**VIRGINIA:**

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

**IN THE MATTER OF PROPOSED**
**LEGAL ETHICS OPINION 1878**

# APPENDIX TO PETITION OF THE VIRGINIA STATE BAR

Brian L. Buniva, President
Karen A. Gould, Executive Director
James M. McCauley, Ethics Counsel
Emily F. Hedrick, Asst. Ethics Counsel
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
Phone (804) 775-0550
Fax (804) 775-0501

TABLE OF CONTENTS

**VIRGINIA STATE BAR**
**COUNCIL**
**VIRTUAL MEETING**
**RICHMOND, VA**
**SATURDAY, FEBRUARY 27, 2021**

**AGENDA**

**9:00 a.m. Council Meeting – Virtual Meeting**

## I. Administrative Matters

FOIA compliance issues; taking the roll; roll call votes, etc.

## II. 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 report – Crystal T. Hendrick, Finance/Procurement Director 3

D. Bar Counsel's report – Renu M. Brennan, Bar Counsel 4

E. Report on IBIS replacement – Cameron M. Rountree, Deputy Executive Director

F. Conference of Local and Specialty Bar Associations report – Susan G. Rager, chair 5

G. Diversity Conference report – Sheila M. Costin, chair 6

H. Senior Lawyers Conference report – Margaret A. Nelson, chair 7

I. Young Lawyers Conference report – Melissa Y. York, president 8

J. Introduction of new Council at-large members: Molly E. Newton, Joanna L. Suyes, and Nicole E. Upshur

## III. Action Items

A. Approval of minutes of October 23, 2020 meeting 9

## IV. Notice of Upcoming Receptions, Dinners & Meetings

2:00 p.m. Tuesday, April 20, 2021, Executive Committee meeting, Omni Richmond Hotel, 100 S. 12th Street., Richmond.

7:00 p.m. Tuesday, April 20, 2021, Council Dinner, Omni Richmond Hotel, 100 S. 12th Street, Richmond.

9:00 a.m., Wednesday, April 21, 2021, Council meeting, Omni Richmond Hotel, 100 S. 12th Street, Richmond.

12 Noon, Thursday, June 17, 2021, lunch and Executive Committee meeting, Hilton Hotel, 3001 Atlantic Avenue, Virginia Beach.

6:30 p.m., Thursday, June 17, 2021, Council reception and dinner, Hilton Hotel, 3001 Atlantic Avenue, Virginia Beach.

9:00 a.m., Friday, June 18, 2021, Council meeting, Hilton Hotel, 3001 Atlantic Ave., Virginia Beach.

12:30 p.m., Thursday, September 9, 2021, lunch and Executive Committee meeting, 3rd Floor Conference Room, Bank of America Building, 1111 E. Main St., Richmond.

12:30 p.m., Thursday, October 28, 2021, lunch and Executive Committee meeting, The Omni Homestead Resort, 7696 Sam Snead Hwy, Hot Springs.

6:30 p.m., Thursday, October 28, 2021, Council reception and dinner, The Omni Homestead Resort, 7696 Sam Snead Hwy, Hot Springs.

9:00 a.m., Friday, October 29, 2021, The Omni Homestead Resort, 7696 Sam Snead Hwy, Hot Springs.

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

1111 East Main Street, Suite 700
Richmond, Virginia 23219-0026
Telephone: (804) 775-0500

Facsimile: (804) 775-0501 TDD (804) 775-0502

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 1878**

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 advisory Legal Ethics Opinion 1878, 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.

This proposed opinion generally addresses the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a *quantum meruit* basis against the proceeds of a recovery.

In this proposed opinion, the Committee concluded that successor counsel in a contingent fee matter must charge a reasonable fee and must adequately explain her fee to the client. If the client, predecessor counsel, and successor counsel cannot agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel should address in her written contingent fee agreement the client's potential obligation to pay fees to discharged counsel, as well as that successor counsel's fees might need to be adjusted in view of predecessor counsel's *quantum meruit* lien, so as to ensure that successor counsel's fee is reasonable using the factors identified in Rule 1.5(a). Successor counsel may represent the client in negotiations and litigation involving the predecessor counsel's claim of lien, provided that

there is no conflict Rule 1.7(a)(2) or the client gives informed consent to a potential conflict under Rule 1.7(b).

***Inspection and Comment***

The proposed 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 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.

# # #


View this email as a webpage

## 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.

If you would like to stop receiving a paper copy of the magazine, you may opt out by logging onto the member portal .

**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.**

Stay connected to your bar:

VSB Home

Rules and Regulations
Rules of Professional Conduct
Legal Ethics Opinions
Unauthorized Practice of Law Opinions
Organization & Government of the Virginia State Bar
Reciprocity: Admission on Motion
Pro Hac Vice
Corporate Counsel Limited Admission and Registration
Foreign Attorneys — Registered Military Legal Assistance Attorneys
Foreign Legal Consultant
Military Spouse Provisional Admission
Bylaws of the Virginia State Bar and Council
Unauthorized Practice Rules
Mandatory Continuing Legal Education Regulations
Clients' Protection Fund Rules
Attorney Trust Account Regulations
Regulations of Attorney Real Estate Settlement Agents
Virginia Licensed Legal Aid Society Regulations
Principles of Professionalism
Provision of Legal Services Following Determination of Major Disaster

Actions on Rule Changes and Legal Ethics Opinions



Home > Actions on Rule Changes and Legal Ethics Opinions > LEO 1878 regarding a successor lawyer's duties in a contingent fee matter.

