

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
REVISED LEGAL ETHICS OPINION 1850**

APPENDIX TO PETITION OF THE VIRGINIA STATE BAR

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TABLE OF CONTENTS

I.	VSB Council Agenda for October 23, 2020	1
II.	Ethics Committee Agenda for December 12, 2019	4
III.	Publication Notifications seeking public comment: Publication Release; VSB E-News; VSB Rule Changes; VSB News & Information	5
IV.	Comments	17
V.	Revised LEO 1850 Comparison Document	23
VI.	Affidavit of Karen A. Gould	39

**VIRGINIA STATE BAR
COUNCIL MEETING
HOT SPRINGS, VIRGINIA
FRIDAY, OCTOBER 23, 2020**

AGENDA

**9:00 a.m. Council Meeting – Grand Ballroom West
The Omni Homestead Resort, Hot Springs, VA**

I. Reports and Information Items

- | | |
|--|---|
| A. President's report – Brian L. Buniva, President | 1 |
| B. Executive Director's report – Karen A. Gould, Executive Director | 2 |
| C. Financial reports by Crystal T. Hendrick, Finance/Procurement
Director (presented by Karen Gould) | |
| -- Financial Report for FY 2020 | 3 |
| -- Current Financial Report | 4 |
| D. Bar Counsel's report by Renu M. Brennan, Bar Counsel
(presented by Karen Gould) | 5 |
| E. Conference of Local and Specialty Bar Associations report –
Susan G. Rager, CLSBA chair (presented by Karen Gould) | 6 |
| F. Diversity Conference report – Sheila M. Costin, DC chair | 7 |
| G. Senior Lawyers Conference report – Margaret A. Nelson,
SLC chair | 8 |
| H. Young Lawyers Conference report – Melissa Y. York, YLC president | 9 |
| I. Opportunity for questions and comments | |

II. Action Items

- | | |
|--|----|
| A. Approval of minutes of February 29, 2020 meeting | 10 |
| B. Proposed LEO 1850 – Emily F. Hedrick, Assist. Ethics Counsel,
Standing Committee on Legal Ethics | 11 |
| C. Proposed amendments to Rules of Professional Conduct 1.17,
1.18, and 5.5 – Emily F. Hedrick, Assistant Ethics Counsel,
Standing Committee on Legal Ethics | 12 |
| D. Nominating Committee report – Marni E. Byrum, Nominating
Committee chair | 13 |

Council meeting agenda
October 23, 2020

- | | |
|---|----|
| E. Diversity Conference bylaw amendments – Sheila M. Costin,
DC chair | 14 |
| F. Proposed amendments to Paragraph 13-6.D – Cameron M. Rountree,
Deputy Executive Director | 15 |
| G. Proposed bylaw amendment to change audit requirement –
Cameron M. Rountree, Deputy Executive Director | 16 |

III. Presentations

- | | |
|--|----|
| A. Tribute to the late Justice Ruth Bader Ginsburg – Marni E. Byrum,
Immediate Past President | |
| B. VSB president-elect introductions | |
| C. Presentation of resolutions honoring Marni E. Byrum –
Brian L. Buniva, President | 17 |

IV. Notice of Upcoming Receptions, Dinners & Meetings¹

12 Noon, Friday, February 26, 2021, lunch and Executive Committee meeting, 3rd Floor Conference Room, 1111 E. Main St., Richmond (Bank of America building).

6:30 p.m., Friday, February 26, 2021, Council reception and dinner, Virginia Museum of Fine Arts, 200 N. Arthur Ashe Blvd., Richmond.

9:00 a.m., Saturday, February 27, 2021, Council meeting, Omni Richmond Hotel, 100 S. 12th Street, Richmond.

12 Noon, Thursday, April 22, 2021, lunch and Executive Committee meeting, 3rd Floor Conference Room, 1111 E. Main St., Richmond (Bank of America building).

12 Noon, Wednesday, June 16, 2021, lunch and Executive Committee meeting, Holiday Inn North Beach, 3900 Atlantic Avenue, Virginia Beach.

6:30 p.m., Wednesday, June 16, 2021, Council reception and dinner, Sheraton Virginia Beach Oceanfront Hotel, 3501 Atlantic Avenue, Virginia Beach.

9:00 a.m., Thursday, June 17, 2021, Council meeting, Cape Henry Room, Holiday Inn & Suites North Beach, 3900 Atlantic Ave., Virginia Beach.

12:30 p.m., Thursday, October 21, 2021, lunch and Executive Committee meeting, location TBD.

¹ All meeting dates and locations are subject to change or cancellation, dependent upon the course of the pandemic.

Council meeting agenda
October 23, 2020

6:30 p.m., Thursday, October 21, 2021, Council reception and dinner, location TBD.

9:00 a.m., Friday, October 22, 2021, Council meeting, location TBD.

12 noon, Friday, February 25, 2022, lunch and Executive Committee meeting, 1111 E. Main St., 3rd Floor Conference Room, Richmond (Bank of America building).

6:30 p.m., Friday, February 25, 2022, Council reception and dinner, Virginia Museum of Fine Arts, 200 N. Arthur Ashe Blvd., Richmond.

9:00 a.m., Saturday, February 26, 2022, Council meeting, Omni Richmond Hotel, 100 S. 12th Street, Richmond.

**ALL unfinished business of the Legal Ethics Committee is confidential, pursuant to
SCV Rule Part 6, Section IV, Paragraph 10.*

**VIRGINIA STATE BAR
STANDING COMMITTEE ON LEGAL ETHICS**

Thursday, December 12, 2019

10:00 a.m.

Richmond, Virginia

AGENDA

I. APPROVAL OF MINUTES

II. RULES OF PROFESSIONAL CONDUCT

A. Rule 3.8 – Additional Responsibilities of Prosecutors

B. Rule 4.2 – Communication with Represented Persons

C. Rule 1.8 – Conflict of Interest: Prohibited Transactions

III. OPINIONS

A. LEO 1892 – Imputation of Personal Interest Conflicts

B. LEO 1878 – Successor Lawyer’s Duties to Explain and Provide for Reasonable Fees

C. LEO 1850 – Outsourcing (revisions)

IV. ADJOURNMENT



Virginia State Bar

Seeking Public Comment

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MEDIA CONTACT: James M. McCauley, Ethics Counsel

RELEASE DATE: December 13, 2019

VIRGINIA STATE BAR'S STANDING COMMITTEE ON LEGAL ETHICS SEEKING PUBLIC COMMENT ON LEGAL ETHICS OPINION 1850

RICHMOND - Pursuant to Part 6, § IV, ¶ 10-2(C) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed revisions to Legal Ethics Opinion 1850, Outsourcing of Legal Services.

This opinion generally addresses the ethical issues involved when a lawyer considers outsourcing legal or non-legal support services.

In this proposed opinion, the Committee concludes a lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed advance consent to outsourcing the work. The proposed revisions simplify and streamline the scenarios and analysis in the opinion, and clarify what a lawyer must disclose to a client when outsourcing services.

Inspection and Comment

The proposed revised advisory opinion may be inspected at the office of the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics

LEO 1850

Page 2

Counsel at 804-775-0557, or can be found at the Virginia State Bar's website at <http://www.vsb.org>.

Any individual, business, or other entity may file or submit written comments in support of or in opposition to the proposed opinion with Karen A. Gould, Executive Director of the Virginia State Bar, not later than February 7, 2020. Comments may be submitted via email to publiccomment@vsb.org.



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Governance

On November 1, 2019, the **Supreme Court of Virginia** amended [Rule 1A:5 regarding Virginia Corporate Counsel and Corporate Counsel Registrants](#) , effective January 1, 2020.



The **Standing Committee on Legal Ethics** seeks comments on proposed amendments to Rule 1.8, a proposed new legal ethics opinion, and amendments to existing LEO 1850. Full details [here](#) .

