he did not consult with either of his clients, nor did he seek their consent to the concurrent representation. Each client, as well as the appointing court for the appeal, operated in a vacuum regarding the attorney's loyalty.

K. Legal Ethics Opinion 1797—Disbursal of Proceeds From a Trust Account the Bank Has Temporarily Frozen

Is a law firm violating the Rules or any other real estate law if it continues to use a bank trust account when the bank's policy will lead to the occasional bouncing of checks written to and for clients?

This opinion involves a dilemma faced by an attorney due to his bank's new trust account procedures. The attorney has a regular real estate practice. The bank has informed him that whenever he deposits a check into his trust account after 2:00, the entire trust account will be frozen for two days. The attorney's question is whether the bank's explanation to the bar, each time the check bounces, is sufficient to permit the attorney to write checks during the hold period. The opinion concludes that the attorney may not do so. To write checks during the hold period, the attorney would be making an impermissible misrepresentation to the payee of each check and would be prejudicing each client for whom the attorney wrote checks.

L. Legal Ethics Opinion 1798—Are Commonwealth's Attorneys Held to the Same Ethical Requirements as Other Attorneys?

Does a Commonwealth's Attorney violate Rule 1.1's duty of competence and Rule 1.3's duty of diligence when he fails to adequately represent clients due to his exceptionally high caseload? Furthermore, has the Commonwealth's Attorney violated his supervisory duties under Rule 5.1 by assigning the assistant more cases than he can reasonably be expected to prosecute in a competent and diligent manner?

This opinion presents hypotheticals involving an Assistant Commonwealth's Attorney who is currently assigned far more cases than the state standards suggest he should be handling. Because of his heavy caseload, this attorney does not have adequate time to prepare the cases he takes to trial. He complained to his boss, the Commonwealth's Attorney, who responds by stating that he knows the office is understaffed, but given the current lack of funding, there is nothing he can do about it. Fundamental to the first question is whether Commonwealth's Attorneys are held to the same ethical requirements as other attorneys. The committee, finding no exception for Commonwealth's Attorneys in the Rules, opines that Commonwealth's Attorneys are held to the same ethical responsibilities as all other attorneys. Therefore, the committee opines that a Commonwealth's Attorney who operates with a caseload so overly large as to preclude competent, diligent representation in each case is in violation of the ethics rules. With regard to the second question, the requestor asks whether there is any ethical issue faced by the supervising Commonwealth's Attorney if the Assistant is in violation of Rule 1.1 and/or Rule 1.3. Rule 5.1 (a) requires that a lawyer in a managerial position make reasonable efforts to ensure that the firm has measures in place so that lawyers in the office conform to the Rules. Also, paragraph (b) of that rule states that where one attorney has direct supervision over another lawyer, the supervisor should make reasonable efforts to ensure the other lawyer complies with the Rules of Professional Conduct. The rule continues in paragraph (c) to hold a supervising attorney responsible for the ethical violations of an attorney he supervises if he orders or knowingly ratifies the conduct involved. Where a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney's ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1.

M. Legal Ethics Opinion 1799—Conflict of Interest Between Commonwealth's Attorney and His Former Partner

Can a Commonwealth's Attorney prosecute cases where the defendant is represented by the Commonwealth's Attorney's former partner with whom he/she owns an interest in real estate?

This opinion considers a potential conflict of interest arising from the business relationship between an Assistant Commonwealth's Attorney and his former partner, who continues to represent defendants in that jurisdiction. The business relationship includes joint ownership of the building in which the former partner practices; a joint mortgage on the building; other rent-paying tenants; and joint ownership of all office equipment, such as computers, used by the former partner and other tenants. The opinion applies Rule 1.7(b), which states that "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." The concern of diminished loyalty to one's client is at the heart of a "personal interest" conflict for a lawyer. In the present scenario, several facts also indicate further entanglement between the prosecutor and the defense attorney because the business connection between the prosecutor and this defense attorney is directly related to the law practice of the defense attorney. Therefore, the Committee opines that this business relationship qualifies as a personal interest of the prosecutor giving rise to a conflict of interest under Rule 1.7(b). As the prosecutor's client is the Commonwealth, he is not able to obtain client consent as contemplated in Rule 1.7(b)(2). Accordingly, in this hypothetical, the Assistant Commonwealth's Attorney is precluded from prosecuting clients represented by the defense attorney.