# Proposed | LEO 1878 regarding a successor lawyer's duties in a contingent fee matter. 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 advisory Legal Ethics Opinion 1878, 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.

This proposed opinion generally addresses the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a *quantum meruit* basis against the proceeds of a recovery.

In this proposed opinion, the committee concluded that successor counsel in a contingent fee matter must charge a reasonable fee and must adequately explain her fee to the client. If the client, predecessor counsel, and successor counsel cannot agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel should address in her written contingent fee agreement the client's potential obligation to pay fees to discharged counsel, as well as that successor counsel's fees might need to be adjusted in view of predecessor counsel's *quantum meruit* lien, so as to ensure that successor counsel's fee is reasonable using the factors identified in Rule 1.5(a). Successor counsel may represent the client in negotiations and litigation involving the predecessor counsel's claim of lien, provided that there is no conflict under Rule 1.7(a)(2) or the client gives informed consent to a potential conflict under Rule 1.7(b).

## View proposed LEO 1878 (pdf)

### Inspection and Comment

The proposed advisory opinion may be inspected above or at the office of the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219, 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.

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.

Updated: January 7, 2020


1111 East Main Street, Suite 700 | Richmond, Virginia 23219-0026
**All Departments: (804) 775-0500**
Voice/TTY: 711 or (800) 828-1120
Office Hours: Mon.-Fri. 8:15 a.m. to 4:45 p.m. (excluding holidays)
The Clerk's Office does not accept filings after 4:45 p.m.

News Archives

2020
2019
2018
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





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

**All Departments: (804) 775-0500**

Voice/TTY: 711 or (800) 828-1120

Office Hours: Mon.-Fri. 8:15 a.m. to 4:45 p.m.
(excluding holidays)
The Clerk's Office does not accept filings after 4:45 p.m.

Rule Changes, Statutory Changes, Actions on Legal Ethics Opinions, and Comments on Proposed Changes
Public Disciplinary Hearings
Unauthorized Practice of Law
Status
Pro Bono & Access to Legal Services
Trust Accounts & IOLTA
Virginia Lawyer Referral Service
Healthcare Decisions Day
Job Postings

## Notices to Lawyers

### 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 deadline for comment has been extended to March 20. www.vsb.org/site/news/item/ethics_committee_seeks_comments

### Supreme Court of Virginia Amends Rules of Court

On January 9, the Supreme Court of Virginia amended Rules of Court, including Rule 1.15 regarding the safekeeping of property, and adopted two new LEOs. Some changes are effective immediately and some on March 15. www.vsb.org/site/news/item/SCV_amends_rules_of_court_Jan20%20/

### U.S. Court of Appeals for the Fourth Circuit Amends Four Rules

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. www.vsb.org/site/news/item/u.s._court_of_appeals_amends_rules

### Calling All Active and In-good-standing Lawyers

There are several Virginia State Bar bodies looking for members for terms that begin on July 1:

**Disciplinary District Committees**
Résumés and short statements of interest for lawyers interested in joining their local disciplinary district committee are due on February 28 to the Bar. See if there's a vacancy in your circuit and apply. www.vsb.org/site/news/item/first_line_of_defense

**Special Boards and Committees**
The Clients' Protection Fund Board, the Judicial Candidate Evaluation Committee, and Bar Council's Executive Committee also have vacancies and seek applicants by March 27. www.vsb.org/site/news/item/serve_your_bar

**Bar Council Elections**
The Virginia State Bar's governing body will hold its annual elections by electronic ballot in April, and Virginia lawyers who wish to be on the ballot must be active members in good standing of their circuit as of March 15. They will also need to file a nominating petition, a statement of qualifications, and a digital headshot by April 1. Learn more on page 41.

Even if you're not running for Bar Council, be sure your contact information is current with the Bar before March 15 to be eligible to vote — and to receive your ballot.