Effective December 9, 2019, the **United States Court of Appeals for the Fourth Circuit** amended [four local rules](#) to better conform with December 1, 2019, amendments to the Federal Rules of Appellate Procedure.

Be a Bar leader! The Virginia State Bar [seeks Virginia lawyers and nonlawyers](#) to serve on its many boards and committees that work to improve the legal system in the Commonwealth.

The **Virginia Judges and Lawyers Assistance Program** (VJLAP) unveiled a [new website](#) with a number of resources and a 24/7/365 assistance line as it looks toward an expansion in the coming year.

Discipline

Recent [disciplinary actions](#) :

[Robert Earl Schulz](#) , license revoked, effective December 9, 2019.

[Alfred Lincoln Robertson Jr.](#) , license suspended, effective December 6, 2019.

[Michael Anthony Cole](#) , license suspended, effective January 2, 2020.

[Vincent Mark Amberly](#) , license suspended, effective January 5, 2020.

[James McMurray Johnson](#) , public reprimand, effective December 6, 2019.

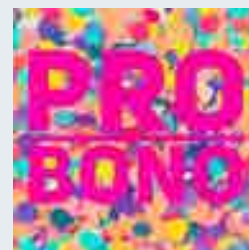
Compliance



Still haven't finished your [2019 CLE requirement](#) ? The next deadline is 4:45 pm EST on **February 1, 2020** . After this date, the late filing fee increases to \$200. You may pay your noncompliance fee and late filing fees online with a Visa or MasterCard.

Pro Bono / Access to Justice

Nominate a pro bono star! The deadline for nominating a lawyer for the 2020 **Legal Aid Award** and a 3L law student for the **Oliver White Hill Law Student Pro Bono Award** is March 8, 2020. More information on the awards and the procedures may be found [here](#) .



Already broken that New Year's resolution? Here's one to try: Make pro bono a resolution for 2020. It's easier than ever with **Virginia Free Legal Answers** , the online pro bono portal where Virginia attorneys can anonymously provide advice and counsel to Virginians in need from the comfort of your home or office. [Register here](#) .

The Virginia Lawyer Referral Service (VLRS) needs you! This year, joining the **VLRS** is free for lawyers new to the service, and as always the VLRS gives Virginians a simple, affordable way to speak to a lawyer. Please consider [becoming a panel member](#) and helping to provide access to justice.

2020 CLE, Events & Awards

- **[50th Annual Criminal Law Seminar](#)**, Charlottesville & Williamsburg – Feb 7 & 14
- **[Bar Leaders Institute](#)**, Lewis Ginter Botanical Garden, Richmond – March 6
- **[YLC Bench-Bar Conference](#)**, Lewis Ginter Botanical Gardens – March 13
- **[Solo & Small-Firm Practitioner Forum](#)**, Eastern Shore Community College, Melfa – April 3
- **Techshow CLE**, Richmond Convention Center April 27 – [early registration](#) is open!
- **Leroy R. Hassell Sr. Indigent Criminal Defense Seminar**, Richmond Convention Center; (Remote locations: Wytheville Meeting Center and James Madison University, Festival Conference & Student Center, Harrisonburg) – May 1
- **[Solo & Small-Firm Practitioner Forum](#)**, Institute for Advanced Learning and Research, Danville – May 19
- **VSB Annual Meeting**, Virginia Beach – June 18-20

Thank you to the advertisers and contributors who made **Virginia Lawyer** a vibrant record of the Commonwealth's legal community in the last decade. *Virginia Lawyer* is the only publication that reaches every member of the VSB in Virginia and across the USA, and remains accessible online for years to come.

Our [last issue of the decade](#) focused on pro bono and the myriad ways Virginia lawyers work to improve access to justice.

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Check out the [VSB classifieds](#) if you are looking for a new job or have a position to post. Lawyer job listings of 50 words or less are free for VSB members. Other listings are \$1.50 a word for online and in the *Virginia Lawyer* . There's no less expensive way to reach all 50,000+ Virginia lawyers.

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Professional Guidelines

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Proposed | revisions to LEO 1850 regarding the outsourcing of legal services. Comments extended until March 20, 2020.

Pursuant to Part 6, § IV, ¶ 10-2(C) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's [Standing Committee on Legal Ethics](#) is seeking public comment on proposed revisions to [Legal Ethics Opinion 1850](#), Outsourcing of Legal Services.

This opinion generally addresses the ethical issues involved when a lawyer considers outsourcing legal or non-legal support services.

In this proposed opinion, the committee concludes a lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed advance consent to outsourcing the work. The proposed revisions simplify and streamline the scenarios and analysis in the opinion, and clarify what a lawyer must disclose to a client when outsourcing services.

Inspection and Comment

The proposed revised advisory opinion may be inspected below or at the office of the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday, excluding holidays. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at [804-775-0557](tel:804-775-0557).

Any individual, business, or other entity may file or submit written comments in support of or in opposition to the proposed opinion with Karen A. Gould, Executive Director of the Virginia State Bar, not later than **March 20, 2020**. Comments may be submitted via email to publiccomment@vsb.org.

View a [redlined version of proposed revisions to LEO 1850 \(pdf\)](#). A clean version of revised LEO 1850 as of December 13, 2019, follows.

LEGAL ETHICS OPINION 1850 **Revised**
SERVICES

OUTSOURCING OF LEGAL

This opinion deals with the ethical issues involved when a lawyer considers outsourcing legal or non-legal support services to lawyers or paralegals. Many lawyers already engage in some form

of outsourcing to provide more efficient and effective service to their clients. Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example. Law firms have always and will always engage other lawyers and nonlawyers in the provision of various legal and non-legal support services. Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the lawyer the opportunity to seek the services of outside lawyers and staff in complex matters. Legal outsourcing also gives sole practitioners and small law firms more flexibility in not having to hire staff or employees when they experience temporary work overflows for which a contract lawyer or non-lawyer may be appropriate.

A few examples of outsourcing arrangements are:

1. A Virginia law firm retains an outsourced law firm in India to conduct patent searches and to prepare patent applications for some of its clients. Lawyers and nonlawyers at the outsourced firm may work on the matters. The outsourced firm will not have access to any client confidences except confidential information that is necessary to perform the patent searches and prepare the patent applications. The outsourced law firm regularly does patent searches and applications for U.S. law firms. In some situations, the outsourced law firm might be hired through an intermediary company that verifies the credentials of the firm and checks conflicts; in other situations, the Virginia law firm might directly retain the outsourced law firm.

2. A Virginia law firm occasionally hires Lawyer Z, who works for several firms on an as-needed contract basis, to perform specific legal tasks such as legal research and drafting legal memoranda and briefs. Lawyer Z is a Virginia-licensed lawyer who works out of her home and works on an hourly basis for the law firm, but does not meet with firm clients. She has access to firm files and matters only as needed for the discrete tasks she is hired to perform.

3. A Virginia law firm sends legal work involving legal research and brief writing to a legal research “think tank” to produce work product that is then incorporated into the work product of the law firm.

On the other hand, a situation that may be colloquially called “outsourcing” but that does not raise any of the concerns identified in this opinion is: a Virginia law firm regularly hires Lawyer Y to perform specific legal tasks for them, which may or may not involve contact with firm clients, working directly with and under the supervision of lawyers in the law firm. In that scenario, Lawyer Y is working under the direct supervision of lawyers in the firm and has full access to information about the firm’s clients, and therefore is associated with the firm for purposes of the Rules of Professional Conduct, including confidentiality and conflicts.

Applicable Rules and Opinions

The applicable Rules of Professional Conduct are: Rule 1.1, Competence, Rule 1.2(a), Scope of Representation, Rule 1.4, Communication, Rule 1.5, Fees, Rule 1.6, Confidentiality of Information, Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, and Rule 5.5, Unauthorized Practice of law; Multijurisdictional Practice of Law.

Applicable legal ethics opinions are LEOs 1712 and 1735, regarding the use of temporary lawyers and contract lawyers.