Supreme Court Opinion

Legal Ethics Opinion 1765 was issued by the Standing Committee on Legal Ethics on June 13, 2003 and approved by the Supreme Court by order dated February 6, 2004. Legal Ethics Opinion 1765 generally addresses whether an attorney working for a federal intelligence agency may perform undercover work without running afoul of the prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation. The opinion request noted that while Rule 8.4 prohibits any conduct involving dishonesty, fraud, deceit, or misrepresentation, attorneys working for federal intelligence agencies routinely need to misrepresent their identity or purpose as part of standard undercover work. In wrestling with this question, the committee stayed the issuance of an opinion so that Rule 8.4 could be ammended. That rule change has now been effectuated—the Supreme Court of Virginia adopted a revised Rule 8.4 that prohibits dishonesty, fraud, deceit, or misrepresentation *that reflects adversely on the lawyer's fitness to practice law*. The committee then issued this opinion which concludes that, where an attorney is performing his lawful job duties as a staff member of a federal intelligence agency that lawful performance does not reflect adversely on the lawyer's fitness to practice law, even where dishonesty, fraud, deceit, or misrepresentation may be involved. The Virginia Supreme Court adopted this opinion; therefore, it is no longer merely advisory.

Recent Revisions to the Rules of Professional Conduct

The Virginia State Bar's Standing Committee on Legal Ethics is proposing an amendment to Rule 1.7 of the Virginia Rules of Professional Conduct, which was approved by the VSB Council at its meeting June 17, 2004, and has been submitted to the Supreme Court of Virginia for consideration. This amendment was originally part of the Legal Ethics Committee's comprehensive review of the Rules of Professional Conduct, the majority of amendments of which were approved by the Supreme Court and went into effect on January 1, 2004. 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 Legal Ethics Committee reviewed Virginia's current rules to determine, now that they have been in place since January 2000, whether any provisions need clarification.

The majority of proposed amendments were approved by the Supreme Court and went into effect on January 1, 2004. A remaining proposed amendment to Rule 1.7 that replaces the rule in its entirety. The new language is from the Ethics 2000 initiative. The committee found persuasive the ABA's contention that the current language of Rule 1.7 is ambiguous. The purpose of the proposed language is to provide a clearer test for lawyers to apply to potential conflicts of interest; nonetheless, the committee does not believe the new language represents a substantively different test, just a clearer articulation of the current one. The committee, in proposing this new language, chose not to include the ABA's requirement that consent be in writing as that requirement would have been a substantial departure from the current Rule. The proposed amendment, however, does require that an attorney memorialize in writing that the attorney and client discussed a conflict and that the client consented to the lawyer continuing the representation. Further, the Committee proposed changes to the comments of the rule to clarify that, while any memorialization would be better than none at all, it would be best to obtain the client's consent in writing.

Additionally, the committee moved language from Rule 2.2 (this rule was deleted by the amendments effective January 1, 2004) and put them into the comments of Rule 1.7. Rule 2.2 has been deleted already; the purpose was concern that there could be confusion between Rule 1.7's application to joint representations and former Rule 2.2's application to the lawyer's role as intermediary. As the two contexts are indistinguishable, all such situations would now be handled in one rule, i.e., Rule 1.7.

Recent Revision to Rule Regarding Promulgation of Advisory Opinions

In order to stimulate more bar and public comment on advisory opinions, the Legal Ethics Committee, along with the Lawyer Advertising and the Unauthorized Practice of Law committees, proposed amendments to Part 6, Section IV, Paragraph 10 of the Rules of the Supreme Court which were approved by the VSB Council on February 21, 2004 and submitted to the Supreme Court. The current rules governing the process for issuing advisory opinions do not provide for notice and public comment *before* the opinions are issued by one of the standing committees. The proposed amendments to Paragraph 10 would require the standing committees to issue "draft" or "proposed" opinions which would be published for comment while the opinions are still pending before the committee.

Two other areas of needed improvement in Paragraph 10 were also identified. The first clarifies the application of Paragraph 10. Specifically, the rule-making process outlined in Paragraph 10 applies only to changes to Rules of Professional Conduct and the Unauthorized Practice Rules, and not to changes to Paragraph 13, which contains the rules of procedure for the discipline system. To reinforce that Paragraph 13 changes are not subject to the Paragraph 10 process, a definitional change limits this paragraph's application to rule changes proposed by the Legal Ethics Committee, the Unauthorized Practice of Law Committee or the Lawyer Advertising Committee.

The final amendment regards the informal ethics advice that the bar's ethics counsel provide by telephone. While it has always been the ethics counsel's policy that these calls are confidential, that policy is not currently incorporated in Paragraph 10. Language has been added to establish that the calls are confidential and that ethics counsel may only testify regarding the content of such a call if the caller consents.

Ethics Telephone Calls

From July 1, 2003 through June 30, 2004, the average number of ethics calls to VSB staff attorneys per month has been 344. This represents a steady increase of calls over the past three years where FY 2003 had an average of 305 calls per month; FY 2002 an average of 280 calls per month; and FY 2001 an average of 266 calls per month.

I wish to thank the members of the committee—Vice Chair James O. Broccoletti, Jennifer A. Brust, Roger T. Creager, Kathleen A. Dooley, John P. Fishwick, Leonard C. Heath Jr., David Ross Rosenfeld, Ida O. McPherson—for their dedication and contributions to the work of the committee during the past year.