### Nominate a Deserving Lawyer for an Award:

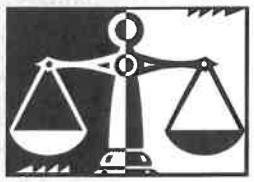
**Access to Legal Services Committee Seeks Nominations** for the 2020 Virginia Legal Aid Award and the Oliver White Hill Law Student Award. March 6 is the nomination deadline. www.vsb.org/site/sections/pro_bono/awards

**The General Practice Section** is seeking nominations for the Tradition of Excellence Award. This award recognizes attorneys who have devoted significant amounts of time, efforts, and/or funds to activities that benefit their community. The nomination deadline is April 6, 2020. http://bit.ly/GP-nom

**The Young Lawyers Conference** seeks nominations for the R. Edwin Burnette Jr. Young Lawyer of the Year Award This award honors an outstanding young Virginia lawyer who has demonstrated dedicated service to the Young Lawyers Conference, the legal profession, and the community. The nomination deadline is March 13. http://bit.ly/YLC-award

**The Diversity Conference** seeks a Virginia lawyer who embodies the conference's goal of fostering, encouraging, and facilitating diversity and inclusion in the bar, the judiciary, and the legal profession for the 2020 Clarence M. Dunnaville Jr. Achievement Award. The nomination deadline is April 15. http://bit.ly/dunnaville

**The Conference of Local and Specialty Bar Associations** seeks nominees for the 2020 Awards of Merit, Local Bar Leader of the Year, Specialty Bar Leader of the Year, and Bar Association of the Year. The deadline for the Awards of Merit is April 17, and the deadline for the others is May 6. For more information see http://bit.ly/CLSBA



### Got an Ethics Question?

The VSB Ethics Hotline is a confidential consultation service for Virginia lawyers. Questions can be submitted to the hotline by calling (804) 775-0564 or by clicking on the "Email Your Ethics Question" link on the Ethics Questions and Opinions web page at www.vsb.org/site/regulation/ethics/.

Loudoun County, Virginia
www.loudoun.gov

Office of the County Attorney
1 Harrison Street SE, P.O. Box 7000, Leesburg, VA 20177-7000
Telephone: 703-777-0307 / Facsimile: 703-771-5025

March 16, 2020

Karen A. Gould, Executive Director
Virginia State Bar
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

VIRGINIA
TRIAL LAWYERS
ASSOCIATION

919 EAST MAIN STREET
SUITE 620
RICHMOND, VIRGINIA 23219
(804) 343-1143 • (800) 267-8852
(804) 343-7124 fax
www.vtla.com

Jason W. Konvicka
President
1809 Staples Mill Road
Richmond, VA 23230
jason.konvicka@allenandallen.com

Valerie M. O'Brien
Executive Director
vobrien@vtla.com

March 19, 2020

Karen Gould, Esq.
Executive Director
Virginia State Bar
111 E. Main Street, Suite 700
Richmond, VA 23219

Re: Proposed Legal Ethics Opinion 1878

Dear Karen,

Please accept this letter as the formal comment of the Virginia Trial Lawyers Association ("VTLA") on Proposed Legal Ethics Opinion 1878 ("PLEO 1878"), related to the ethical duties of successor counsel in a contingent fee matter. PLEO 1878 recommends that successor counsel include certain provisions in their written engagement agreement regarding predecessor counsel's legal fee claim. VTLA opposes these recommendations for the reasons stated below.

I am the President of VTLA. I have also practiced plaintiff's personal injury law for 25 years. Like a large percentage of VTLA's nearly 2,000 members, I regularly utilize contingency fee agreements. Additionally, I have had a number of clients over the years who have hired me and my firm after originally retaining another attorney.

The ethical duties that successor counsel owes to her client upon undertaking contingent representation following discharge of prior counsel are already well-established. While PLEO 1878's summary of those duties is helpful, its recommendations regarding the content that should be included in successor attorney fee agreements are based on incorrect assumptions regarding interactions between the client and successor counsel and the information typically available to successor counsel at the time of engagement. As a result, this portion of PLEO 1878 is likely to do more harm than good.

PLEO 1878 states:

> **[i]n many cases**, successor counsel's review of predecessor counsel's file reveals how far predecessor counsel progressed with the claim by way of investigation, negotiation, and litigation, to include discovery conducted and responded to, and the consultation and retention of experts. Thus, successor counsel should **in many if not most cases** be able to determine

> at the very least that predecessor counsel will have an enforceable lien for fees which will be in addition to successor counsel's legal fees.

PLEO 1878 goes on to state that although the *value* of predecessor counsel's *quantum meruit* claim may not be easily determined at that time, substantial information related to the predecessor's counsel's work on the case is usually available at the time successor counsel and the client enter into a fee agreement.

This statement is largely incorrect.

PLEO 1878 assumes that the majority of clients first meet with successor counsel after the client has terminated predecessor counsel, that the client has their entire file with them, and that the client and subsequent counsel enter into a contingency engagement agreement during their first meeting. The reality is much different.

The majority of cases begin with a phone call and/or an in-person meeting. Typically, the client has not yet terminated their relationship with predecessor counsel and is simply seeking a second opinion or information related to replacing their existing counsel, as permitted by Rule 4.2 (Comment (4); *see* LEOs 369 and 1890). This is the stage when the prospective client is in most need of, and will most benefit from, information regarding the termination of their existing lawyer, the *quantum meruit* lien their existing lawyer may have and assert upon termination, how successor counsel will be paid, etc. However, because successor counsel cannot accept employment at this stage – predecessor counsel has not yet been discharged – there is no engagement/fee agreement within which to include the information suggested in PLEO 1878. Simply stated, the prospective client most needs that information while they are considering terminating their lawyer and hiring new counsel, not after they have already terminated counsel and they are signing a fee agreement with successor counsel. This information can be, and currently is, being provided verbally to prospective clients. Written documentation in a fee agreement should not be necessary or required.