Analysis

A lawyer’s ethical duties when outsourcing tasks fall into four categories: supervision of nonlawyers, including unauthorized practice of law issues, client communication and the need for consent to outsourcing arrangements, confidentiality, and billing and fees. This opinion will address each of these categories in order.

Supervision and unauthorized practice of law

The lawyer's initial duty when considering outsourcing, as established by Rule 5.3(b), is to exercise due diligence in the selection of lawyers or nonlawyers. Lawyers have a duty to be competent in the representation of their clients and to ensure that those who are working under their supervision perform competently. See Rule 1.1. To satisfy the duty of competence, a lawyer who outsources legal work must ensure that the tasks in question are delegated to individuals who possess the skills required to perform them and that the individuals are appropriately supervised to ensure competent representation of the client.

The lawyer must also consider whether the lawyer or nonlawyer understands and will comply with the ethical rules that govern the initiating lawyer's conduct and will act in a manner that is compatible with that lawyer's professional obligations, just as in any other supervisory situation. In order to comply with Rule 5.3(b), the lawyer must be able to adequately supervise the nonlawyer if the work is outsourced. Specifically, the lawyer needs to review the nonlawyer's work on an ongoing basis to ensure its quality, the lawyer must maintain ongoing communication to ensure that the nonlawyer is discharging the assignment in accordance with the lawyer's directions and expectations, and the lawyer needs to review thoroughly all work product to ensure its accuracy and reliability and that it is in the client's interest. The lawyer remains ultimately responsible for the conduct and work product of the nonlawyer. Rule 5.3(c).

The Committee recommends that overseas outsourcing, in particular, should include a written outsourcing agreement to protect the law firm. The agreement should include assurances that the outsourced firm or vendor will meet all professional obligations of the hiring lawyer, specifically including confidentiality, information security, conflicts, and unauthorized practice of law. The hiring lawyer should make reasonable inquiry and act competently in choosing a provider that will honor these obligations and use reasonable measures to supervise the vendor's work.

Client communication and consent

In LEO 1712, the Committee concluded that when a lawyer hires a temporary lawyer to work on a client's matter, the lawyer must advise the client of that fact and must seek the client's consent to the arrangement if the temporary lawyer will perform independent work for the client and will not work under the direct supervision of a lawyer in the firm. Applying Rules 1.2(a) and 1.4, the Committee concluded that the client is entitled to know who is involved in the representation and can refuse to allow the use of an outsourced lawyer or nonlawyer. Extending that analysis to other outsourcing situations, a lawyer must obtain informed consent from the client if the lawyer is outsourcing legal work to a lawyer or nonlawyer who is not associated with or working under the direct supervision of a lawyer in the firm that the client retained, even if no confidential information is being shared outside of the firm.

Confidentiality

If confidential client information will be shared with a lawyer or nonlawyer outside of the law firm (meaning either not associated with the firm or directly supervised by a lawyer in the firm), the lawyer must secure the client's consent in advance. The implied authorization of Rule 1.6(a) and its Comment [5a]^[1] to share confidential information within a firm generally does not extend to entities or individuals working outside the law firm. Thus, in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. Additionally, the lawyer needs to ensure that all appropriate measures have been employed to educate the nonlawyer on the lawyer's duties as they apply to client confidences.

When sharing or storing confidential information, the lawyer must act reasonably to safeguard the information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by anyone under the lawyer's supervision. See Rule 1.6, Comment [19]. For example, the nonlawyer should assure the lawyer that policies and procedures are in place to protect and secure data while in transit and that he or she understands and will abide by the policies and

procedures. Written confidentiality agreements are strongly advisable in outsourcing relationships. The outsourcing lawyer should also ask the nonlawyer whether he or she is performing legal services for any parties adverse to the lawyer's client, and remind him or her, preferably in writing, of the need to safeguard the confidences and secrets of the lawyer's current and former clients. See Rule 1.6, Comment [5c].^[2]

Billing and Fees

In LEO 1712, the Committee discussed the issue of payment arrangements when legal services are outsourced or when temporary lawyers are used. The Committee reiterated its position in LEO 1735, which deals with a lawyer independent contractor. This Committee opines that if payment is billed to the client as a *disbursement*, then the lawyer must disclose the actual amount of the disbursement including any mark-up or surcharge on the amount actually disbursed to the nonlawyer. Any mark-up or surcharge on the disbursement billed to the client is tested by the principles articulated in ABA Formal Opinion 93-379 (1993):

When that term ["disbursements"] is used, clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if a lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.

It is the view of this Committee that in the absence of disclosure to the contrary it would be improper for the lawyer to assess the surcharge on these disbursements over and above the amount actually incurred unless the lawyer incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper for the lawyer to charge the client the full rate and to retain the profit instead of giving the client the discount. Clients could view this practice as an attempt to create profit centers when they had been told they would be billed for disbursements. LEO 1712.

On the other hand, if the lawyer or firm hires a contract lawyer or non-lawyer to work on site or under the direct supervision of the lawyer such that they are considered "associated" with the firm, the lawyer or firm may bill the client for the usual or customary charge the firm would bill for any other associate or employee even if that amount is more than what the firm pays the staffing agency or vendor. The amount paid to the staffing agency or vendor is an overhead expense that the firm is not required to disclose to a client.

This Committee believes that these same principles apply in the case of outsourced legal services. Fees must be reasonable, as required by Rule 1.5(a), and adequately explained to the client, as required by Rule 1.5(b). Further, in a contingent fee case it would be improper to charge separately for work that is usually done by the client's own lawyer and that is incorporated into the standard fee paid to the lawyer, even if that cost is paid to a third-party provider.

Conclusion

A lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed advance consent to outsourcing the work.

^[1] Rule 1.6, Comment [5a]: Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to

protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections.

[\[2\]](#) Rule 1.6 Comment [5c]: Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

Updated: January 7, 2020

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2017

2016

2015

2014

2013

2012

2011

2010

2009

NEWS AND INFORMATION

[Home](#) [News](#) [Ethics Committee Seeks Comments on Proposed LEO and Rule Changes](#)

December 16, 2019

Ethics Committee Seeks Comments on Proposed LEO and Rule Changes

The [Standing Committee on Legal Ethics](#) seeks comments on proposed amendments to Rule 1.8, a proposed new legal ethics opinion, and amendments to existing LEO 1850.

The [proposed amendments to Rule 1.8](#), which concerns conflicts of interest, would add a new paragraph and comments to establish a bright-line rule prohibiting sexual relations with a current client unless the relationship predated the lawyer-client relationship.

[Proposed LEO 1878](#) concerns a successor lawyer's duties to include in a written engagement agreement provisions relating to predecessor counsel's *quantum meruit* legal fee claim in a contingent fee matter.

And [proposed revisions to LEO 1850](#), which pertains to the outsourcing of legal services, simplify and streamline the scenarios and analysis in the opinion – and clarify what a lawyer must disclose to a client when outsourcing services.

The deadline for comment on all three proposals has been extended to March 20, 2020. Follow the links above to view the full proposed amendments, commentary, and information on how to submit comments.

Updated: Jan 07, 2020



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March 16, 2020

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1111 East Main Street, Suite 700
Richmond, VA 23219-0026

Re: Proposed Legal Ethics Opinions 1850 and 1878 and
Proposed Amendment to Rule 1.8

Dear Ms. Gould:

Thank you for seeking public comment on proposed advisory Legal Ethics Opinions 1850 and 1878 ("LEOs") and proposed amendment to Rule 1:8.

After reviewing and discussing the proposed LEOs and amendment to Rule 1:8, the Ethics Committee of the Local Government Attorneys of Virginia, Inc. ("LGA") has determined that the proposed do not have any impact unique to the practice of local government law. Therefore, the Committee has no comment on the proposed LEOs or amendment to Rule 1:8. However, we do appreciate the continuing opportunity to provide comments on proposed Legal Ethics Opinions and Rule changes.