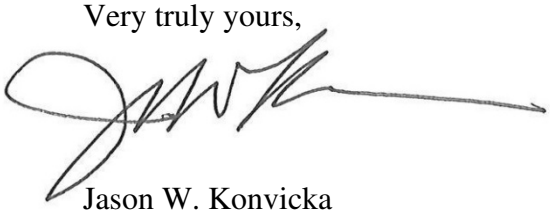
In addition, contrary to what is stated in PLEO 1878, it is rare that a client has the entirety of their file with them at the time of signing an engagement agreement with successor counsel. Subsequent counsel should not be required to include this information in their written fee agreements because they cannot discuss the work that the predecessor did, the value that they added to the case, and how that will affect the *quantum meruit* claim, until subsequent counsel has had an opportunity to receive and review the complete file.

VTLA also questions why PLEO 1878 treats contingency fee agreements differently than other written fee agreements. For example, Rule 1.5 regarding fees applies to *all* lawyer engagements. While contingency fee engagements are different from hourly or flat-fee arrangements, that does not mean that hourly or flat-fee arrangements are exempt from ethical requirements. VTLA does not suggest that the committee also impose specific requirements on other fee agreements. Rather, VTLA suggests that if attorneys engaged in hourly or flat-fee (or any alternative fee arrangement other than contingency fee) work are considered capable of adequately satisfying their Rule 1.5 ethical obligations to their clients, then attorneys who work on a contingency fee basis should be treated similarly.

Finally, VTLA is concerned that by itemizing information to be conveyed to the client, as PLEO 1878 does in lines 162-173, there is a risk that the client will only be provided with that mandatory, minimum amount of information. An attorney who includes requirements a-c from PLEO 1878 in her fee agreement with her new client will likely believe, with a reasonable basis to do so, that she has fully satisfied her ethical obligations to the client. In some cases, that may be true. However, each case is unique, as is each client. VTLA submits that the Committee should remove the one-size-fits-all checklist, and focus instead on counsel's ethical obligations generally (as PLEO 1878 otherwise does well), which in turn will encourage counsel to tailor their communications to suit the needs of the case and client.

We appreciate your consideration of our formal comments regarding Proposed LEO 1878. We are happy to discuss this with the Committee in greater detail if desired, and you are welcome to contact the undersigned at 804-257-7528 with any questions.

Very truly yours,



Jason W. Konvicka

# HEATH, OVERBEY, VERSER & OLD, P.L.C.

Attorneys and Counselors at Law

LEONARD C. HEATH, JR.
SHAWN W. OVERBEY
JOSEPH F. VERSER
W. HUNTER OLD

JORDAN C. HEATH

Direct Dial No. (757) 243-1461
Email Address: lheath@hovplc.com

The Atrium Building
11832 Rock Landing Drive
Suite 201
Newport News, VA 23606

Tel. No.: (757) 599-0734
Fax No.: (757) 599-0735

March 18, 2020

VIA EMAIL
James McCauley, Esq.
Legal Ethics Counsel
Virginia State Bar

Re: Proposed LEO 1878

Dear Jim:

I hope that you are doing well. Given the fact that I will be rolling off Bar Council as the Immediate Past President after the June 2020 Annual Meeting, and the fact that proposed LEO 1878 may not be presented to Bar Council prior to my departure, I wanted to provide my written comments to this proposed LEO. I believe proposed LEO 1878 is based upon a misunderstanding of the law and imposes requirements not mandated by Virginia's Rules of Professional Conduct. While the LEO addresses prudent practice pointers, legal ethics opinions should interpret and apply Rules of Professional Conduct. Hopefully, the Ethics Committee will revisit the proposed LEO based upon the comments that follow.

By way of background, I have performed personal injury work on a contingent-fee basis for over 30 years. Fortunately, it is extremely rare that I run into a situation where a client comes to me after they have retained and discharged counsel. It is rarer that I experience the situation where a client has left to go with new counsel. However, those situations do occur and fortunately in all of those situations I was able to work out with either the predecessor or successor counsel an agreed-upon formula for respective attorneys' fees. With that said, I am sure that there are situations where, for whatever reason, an agreement cannot be reached with regard to how the predecessor attorney's *quantum meruit* claim will be handled.

Contingent-fee arrangements provide access to experienced trial attorneys for people who could not otherwise afford adequate legal representation. Unlike any other fee arrangement, the attorney shares the risk with the client in the litigation. Anecdotally, my firm probably does not obtain its normal hourly rate in approximately 80% of our contingent-fee arrangements. However, this deficiency is made up in the remaining contingent-fee arrangements. If an attorney appropriately selects cases, and does a good job for the client, at the end of the year she should perform at a better than normal hourly rate on contingent-fee arrangements. In using standard business analysis of risk and reward, the attorney should be rewarded for the risk taken, investment of time and money, and to take into account the time value of money. An attorney can work on a case for three or more years before actually bringing the case to a

conclusion. Simply stated, contingent-fee arrangements allow many clients to achieve a more level playing field when dealing with larger, better funded, and more sophisticated parties. Because contingent-fee arrangements provide great access to justice for many clients, I tend to spend more time evaluating proposed LEOs that may impact that fee arrangement.

Turning to the proposed LEO, my first concern is that the American Bar Association's (ABA) Formal Opinion 487, upon which the proposed LEO 1878 is based, may be based on misstatements of law, at least to the extent that Virginia law applies. That opinion has two problematic statements as follows:

1. "Successor counsel must address with the client whether the client risks paying twice: one contingent fee to the predecessor counsel and another to the successor counsel. A client cannot be exposed to more than one contingent fee when switching attorneys given that under Rule 1:5(a) factors, each counsel did not perform all of the services required to achieve the result."
2. "Thus, neither the predecessor nor the successor counsel ordinarily would be entitled to a full contingent fee."

Turning to the first misstatement of law, the Supreme Court of Virginia has made it abundantly clear that a lawyer retained on a contingent fee basis who is then discharged without cause is no longer entitled to the contract rate, but instead is entitled to *quantum meruit*. While this *quantum meruit* amount could theoretically be more or less than the original contingent-fee arrangement, I believe most courts would set the *quantum meruit* value at an amount lower than the contractual contingent-fee amount. When a new lawyer is retained, that lawyer would be compensated at a new contractual amount, whether contingent fee, hourly, a blend, or otherwise. In other words, in Virginia there is never an opportunity for a client to be exposed to more than one contingent fee when switching attorneys.

With regard to the second misstatement, of course, the keyword in that statement is "ordinarily." The ABA Opinion seems to be based upon an assumption that all contingent-fee agreements are the same. In fact, Formal Opinion 487 is premised on two successive contingent-fee arrangements involving 1/3 of any recovery. However, I have seen lawyers across this Commonwealth use contingent-fee percentages ranging from 25% to 50%. Some contingent fees remain at the same percentage throughout the representation, while others increase at different stages of the litigation including appeals. As explained below, I believe that there are situations where the successor attorney will (and should) receive a full contingent fee. And there are scenarios where the client, who discharges the first lawyer without cause, could end up paying total fees that exceed the original contingent-fee amount.

What seems to be implied from proposed LEO 1878 and ABA Formal Opinion 487 is an overreaching belief that, to be reasonable, the combined fees of the predecessor lawyer and successor lawyer can be no higher than the originally set contingent-fee amount. From a legal standpoint, the client, who abandons without cause his contract with his original attorney, certainly can be exposed to both a *quantum meruit* claim for the original attorney and a contractual claim for the successor attorney. As the San Francisco Bar Association pointed out, "the client's obligation to the discharged attorney for payment of the *quantum meruit* claim could be in addition to the contingency fee paid to the successor attorney" under California law. The same is true in Virginia.

This gets us to the requirement that the fee must be reasonable. Of course, reasonable is subjective and varies on a case-by-case basis. In fact, the theoretical cases are so varied that it is almost impossible to provide meaningful guidance to a successor lawyer in an LEO. By way of example, what if the successor lawyer was retained on an hourly basis? Would that fee be subject to adjustment given the predecessor counsel's *quantum meruit* claim, even if the combined *quantum meruit* claim and subsequent hourly-fee arrangement exceeded the original contingent-fee amount? What if the successor attorney, taking into account the work that had already been performed, proposed a contingent-fee arrangement of 15% knowing that the client also had to pay the previous attorney's *quantum meruit* claim? What if instead of 15%, the percentage was 20%, 25%, or 30%? What about a blended hourly and contingent-fee basis, a fixed fee basis, or a blended fixed fee and contingent-fee basis? Would all of these fee arrangements be subject to "be adjusted in light of the predecessor counsel's lien or *quantum meruit* claim?" I would hope not.

In addition to these two misstatements of law, I have additional concerns. First, in an attempt to overly protect a client in proposed LEO 1878, the LEO as currently proposed will make it difficult, if not impossible, for the client who has discharged previous counsel without cause to retain a successor attorney because neither the successor attorney nor the client will know how the successor attorney's fee will ultimately be calculated. Why would any attorney agree to invest time and effort, and many times money, into a case not knowing what the ultimate fee agreement is because everything is subject to adjustment? More importantly, why would the client enter into such a vague contractual arrangement?

Second, I have a concern about the overuse of the word "may" in the opinion. The use of that word is not terribly helpful or informative for practicing lawyers or clients. As an example, in lines 66-68, the LEO states as follows: "In Virginia, where a *quantum meruit* determination of predecessor counsel's fee applies, it remains the case that *payment to successor counsel of a 'full contingent fee' may be unreasonable.*" (Italics in the original). The word "may" could just as easily be read "may, or may not." Further, why are the words placed in italics?