Sincerely,

Leo P. Rogers
County Attorney and
Chair of the LGA Ethics Committee

cc: Timothy R. Spencer, LGA President

From: [Hall, Kristi](#)
To: ["jweaver28@gmail.com"](mailto:jweaver28@gmail.com)
Cc: [Gould, Karen](#); [Ethics](#); [publiccomment](#)
Subject: FW: [EXTERNAL SENDER] Proposed LEO 1850
Date: Monday, March 23, 2020 10:48:50 AM

Dear Ms. Weaver:

Thank you for your comment regarding the Standing Committee on Legal Ethics' proposed revisions to LEO 1850. The committee will consider your comment at its next meeting.

Best,



Kristi R. Hall
Executive Assistant/Paralegal
 Virginia State Bar
 1111 East Main Street, Ste. 700 | Richmond, VA 23219-0026
 804/775.0557 | Fax 804/775.0597 | hall@vsb.org | www.vsb.org

The Virginia State Bar is a state agency that protects the public by educating and assisting lawyers to practice ethically and competently, and by disciplining those who violate the Supreme Court's Rules of Professional Conduct, all at no cost to Virginia taxpayers.

From: jane weaver <jweaver28@gmail.com>
Sent: Friday, March 20, 2020 8:11 PM
To: publiccomment <PublicComment@vsb.org>
Subject: [EXTERNAL SENDER] Proposed LEO 1850

[EXTERNAL SENDER]

Of course I don't know that Chancellor George Wythe rolled over in his grave in historic St. John's Churchyard in Richmond when this LEO was adopted in 2010, but it shocked me when I read it, and these changes make the basic problem worse. The LEO does not deserve the Supreme Court's imprimatur. In fact, despite being hobbled by lack of access to ethics databases because of the closure of the Antinin Scalia Law School's library to non-alumni over a year ago (and other libraries including the Library of Congress not subscribing to expensive ethics databases), I dare instead suggest it be rescinded.

LEO assumes the bar is meant to serve law firms, not the public and definitely not the least wealthy, whom the Chancellor (whose surname Google's spellchecker apparently detests) devoted much of his professional career to protect. Many potential clients whom the Chancellor refused to represent in private practice wished to use the law to oppress widows, orphans, slaves and the poor. Clean hands are the core of equity, but not of corporations only wishing the cheapest supplier, or wishing to leverage their economic resources against considerably less wealthy individuals. Outsourcing abroad also limits the possibility of whistleblowing concerning practices inconsistent with Virginia values, such as fraud. Indeed, I recently learned of the Richmond Times Dispatch's November series about guardianship abuses by the law firm also representing the much wealthier VCU hospital.

Even visiting the Bar office before the coronavirus closure, I was unable to learn the ethics committee members in 2010, much less what entity requested this LEO. I was told no comments had been received, and that this was essentially a done deal. Would the Chancellor have exclaimed "For

shame!"?

I write assuming the deadline for comment has not been extended, since this LEO was difficult to find on the website.

Jane Weaver

From: [Hall, Kristi](#)
To: crouchandcrouch@gmail.com
Cc: [Gould, Karen](#); [McCauley, Jim](#); [Hall, Kristi](#); [publiccomment](#)
Subject: FW: [EXTERNAL SENDER] Comments on LEO 1850 revisions
Date: Friday, March 20, 2020 4:48:28 PM

Dear Mr. Crouch:

Thank you for your comments to the Standing Committee on Legal Ethics' proposed revisions to LEO 1850. The Legal Ethics Committee will consider your comments at its next meeting.

Please feel free to call with any questions.

Best,



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From: John Crouch <crouchandcrouch@gmail.com>
Sent: Friday, March 20, 2020 1:31 PM
To: publiccomment <PublicComment@vsb.org>
Subject: [EXTERNAL SENDER] Comments on LEO 1850 revisions

[EXTERNAL SENDER]
 Karen,

Supervision and UPL:

“The Committee recommends that overseas outsourcing, in particular, should include a written outsourcing agreement to protect the law firm.”

Might be nice to add “and its clients” at the end of the sentence.

Confidentiality:

Grammar:

"(meaning either not associated with the firm or directly supervised by a lawyer in the firm)"
 — The multiple negatives and the either/ors are kind of mixed up here. If it means
 "(meaning **neither** associated with the firm **nor** directly supervised by a lawyer in the firm)"
 it would be clearer to say it that way. Or if another meaning is intended, other such changes to

clarify it would help.

Substance:

1. The Confidentiality section, by including “non lawyers”, generally reads as if it applies to all kinds of services that lawyers use, including outside typists, couriers, process servers, court reporters, storage, movers, computer repair shops, and internet services of all kinds. If those are included, I heartily agree with the advice about reasonable steps to ensure confidentiality and to watch out for conflicts of interest that the service providers may have. But requiring clients’ consent for all of these seems impractical, or at least a huge change from how we do things now.

Rule 1.6 Comments 19 et seq. address this issue comprehensively, and as far as I can see, they do not require this kind of client consent when it comes to such non-lawyer service providers.

On the other hand, the Confidentiality section’s phrase,
"ask the nonlawyer whether he or she is performing legal services for any parties adverse to the lawyer’s client"

suggests that maybe this section IS only about outsourcing LEGAL work. If it is not meant to be limited to that, it would be clearer to just say “services” instead of “legal services”.

(The concept of nonlawyers providing “legal services” is also troubling, unless there is a definition somewhere that distinguishes “legal services” from lawyers’ work.)

2. I also thoroughly disagree with this line in the original and the revised LEO:

"The implied authorization of Rule 1.6(a) and its Comment [5a] to share confidential information within a firm generally does not extend to entities or individuals working outside the law firm."

First, as a solo and even when I was in a two-lawyer firm, I had always assumed that Comment 5a’s phrase, “consult with colleagues or other attorneys” MUST mean lawyers outside my own firm. Until I looked it up just now, I always thought “colleagues” meant my fellow lawyers, not “co-workers.” Even if I’m wrong, there are probably a lot of us who assume the same thing.

Second, most of Comment 5a only makes sense in the context of consulting lawyers outside the firm. The part of 5a quoted in the LEO’s footnote cautions against possible waiver of privilege. 5a’s last three sentences, which do not appear in the footnote, say to check for conflicts and to try to be abstract and hypothetical, and impose duties on the consulted lawyer that would go without saying for a lawyer in the same firm.

Billing and Fees:

I totally agree with the thrust of this section, and with the added paragraph. But I don’t understand why disclosure would make the practice — surcharges on third-party costs, generally paid for with the client’s trust-account money — OK. I get that it would make it be “adequately explained to the client” — if done in a prominent enough manner that the client actually understands it —

but why would such charges be “reasonable”? And why would they even be legal fees, if they aren’t for legal work, but just padding of third-party charges?

John

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1 LEGAL ETHICS OPINION 1850 Revised
 2 OF LEGAL SERVICES.

OUTSOURCING

3
 4 —This opinion deals with the ethical issues involved when a lawyer
 5 considers outsourcing legal or non-legal support services to lawyers or
 6 paralegals. -Many lawyers already engage in some form of outsourcing to
 7 provide more efficient and effective service to their clients. -Outsourcing
 8 takes many forms: reproduction of materials, document retention database
 9 creation, conducting legal research, case and litigation management,
 10 drafting legal memoranda or briefs, reviewing discovery materials,
 11 conducting patent searches, and drafting contracts, for example. -Law firms
 12 have always and will always engage other lawyers and nonlawyers in the
 13 provision of various legal and non-legal support services. -Legal
 14 outsourcing can be highly beneficial to the lawyer and the client, since it
 15 gives the lawyer the opportunity to seek the services of outside lawyers and
 16 staff in complex matters. Legal outsourcing also gives sole practitioners
 17 and small law firms more flexibility in not having to hire staff or employees
 18 when they experience temporary work overflows for which a contract
 19 lawyer or non-lawyer may be appropriate.