My most substantive concern about the proposed LEO is the Committee's recommendation or mandate (I am not sure of which as explained below) that successor counsel include in her proposed contingent-fee agreement three things, listed A through C. While these three items identify great practice pointers for what may be included in a fee agreement, I can find no requirement in Virginia's RPC for any of the three. Item A states as follows:

> a. the state of the law in Virginia regarding perfection of attorneys' liens and *quantum meruit* awards available to attorneys discharged without cause;

The RPC does not require such statements of law or, presumably, legal analysis in a fee arrangement.

More problematic is item "B." That item currently states as follows:

> b. a statement that the successor counsel's fee may[1] be adjusted in light of the predecessor counsel's lien or *quantum meruit* claim, determined by either agreement or adjudication;

This particular clause provides absolutely no guidance to the client. In fact, it causes confusion and would lead to an unenforceable contract. In essence, the successor attorney is placing in her agreement an agreement to make an agreement in the future, which we all know is not enforceable. The recommended language further renders the successor attorney's fee agreement so vague as to violate RPC Rule 1.5 because of lack of clarity.

Assuming the RPC requires statements of law or legal analysis in writing in the fee agreement (which I believe it does not), in its place, I would recommend the following:

> b. a statement as to whether the successor counsel's fee, whether contingent or otherwise, will be reduced by, or in addition to, the *quantum meruit* claim.

Of course, if the successor attorney's contingent fee is going to be reduced in the amount of the predecessor lawyer's *quantum meruit* claim per the successor attorney's fee contract, that contractual term must be included in the contract. However, the contrary scenario, involving no reduction of the contingent fee, would not be a contractual term and therefore the RPC does not require it in the fee agreement.

Item C states as follows:

> c. who bears the expense (legal fees and court costs, if any) of determining predecessor counsel's fee entitlement, to include the cost of adjudicating the validity and amount of any claimed lien through an interpleader action or otherwise.

Assuming that the successor counsel's fee arrangement expressly states that successor counsel's fee will be reduced by the *quantum meruit* claim, I believe that the language in item C must be included in the contract to make sure that the contractual terms are clear. However, absent that, item C again would purely be a statement of law. I surmise that the genesis of item C was the San Francisco Bar Association LEO 1989-1, referenced in the proposed LEO. However, this particular requirement in the San Francisco Bar Association LEO arose out of a completely different context: an engagement agreement whereby the successor attorney specifically agrees to indemnify the client for the predecessor attorney's *quantum meruit* claim. In that context, the San Francisco Bar Association Ethics Committee wrote as follows:

> Even if the successor attorney agrees to indemnify the client, the successor attorney should advise the client that the discharged attorney may be required to sue the client to enforce his fee claim. In this instance, the attorney who agrees to indemnify the client against the former counsel's claim should provide in the contingency fee contract the extent, if any, the client could be required to pay fees or costs in defense of the former attorney's lawsuit for fees.

---

[1] Here again we find a problematic word "may," which I will always interpret as "may or may not."

So that part of the San Francisco Bar Association opinion was dealing with something completely different than the scenario addressed in the proposed LEO 1878. Again, if this is just a statement of law, the RPC does not require item C in the contract. If it is a contractual term, i.e., the contract calls for the contingent fee to be adjusted, then it must be included.

I agree with the Committee that, in a perfect world, with the originally proposed items A and C, and my revised item B, the client will be adequately advised in writing as to the state of the law in Virginia concerning the predecessor attorney's *quantum meruit* claim and who bears the expense of determining that claim. But, again, Virginia's RPC does not mandate this and legal ethics opinions are supposed to interpret and apply the Rules of Professional Conduct.

Finally, is the Committee reading Rule 1.5(a) to mean the *total* combined fees of *both* the predecessor and successor attorneys must be reasonable employing a standard of what would have been reasonable if only one attorney had performed the work from beginning to end? Presumably, under the facts of the hypothetical, neither the original attorney nor the successor attorney did anything wrong which resulted in the client deciding to abandon the contingent-fee contract with the original attorney and retain a successor attorney. While the client has the absolute right to do so, this may necessarily mean that in the end the client will have to pay more in total attorneys' fees. My initial impression is that the reasonableness of fees must be viewed when dealing with the work each attorney performed for the client, not the total cumulative work performed by both attorneys. And if I am correct that the Rule 1.5(a) reasonableness analysis applies to each attorney separately, as opposed to an application collectively to both attorneys, then the currently proposed "advisable" [2] language set forth in this particular LEO would not have to be included in the fee agreement itself if the successor attorney's contract does not provide for adjustment for *quantum meruit*, since items A through C would not be terms of the fee arrangement, but instead statements of substantive law. If the successor counsel's contingent-fee agreement includes a provision that the contingent fee will (not may) be reduced by the *quantum meruit* claim, then that term and item C must be included in the written contingent-fee arrangement.

Simply stated, the *quantum meruit* claim of the predecessor lawyer is a lien on the personal injury claim, not on the contract claim of the successor attorney. It is separate and apart from the successor's attorney's fee agreement, unless the successor attorney expressly makes it part of the successor attorney's fee calculation formula. Using the reasoning set forth in the currently proposed LEO, must the successor attorney's contingent-fee agreement also identify in writing other liens that might apply to the personal injury claim under Medicare, Medicaid, ERISA, and FEB plans?