20
 21 ~~—With the uptick in outsourcing, the Committee would like to consider a~~
 22 ~~number of ethical concerns raised by outsourcing models: conflicts of~~
 23 ~~interest, confidentiality, scope of representation, professional independence~~
 24 ~~and billing, and the unauthorized practice of law and supervision of~~
 25 ~~nonlawyers. There are many variations of outsourcing arrangements and~~
 26 ~~the Committee would like to consider several common scenarios to provide~~
 27 ~~guidance on the ethical issues. For purposes of this opinion, the~~
 28 ~~Committee will use the term *nonlawyer* to refer to an outsourced lawyer~~
 29 ~~who is not licensed in Virginia as well as a nonlawyer.~~

30
 31 ~~—In Scenario 1, Virginia Law Firm~~ A few examples of outsourcing
 32 arrangements are:

33
 34 1. A Virginia law firm retains an outsourced law firm in India to conduct
 35 patent searches and to prepare patent applications for some of ~~their~~ its
 36 clients. -Lawyers and nonlawyers at the outsourced firm may work on the
 37 matters. -The outsourced firm will not have access to any client
 38 confidences ~~with the exception of~~ except confidential information that is

39 necessary to perform the patent searches and prepare the patent
 40 applications. ~~The outsourced law firm~~ regularly does patent
 41 searches and applications for ~~many~~ U.S. law firms. ~~In some situations, the~~
 42 outsourced law firm might be hired through an intermediary company that
 43 verifies the credentials of the firm and checks conflicts; in other situations,
 44 the Virginia law firm might directly retain the outsourced law firm.

45
 46 ~~—Would it make a difference if the outsourced law firm was hired through~~
 47 ~~an intermediary company that verifies the credentials of the outsourced firm~~
 48 ~~and checks conflicts?~~

49

50 ~~—In Scenario 2, A Virginia Law Firm:~~

51

52 ~~(a) routinely~~ law firm occasionally hires Lawyer Z, who works for several
 53 firms on an as-needed contract basis, to perform specific legal tasks ~~for~~
 54 ~~them,~~ such as legal research, and drafting legal ~~memorandum~~ memoranda
 55 and briefs, ~~and other related legal work.~~ Lawyer Z is a Virginia ~~licensed~~
 56 lawyer who works out of her home and works on an hourly basis for
 57 ~~Virginia Law Firm~~ the law firm, but does not meet with firm clients. ~~Even~~
 58 ~~though she works remotely, she~~ She has ~~complete~~ access to firm files and
 59 matters only as needed ~~and works directly with and under~~ for the direct
 60 supervision of Partner A with the Virginia Law Firm ~~discrete tasks she is~~
 61 hired to perform.

62

63 ~~(b) Alternatively, Law Firm occasionally hires Lawyer Z who works for~~
 64 ~~several firms on an as-needed contract basis.~~

65

66 ~~—In Scenario 3, A Virginia Law Firm~~ law firm sends legal work
 67 involving legal research and brief writing to a legal research “think tank” to
 68 produce work product that is then incorporated into the work product of the
 69 ~~Virginia Law Firm~~ law firm.

70

71 ~~APPLICABLE RULES AND OPINIONS:~~

72

73 ~~—Rule 1.1 deals with the lawyer’s duty to provide competent representation~~
 74 ~~and Rule 1.2(a)¹ addressees the scope of representation and states that~~
 75 ~~the lawyer must abide by the client’s decisions and consult with the client~~
 76 ~~regarding the means by which the objectives of the representation will be~~
 77 ~~pursued. Application of Rule 1.2 leads the Committee to consider Rule~~
 78 ~~1.4’s² communication requirements that the lawyer keep the client~~
 79 ~~reasonably informed and explain enough about a matter to permit the client~~
 80 ~~to make an informed decision. A threshold issue is whether and under~~
 81 ~~what circumstances a lawyer must communicate with and seek approval~~
 82 ~~from the client in order to outsource legal work.~~

83
 84 ~~—Rule 1.6³ imposes duties of confidentiality. The lawyer must be mindful~~
 85 ~~of protecting all client information and must remain cautious that others to~~
 86 ~~whom he/she may be outsourcing work understand and abide by such~~
 87 ~~client confidentiality provisions as required by the rule. An important issue~~
 88 ~~is whether and under what circumstances the lawyer must seek client~~
 89 ~~consent to share confidential information with third parties involved in the~~
 90 ~~outsourcing process. Outsourcing may also require a conflicts analysis~~
 91 ~~under Rules 1.7 and 1.9, which require loyalty to current and former clients~~
 92 ~~and duties to protect their information.~~

93
 94 ~~—Rule 1.5 applies to the questions that arise when the lawyer considers~~
 95 ~~appropriate billing and fees for outsourced work, and Rule 5.4 requires the~~

¹Rule 1.2

~~—(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued.~~

²Rule 1.4

~~—(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.~~

~~—(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation.~~

³Rule 1.6

~~—(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).~~

~~lawyer to preserve his/her professional and independent judgment when delegating tasks to nonlawyers outside the firm.~~

~~—Outsourcing will also likely involve supervising nonlawyers. Rule 5.3(b)⁴ requires that a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Rule 5.3(c) directs that the lawyer overseeing the conduct of a nonlawyer will remain ultimately responsible for the ethical conduct of that nonlawyer, when the lawyer has direct supervisory authority over that nonlawyer and orders or ratifies that nonlawyer's conduct.~~

~~—Lastly, the lawyer must determine whether the work being undertaken or assigned to nonlawyers might violate Rule 5.5⁵, which forbids lawyers to assist in the unauthorized practice of law.~~

~~—In addition to the Rules cited, Legal Ethics Opinions 1712 and 1735 provide guidance. LEO 1712 involves the use of temporary lawyers and addresses conflicts issues, client confidences, billing, communication and client consent, and maintaining the lawyer's independent professional~~

⁴Rule 5.3

~~—With respect to a nonlawyer employed or retained by or associated with a lawyer:~~

~~—(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure the person's conduct is compatible with the professional obligations of the lawyer; and~~

~~—(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:~~

~~—(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or~~

~~—(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.~~

⁵Rule 5.5

~~—(a) A lawyer shall not:~~

~~—(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or~~

~~—(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.~~

116 ~~judgment on behalf of the client. Similarly, LEO 1735 addresses the firm's~~
117 ~~use of an independent contractor instead of an employee or partner of the~~
118 ~~law firm to provide legal services to clients, and it reiterates the~~
119 ~~confidentiality protections, needed conflicts analysis, and necessary client~~
120 ~~disclosure and consent.~~

121
122 **ANALYSIS:**

123
124 ~~—The Committee notes at the beginning that its analysis applies regardless~~
125 ~~of whether legal services are outsourced overseas or locally. Additionally,~~
126 ~~the Committee reminds lawyers that their duties of communication with a~~
127 ~~client include the duty to advise a client of possible alternatives that might~~
128 ~~involve outsourcing when the lawyer believes that such services may~~
129 ~~benefit the client. Rule 1.4.⁶~~

130
131 ~~—First, the Committee addresses the facts as described in Scenario 2(a)~~
132 ~~and finds that this scenario is not an outsourcing relationship because the~~
133 ~~lawyer is working under the direct supervision of Partner A for Virginia Law~~
134 ~~Firm from a remote location and is associated with the firm for all purposes~~
135 ~~and analysis of the Rules.~~

136
137 ~~—*Supervision of Nonlawyers, Duty of Competence, and Avoiding the*~~
138 ~~*Unauthorized Practice of Law*~~

139
140 ~~—There is nothing unethical about a lawyer outsourcing legal and non-legal~~
141 ~~services, provided the outsourcing lawyer renders legal services to the~~
142 ~~client with the “legal knowledge, skill, thoroughness and preparation~~
143 ~~reasonably necessary for the representation,” as required by Rule 1.1.~~
144 ~~Comment [1] further counsels:~~

⁶The Committee relies upon the language in Rule 1.4, Comment [5]: The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

~~In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.~~

~~—On the other hand, a situation that may be colloquially called “outsourcing” but that does not raise any of the concerns identified in this opinion is: a Virginia law firm regularly hires Lawyer Y to perform specific legal tasks for them, which may or may not involve contact with firm clients, working directly with and under the supervision of lawyers in the law firm. In that scenario, Lawyer Y is working under the direct supervision of lawyers in the firm and has full access to information about the firm's clients, and therefore is associated with the firm for purposes of the Rules of Professional Conduct, including confidentiality and conflicts.~~

~~Applicable Rules and Opinions~~

~~The applicable Rules of Professional Conduct are: Rule 1.1, Competence, Rule 1.2(a), Scope of Representation, Rule 1.4, Communication, Rule 1.5, Fees, Rule 1.6, Confidentiality of Information, Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, and Rule 5.5, Unauthorized Practice of law; Multijurisdictional Practice of Law.~~

~~Applicable legal ethics opinions are LEOs 1712 and 1735, regarding the use of temporary lawyers and contract lawyers.~~

~~Analysis~~

~~A lawyer's ethical duties when outsourcing tasks fall into four categories: supervision of nonlawyers, including unauthorized practice of law issues, client communication and the need for consent to outsourcing~~

181 arrangements, confidentiality, and billing and fees. This opinion will address
182 each of these categories in order.

183
184 *Supervision and unauthorized practice of law*

185
186 The lawyer's initial duty when considering outsourcing, as outlined
187 in ~~established by~~ Rule 5.3(b), is to exercise due diligence in the selection of
188 lawyers or nonlawyers. ~~The lawyer must ensure that they are competent~~
189 ~~and determine that they have the appropriate training and skills to perform~~
190 ~~the tasks requested.~~ Lawyers have a duty to be competent in the
191 representation of their clients and to ensure that those who are working
192 under their supervision perform competently. ~~See Rule 1.1.~~ To satisfy the
193 duty of competence, a lawyer who outsources legal work must ensure that
194 the tasks in question are delegated to individuals who possess the skills
195 required to perform them and that the individuals are appropriately
196 supervised to ensure competent representation of the client.

197
198 —The lawyer must also consider whether the lawyer or nonlawyer
199 understands and will comply with the ethical rules that govern the initiating
200 lawyer's conduct and will act in a manner that is compatible with that
201 lawyer's professional obligations, just as within any other supervisory
202 ~~matter.~~

203
204 ~~—Lawyers frequently hire contract lawyers and nonlawyers alike to do legal~~
205 ~~research, document preparation, or document review. The role of the~~
206 ~~lawyer in these situations is akin to outsourcing, but on a more localized~~
207 ~~level. In none of these circumstances does contracting for such services~~
208 ~~constitute aiding the unlicensed practice of law, provided there is adequate~~
209 ~~supervision by the lawyer. See e.g., Unauthorized Practice of Law Op. 191~~
210 ~~(1998) (permitting an attorney or firm to employ nonlawyer personnel to~~
211 ~~perform delegated functions under the direct supervision of a licensed~~
212 ~~attorney). However, the Rules do not permit a nonlawyer to counsel clients~~
213 ~~about legal matters or to engage in the unauthorized practice of law, and~~
214 ~~they require that the delegated work shall merge into the lawyer's~~
215 ~~completed work product. The lawyer must examine and be responsible for~~
216 ~~all work delegated to nonlawyer personnel and must also assure~~
217 ~~compliance by nonlawyer personnel with the Rules. Rule 5.3(b).~~

218 ~~Moreover, the initial and continuing relationship with the client is the~~
219 ~~responsibility of the employing lawyer.~~

220
221 ~~—A client may benefit from a lawyer’s delegation of work to a nonlawyer,~~
222 ~~but in order to avoid the unauthorized practice of law, the lawyer must~~
223 ~~accept complete responsibility for the nonlawyer’s work. In short, the~~
224 ~~lawyer must, by applying professional skill and judgment, first set the~~
225 ~~appropriate scope for the nonlawyer’s work and then vet the nonlawyer’s~~
226 ~~work and ensure its quality.⁷~~

227
228 ~~—situation. In order to comply with Rule 5.3(b), the lawyer must be able to~~
229 ~~adequately supervise the nonlawyer if the work is outsourced. Specifically,~~
230 ~~the lawyer needs to review the nonlawyer’s work on an ongoing basis to~~
231 ~~ensure its quality, the lawyer must maintain ongoing communication to~~
232 ~~ensure that the nonlawyer is discharging the assignment in accordance~~
233 ~~with the lawyer’s directions and expectations, and the lawyer needs to~~
234 ~~review thoroughly all work product to ensure its accuracy and reliability and~~
235 ~~that it is in the client’s interest. The lawyer remains ultimately responsible~~
236 ~~for the conduct and work product of the nonlawyer. Rule 5.3(c).~~

237
238 ~~—In each of our selected Scenarios, the challenge for outsourcing legal~~
239 ~~work is seeking qualified and competent lawyers and nonlawyers and~~
240 ~~adequately overseeing the execution of the project. This challenge can be~~
241 ~~extremely difficult with the physical separation and potential time~~
242 ~~differences involved. Electronic communication can help close the gap, but~~
243 ~~it may have its own challenges regarding monitoring and technology~~
244 ~~security issues. The use of an intermediary company, as suggested by the~~
245 ~~question presented in Scenario 1, may help to assure the credentials of the~~
246 ~~professionals performing the work; however, the law firm needs to check~~
247 ~~the intermediary company’s references to ensure that the company’s~~
248 ~~practices and supervisory procedures are compatible with the lawyer’s~~
249 ~~responsibilities. In addition, the intermediary should produce references~~

⁷ See City of New York Bar Association 2006-3 that addresses the issues involved in a lawyer outsourcing legal services overseas.

250 ~~and a resume or curriculum vitae, etc., for the individual lawyers and~~
 251 ~~nonlawyers who will be providing the services to the law firm.~~

252
 253 —The Committee recommends that overseas outsourcing, in particular,
 254 should include a written outsourcing agreement to protect the ~~Virginia Law~~
 255 ~~Firm. law firm and its clients.~~ The agreement should include ~~recitals~~
 256 ~~regarding confidentiality, security, conflicts, unauthorized practice of law~~
 257 ~~issues, client contact, and~~ assurances that the ~~third party~~outsourced firm or
 258 vendor will meet all professional obligations of the hiring lawyer, ~~—,~~
 259 specifically including confidentiality, information security, conflicts, and
 260 unauthorized practice of law. The hiring lawyer should make reasonable
 261 inquiry and act competently in choosing ~~such~~ a provider that will honor
 262 these obligations and use reasonable measures to ~~follow-up and~~ supervise
 263 the ~~third party~~ vendor's work, ~~which should bring the lawyer in compliance~~
 264 ~~with the requirements of supervision required in Rule 5.1 and 5.3.~~

265
 266 *~~Independent Professional Judgment~~*

267
 268 —~~Rule 5.4 requires that the lawyer must exercise his or her own~~
 269 ~~independent judgment on the client's behalf at all times and cannot~~
 270 ~~abdicate that role to a nonlawyer. Rule 5.4 applies with equal force to~~
 271 ~~outsourced legal services because these are arrangements in which~~
 272 ~~nonlawyer intermediaries exercise control over the delivery of legal~~
 273 ~~services; therefore, outsourced legal services may engender interference~~
 274 ~~with the lawyer's obligations to (1) exercise independent professional~~
 275 ~~judgment on behalf of a client, (2) maintain client confidences and secrets,~~
 276 ~~(3) avoid conflict of interests, and (4) practice law competently. See, e.g.,~~
 277 ~~LEO 1712, UPL Opinion No. 60 (liability insurer may use in-house staff~~
 278 ~~counsel to defend claims brought against insureds).~~