In reading ABA Formal Opinion 487, I also noticed a passage that seems to contain an illogical leap. That passage is as follows:

---

[2] I am not sure whether the Committee is requiring items A through C be included in the fee agreement. The title of the LEO references an "ethical duty to include in a written engagement agreement provisions relating to predecessor counsel's *quantum meruit* legal fee claim." Line 7 of the LEO references "ethical duties," which of course are mandatory. Line 151 has the word "require" mentioned and italicized. However, the sentence that introduces items A through C states as follows: "the Committee considers it *advisable* that successor counsel in a contingent fee matter include in her proposed contingent fee arrangement with the client, the following." (see lines 159-61) (emphasis added). Since the word "advisable" is not mandatory, is the Committee saying that items A through C are required?

> A contingent fee arrangement that fails to mention that some portion of the fee may be due to or claimed by the first counsel in circumstances addressed by this opinion is inconsistent with the requirements of Rule 1.5(b) and (c). To avoid client confusion, making the disclosure in the fee agreement itself is the better practice, but this disclosure may be made in a separate document associated with the contingent fee arrangement and provided to the client at the same time. (footnote omitted).

Neither Rule 1.5(b) nor (c), whether in the model rules or in Virginia's rules, actually state this. Rule 1.5(b) which applies to all fee arrangements, does not even mandate a written fee agreement. Rule 1.5(c), which specifically deals with contingent-fee agreements, does mandate a written agreement signed by the client stating the method by which the fee is determined, what expenses are to be deducted from the recovery, and whether the expenses are deducted before or after the contingent fee is calculated. However, that rule is completely devoid of requiring a writing signed by the client identifying the *quantum meruit* claim that might be due from a predecessor attorney. Even more perplexing in the ABA Formal Opinion is the fact that, while relying on Rule 1.5(c) which requires that a contingent fee agreement be in writing signed by the client, the opinion concedes that the "disclosure" does not actually have to be in the fee agreement, but may be made in a separate document associated with the contingent-fee arrangement and provided to the client at the same time. In other words, the ABA Opinion is not based upon any explicit language in the model rules, particularly Rule 1.5(c) which is the only rule requiring a written fee agreement.

So that no one misunderstands my position, I agree that the better practice is to have some form of items A and C, and my proposed redrafted B, in writing and provided to the client at the time of engagement. An even better practice would be to include that language in the fee arrangement. However, I can find nothing in Virginia's Rules of Professional Conduct that require this. And to say that an attorney who does not include the language in a writing or in the fee agreement has failed to meet his or her ethical duties (thus resulting in an unenforceable contingent-fee agreement and maybe worse) is simply a bridge too far for me. We all must abide by Virginia's RPC. I believe that most Virginia lawyers far exceed on a daily basis the requirements of the RPC. With that said, I do not want to expose an unwary lawyer to an ethical trap when one should not exist.

As always, I thank the Committee for their diligence and hard work and I hope that my comments are viewed as helpful and constructive.

I remain,

Very truly yours,

Leonard C. Heath, Jr.

LCH:tmr

**From:** Hall, Kristi
**To:** crouchandcrouch@gmail.com
**Cc:** Gould, Karen; McCauley, Jim; Hall, Kristi; publiccomment
**Subject:** FW: [EXTERNAL SENDER] Proposed LEO 1878
**Date:** Friday, March 20, 2020 2:32:55 PM

Dear Mr. Crouch,

Thank you for your comment to the Standing Committee on Legal Ethics' proposed LEO 1878. The Legal Ethics Committee will consider your comment at its next meeting.

Feel free to call with any questions you may have.

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



**From:** John Crouch <crouchandcrouch@gmail.com>
**Sent:** Friday, March 20, 2020 12:01 PM
**To:** publiccomment <PublicComment@vsb.org>
**Subject:** [EXTERNAL SENDER] Proposed LEO 1878

[EXTERNAL SENDER]
Karen,

I have almost no experience with contingent fees, so these comments may be misplaced, but they are accurate as far as I can tell.

The LEO displays abundant foresight, humility, and appreciation of real-world realities. I have no complaints about it, as far as it goes.

1. Regarding potential conflicts of interest in negotiating fee-splitting with predecessor counsel:

Aren't there many situations where the arrangements for splitting the fee will not result in any change in the total fee that the client
will pay (as a deduction from the proceeds of the suit)? In those cases, it looks to me like the real interested parties in the negotiation
would be the new and old lawyers, not the client. Not that the client's understanding and consent isn't vital, but I don't see the potential
for a conflict of interest there. I can see how it would still be a good idea to get a waiver of any potential conflict of interest in all cases.
But it would help to lay out the variations, alternatives, and consequent choices more systematically.

In the example given in the paragraph near the bottom of Page 8, starting with Line 206, I think this is addressed, but it doesn't state explicitly what I think is the case (and I don't know if that's what the drafters thought, or not): There's no conflict in that situation, NOT because the lawyer has no personal interest at stake (she does), but because the CLIENT has no interest at stake.