279
 280 —~~Under each of our selected scenarios, the lawyer must maintain~~
 281 ~~independent legal judgment regarding the client's matters and must feel~~
 282 ~~assured that any outsourcing arrangement would not jeopardize this~~
 283 ~~responsibility. Similar concerns are expressed in the context of in-house~~
 284 ~~counsel handling liability claims against an insured, the provision of legal~~

285 ~~services under prepaid legal service plans, and the use of lawyer temp~~
 286 ~~placement services.~~

287
 288 *Client Communication/Consent*

289
 290 ~~—Client communication may be the foremost issue the lawyer needs to~~
 291 ~~address. As mentioned earlier, Rule 1.4 may require in appropriate~~
 292 ~~circumstances consideration of outsourcing as a potential client benefit. If~~
 293 ~~the lawyer considers outsourcing part of the client’s matter, Rule 1.4~~
 294 ~~requires the lawyer to have communication with the client and to obtain the~~
 295 ~~client’s informed communication and consent to engage lawyers or~~
 296 ~~nonlawyers who are not directly associated with or under the direct~~
 297 ~~supervision of the lawyer or law firm that the client retained.~~

298
 299 In LEO 1712, ~~this~~the Committee ~~opined~~concluded that when a lawyer
 300 ~~engages the services of~~hires a temporary lawyer, ~~which is to work on a~~
 301 ~~form of outsourcing~~client’s matter, the lawyer must advise the client of that
 302 fact and must ~~seek~~obtain the client’s consent to the arrangement if the
 303 temporary lawyer will perform independent work for the client and will not
 304 work under the direct supervision of a lawyer in the firm. ~~Relying on Rule~~
 305 ~~1.2(a), requiring a lawyer to consult with a client as to the means by which~~
 306 ~~the client’s objectives are to be pursued, Rule 1.4, relating to client~~
 307 ~~communication, and Rule 7.5(d)⁸, prohibiting lawyers from implying that~~
 308 ~~they practice in a partnership or other organization when that is not the fact,~~
 309 ~~this~~Applying Rules 1.2(a) and 1.4, the Committee concluded that the client
 310 is entitled to know who ~~or what entity is~~ representing him or herinvolved in
 311 the representation and can ~~vet~~refuse to allow the use of an outsourced
 312 lawyer or nonlawyer.

313
 314 ~~—In order to comply with Rule 1.4 in either Scenario 1 or 2(b),~~Extending
 315 that analysis to other outsourcing situations, a lawyer must obtain informed
 316 consent from the client if the lawyer is outsourcing legal work to a lawyer or

⁸Rule 7.5—Firm Names and Letterheads

—(d)—Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

317 nonlawyer who is not ~~directly~~ associated with or working under the direct
 318 supervision of a lawyer in the firm that the client retained, ~~then there must~~
 319 ~~be informed consent from the client. This requirement does not mean that~~
 320 ~~every time a law firm sends work out to be copied or transcribed, the firm~~
 321 ~~must acquire client consent. Certainly rudimentary functions can be~~
 322 ~~performed outside the firm without client consent. There is little purpose to~~
 323 ~~informing a client every time a lawyer outsources legal support services~~
 324 ~~that are truly tangential, clerical, or administrative in nature, or even when~~
 325 ~~basic legal research or writing is outsourced without any client confidences~~
 326 ~~being revealed, as in Scenario 3. However, substantive client work that~~
 327 ~~involves legal analysis and work product related to~~even if no confidential
 328 client information and, therefore, involves application of the lawyer's
 329 independent legal judgment and competence as discussed above, requires
 330 client consent for the lawyer to involve either lawyers or nonlawyers who
 331 are not directly associated with that lawyer's firm. information is being
 332 shared outside of the firm.

334 Confidentiality

335
 336 ~~—Rule 1.4's client communication duties tie right into ethical duties~~
 337 ~~concerning client confidentiality: If, when outsourcing,~~ confidential client
 338 information will be shared with a lawyer or nonlawyer outside of the law firm
 339 ~~(meaning either not~~where "outside of the law firm" means neither
 340 ~~associated with the firm or~~nor directly supervised by a lawyer in the firm),
 341 the lawyer must secure the client's consent in advance. -The implied
 342 authorization of Rule 1.6(a) and its Comment [5a6]⁹ to share confidential
 343 information within a firm generally does not extend to entities or individuals
 344 working outside the law firm. -Thus, in a typical outsourcing relationship, no
 345 information protected by Rule 1.6 may be revealed without the client's
 346 informed consent. ~~Additionally,~~The exception to this requirement is when
 347 the lawyer outsourced service is an "office management" task of the types

⁹ Rule 1.6, Comment [5a]

~~6]: Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading a firm may, in the course of the duty to protect client firm's practice, disclose to each other information would render it difficult for lawyers to consult with each other, which is an important means relating to a client of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of firm, unless the attorney-client privilege or other applicable protections. has instructed that particular information be limited to specified lawyers.~~

348 identified in Rule 1.6(b)(6)¹⁰, for which client consent is not required. In all
 349 cases, the lawyer needs to ensure that ~~all~~ appropriate measures have been
 350 employed to educate the nonlawyer on the lawyer's duties ~~as they apply to~~
 351 protect client confidences. ~~Many foreign jurisdictions have confidentiality~~
 352 ~~rules that provide less protection to client confidences.¹¹ In these cases,~~
 353 ~~the lawyer must assure the client that the nonlawyer will abide by the same~~
 354 ~~restrictions that apply to the lawyer, advise the client of the risks and~~
 355 ~~advantages of the outsourcing relationship, and obtain the client's informed~~
 356 ~~consent to the arrangement.~~

357
 358 ~~—If the information outsourced will be transmitted electronically, the lawyer~~
 359 ~~should be mindful of and receive assurance that the security risks inherent~~
 360 ~~in electronic transmittal of confidential information are controlled. When~~
 361 ~~sharing or storing confidential information, the lawyer must act reasonably~~
 362 ~~to safeguard the information against unauthorized access by third parties~~
 363 ~~and against inadvertent or unauthorized disclosure by anyone under the~~
 364 ~~lawyer's supervision. See Rule 1.6, Comment [19].~~ For example, the
 365 nonlawyer should assure the lawyer that policies and procedures are in
 366 place to protect and secure data while in transit and that he or she
 367 understands and will abide by the policies and procedures. ~~Written~~
 368 ~~confidentiality agreements are strongly advisable in outsourcing~~
 369 ~~relationships. See Rule 1.6, Comment [5c].¹²~~

370
 371 ~~—To minimize the risk that confidential information might be disclosed~~
 372 ~~when outsourcing legal work, the lawyer must ensure that proper~~
 373 ~~procedures are in place. Since the lawyer remains ultimately responsible~~
 374 ~~for protection of client confidences he or she needs to ensure that~~
 375 ~~adequate procedures are in place with the nonlawyer firm to understand~~
 376 ~~and ensure this protection. The outsourcing lawyer should also ask the~~

¹⁰ Rule 1.6(b)(6): To the extent a lawyer reasonably believes necessary, the lawyer may reveal information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

¹¹ The Committee believes that the lawyer has a duty of diligence to understand the legal and ethical implications of confidentiality and other potential threats to the safety and security of the transmission of client's matters before outsourcing to a jurisdiction outside of Virginia.

¹² Rule 1.6 Comment [5c]

—: Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

377 nonlawyer whether he or she is performing ~~legal~~ services for any parties
 378 adverse to the lawyer's client, and remind him or her, preferably in writing,
 379 of the need to safeguard the confidences and secrets of the lawyer's
 380 current and former clients. See Rule 1.6, Comment [5c].¹³

381 ~~—In Scenarios 1 and 2(b), the Virginia Law Firm should obtain client
 382 consent to outsource the work because even though the firm has
 383 appropriately limited the amount of client information disclosed to the
 384 outsourced firm or to the contract lawyer, the firm is still sharing confidential
 385 client information. Additionally, the Virginia Law Firm should ensure that
 386 the outsourced firm or contract lawyer is maintaining confidentiality and is
 387 appropriately handling any potential conflicts. If the outsourced firm or
 388 contract lawyer was hired through an intermediary, it would be prudent to
 389 have those terms and conditions be part of the intermediary company's
 390 engagement agreement, since the company is attesting to its employees'
 391 credentials.~~

393
 394 ~~—In Scenario 2(a) where Lawyer Z works exclusively for the firm under the
 395 direct supervision of Partner A, Lawyer Z would be deemed "associated"
 396 with the firm for the purposes of client confidentiality and conflicts;
 397 therefore, she should be treated as such with regard to any work product
 398 she provides. If she does temporary or contract outsourced work for
 399 several firms, then she should confirm she uses a conflicts database to
 400 conduct an appropriate conflicts analysis on each case before accepting
 401 any new client matters from these firms.~~

402 403 *Billing/ and Fees*

404
 405 —In LEO 1712, the Committee ~~discusses~~discussed the issue of payment
 406 arrangements when legal services are outsourced or when temporary
 407 lawyers are used. -The Committee ~~reiterates~~reiterated its position in LEO
 408 1735, which deals with a lawyer independent contractor.- This Committee
 409 opines that if payment is billed to the client as a *disbursement*, then the

¹³ Rule 1.6 Comment [5c]

]: Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

410 lawyer must disclose the actual amount of the disbursement including any
 411 mark-up or surcharge on the amount actually disbursed to the nonlawyer.
 412 Any mark-up or surcharge on the disbursement billed to the client is tested
 413 by the principles articulated in ABA Formal Opinion 93-379 (1993) ~~as~~
 414 ~~follows:~~);

415
 416 When that term [“disbursements”] is used, clients justifiably should
 417 expect that the lawyer will be passing on to the client those actual
 418 payments of funds made by the lawyer on the client’s behalf. Thus, if
 419 a lawyer hires a court stenographer to transcribe a deposition, the
 420 client can reasonably expect to be billed as a disbursement the
 421 amount the lawyer pays to the court reporting service. Similarly, if the
 422 lawyer flies to Los Angeles for the client, the client can reasonably
 423 expect to be billed as a disbursement the amount of the airfare,
 424 taxicabs, meals and hotel room.

425
 426 —It is the view of this Committee that in the absence of disclosure to
 427 the contrary it would be improper for the lawyer to assess the
 428 surcharge on these disbursements over and above the amount
 429 actually incurred unless the lawyer incurred additional expenses
 430 beyond the actual cost of the disbursement item. ~~In the same regard,~~
 431 ~~if a lawyer receives a discounted rate from a third-party provider, it~~
 432 ~~would be improper for the lawyer to charge the client the full rate and~~
 433 ~~to retain the profit instead of giving the client the discount. ~~Clients~~~~
 434 ~~could view this practice as an attempt to create profit centers when~~
 435 ~~they had been told they would be billed for disbursements. ~~LEO 1712.~~~~

436
 437 ~~—On the other hand, if the lawyer or firm hires a contract lawyer or non-~~
 438 ~~lawyer to work on site or under the direct supervision of the lawyer such~~
 439 ~~that they are considered “associated” with the firm, the lawyer or firm may~~
 440 ~~bill the client for the usual or customary charge the firm would bill for any~~
 441 ~~other associate or employee even if that amount is more than what the firm~~
 442 ~~pays the staffing agency or vendor. The amount paid to the staffing agency~~
 443 ~~or vendor is an overhead expense that the firm is not required to disclose to~~
 444 ~~a client.~~

445
 446 This Committee believes that these same principles apply in the case of
 447 outsourced legal services. ~~The overhead costs associated with the~~
 448 ~~provision of such services may Fees must be minimal or nonexistent.~~
 449 ~~Therefore, the outsourced services should be billed at cost plus the~~

450 ~~reasonable allocation of cost for supervision if the lawyer is not otherwise~~
 451 ~~charging legal fees associated with review, as required by Rule 1.5(a), and~~
 452 ~~integration of the nonlawyer's work. Inadequately explained to the client,~~
 453 ~~as required by Rule 1.5(b). Further, in~~ a contingent fee case it would ~~also~~
 454 be improper to charge separately for work that is usually done by the
 455 client's own lawyer and that is incorporated into the standard fee paid to the
 456 lawyer, even if that cost is paid to a third-party provider.

457 ~~—This Committee further relies upon its analysis earlier in this opinion~~
 458 ~~regarding Client Communication/Consent and reiterates that the lawyer~~
 459 ~~must advise the client of the outsourcing of legal services and must obtain~~
 460 ~~client consent anytime there is disclosure of client confidential information~~
 461 ~~to a nonlawyer who is working independently and outside the direct~~
 462 ~~supervision of a lawyer in the firm, thereby superseding any exception~~
 463 ~~allowing the lawyer to avoid discussing the legal fees and specific costs~~
 464 ~~associated with the outsourcing of legal services. With adequate~~
 465 ~~disclosure as required by Rule 1.5(b)¹⁴, the lawyer's fee must ultimately~~
 466 ~~meet the reasonableness standard as required in Rule 1.5(a).¹⁵ If~~
 467 ~~outsourcing is contemplated at the outset of an engagement, the~~
 468 ~~outsourcing lawyer should fulfill his duties under Rules 1.2, 1.4, 1.5, and~~
 469 ~~1.6 by obtaining client consent to the arrangement and providing a~~
 470 ~~reasonable explanation of the fees and costs associated with the~~
 471 ~~outsourced project. These arrangements should be memorialized in writing~~
 472 ~~at the earliest possible date to avoid confusion and disputes over the~~
 473 ~~outsourcing arrangement or its cost to the client.~~
 474

¹⁴ ~~Rule 1.5(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.~~

¹⁵ ~~Rule 1.5(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:~~

- ~~_____ (1) _____ the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;~~
- ~~_____ (2) _____ the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;~~
- ~~_____ (3) _____ the fee customarily charged in the locality for similar legal services;~~
- ~~_____ (4) _____ the amount involved and the results obtained;~~
- ~~_____ (5) _____ the time limitations imposed by the client or by the circumstances;~~
- ~~_____ (6) _____ the nature and length of the professional relationship with the client;~~
- ~~_____ (7) _____ the experience, reputation and ability of the lawyer or lawyers performing the services;~~
- ~~_____ and _____~~
- ~~_____ (8) _____ whether the fee is fixed or contingent.~~

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~~—Additionally, in cases where the nonlawyer is working independently and outside the direct supervision of a lawyer in the firm, if the firm plans to bill the client on a basis other than the actual cost which can include a reasonable allocation of overhead charges associated with the work, then advance client consent should be obtained even if confidential client information will not be disclosed in the outsourcing relationship.~~

CONCLUSION

—Conclusion

A lawyer may ethically outsource ~~legal support~~ services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously supervises, monitors and reviews the ~~nonlawyer so as to~~ work to ensure that the outsourced work meets the lawyer’s requirements of competency and to avoid aiding ~~the~~ a nonlawyer in the unauthorized practice of law ~~and ensuring that the nonlawyer’s work meets the lawyer’s requirements of competency~~, (2) preserves the client’s confidences, (3) bills for the services appropriately, and (4) obtains the client’s informed consent in advance ~~consent to~~ of outsourcing the work.

AFFIDAVIT

I, Karen A. Gould, Executive Director at the Virginia State Bar, do hereby swear and affirm that the foregoing documents are true copies of the original documents on file in the offices of the Virginia State Bar regarding revisions of LEO 1850.

Given under my hand this 29th day of October 2020.



 Karen A. Gould

STATE OF VIRGINIA
 CITY OF RICHMOND, to-wit:

I, a Notary Public in and for the Commonwealth of Virginia, do hereby certify that Karen A. Gould, personally known to me, appeared in person before me and was by me duly sworn and thereupon executed in my presence and acknowledged to me the truth and voluntariness of the foregoing Affidavit.

Given under my hand this 29th day of October 2020.



 Notary Public

My Commission Expires: 9/30/2023