The following wording is also confusing: "to limit the client's liability to payment of a specific total fee which is reasonable in light of predecessor counsel's agreed or adjudicated quantum meruit compensation."
Does "total fee" mean the total that will be owed to all the lawyers? That meaning is consistent with my understanding of when there would not be any conflict of interest.
However, the phrase "which is reasonable in light of predecessor counsel's ... compensation" makes it sound like the phrase "total fee" only means the fee that the new lawyer would get. Because it is not the grand total of all fees to all lawyers, but rather the new lawyer's share of that grand total, whose reasonableness depends partly on the predecessor's work and fees.

On the other hand, are there situations where the conflict isn't waivable? Or at least, isn't waived? In those situations, where can clients actually go for advice or representation on this issue?

2. Regarding charging the client for work that only increases the lawyer's gain, not the client's:

This is an important issue, but it seems like mostly a separate issue, although the quoted ABA opinion on it includes material that informs the conflict-of-interest issue. There should be a separate short section or paragraph of the LEO explicitly saying not to charge for such work.
Or cross-referring to rules or LEOs that already say so (if any).

But the above suggestion, or even the existing wording, leaves an avenue open for literalist mis-application: When the fees are contingent, not hourly, how is it determined what tasks the lawyer is or is not charging for? Do all lawyers keep detailed time records in all contingent-fee cases? If not, some clients may claim that if the lawyer did it, then the contingent fee is partly for it, and so the lawyer is charging for it.
Even in my hourly-billing cases, I have learned that I not only should not charge for certain non-lawyer or non-productive work, but that the bills should not even say anything that could be interpreted as possibly including such work, and should expressly no-charge it. And even then, I still have some clients who respond as if I had charged for the most useless or non-lawyer work that they were aware of me doing.

So it would help to include a blanket absolution, saying that an otherwise reasonable fractional contingent fee will not be interpreted as
charging for such non-chargeable work. And to advise making it explicit in the engagement agreement, and in any timekeeping or billing
records, that there is no charge for it.

John

John Crouch
Crouch & Crouch Law Offices
2111 Wilson Boulevard, Suite 800
Arlington, Virginia  22201
703-528-6700
Fax 703-522-9107
john@crouch.law
www.crouchfamilylaw.com
Fellow, International Academy of Family Lawyers (Formerly IAML)
and International Academy of Collaborative Professionals

**From:** McCauley, Jim
**To:** Hall, Kristi
**Subject:** FW: EXTERNAL SENDER Draft LEO 1878_with LCH edits Dec 15 2020
**Date:** Monday, March 1, 2021 4:05:25 PM

Kristi—here is the email thread to go along with the redlined draft w/Len Heath's suggestions.

**James McCauley, Ethics Counsel**
Virginia State Bar
1111 East Main Street, Suite 700 | Richmond, Virginia 23219-0026
(804) 775-0565
www.vsb.org |mccauley@vsb.org



**From:** McCauley, Jim
**Sent:** Tuesday, December 15, 2020 3:55 PM
**To:** Len Heath <lheath@hovplc.com>
**Cc:** Hall, Kristi <Hall@vsb.org>; Hedrick, Emily <hedrick@vsb.org>
**Subject:** RE: EXTERNAL SENDER Draft LEO 1878_with LCH edits Dec 15 2020

Len,

Thanks for reviewing the LEO again and offering your suggestions. I will see that the Committee sees them on Thursday when it reviews it again.

Happy holidays to you, Len.

Best,
Jim

**James McCauley, Ethics Counsel**
Virginia State Bar
1111 East Main Street, Suite 700 | Richmond, Virginia 23219-0026
(804) 775-0565
www.vsb.org |mccauley@vsb.org

COVID-19 Update: The VSB continues to provide essential services to Virginia's lawyers and the public. However, we have taken steps to keep the health and safety of our members, employees, and the general public at the forefront of our actions during this rapidly changing situation. The VSB ethics hotline is fully operational and you may either call 804-775-0564 or send an email to ethicshotline@vsb.org Ethics hotline inquires are for lawyers and judges only and are strictly confidential. We will not share any information about an inquiry without the express written consent of the inquirer.

**From:** Len Heath <lheath@hovplc.com>
**Sent:** Tuesday, December 15, 2020 3:37 PM
**To:** McCauley, Jim <mccauley@vsb.org>
**Subject:** EXTERNAL SENDER Draft LEO 1878_with LCH edits Dec 15 2020

Jim,

Good afternoon. Attached are my suggestions. If you have any questions about them, just give me a call. I thank the committee for revisiting this proposed LEO and making good substantive changes. Happy Holidays my friend.

Len

Leonard C. Heath, Jr., Esquire
Heath, Overbey, Verser & Old, PLC
The Atrium Building
11832 Rock Landing Drive, Suite 201
Newport News, VA 23606
Telephone No.: (757) 243-1461
Fax No.: (757) 599-0735
Email Address: lheath@hovplc.com
Firm Website: hovplc.com

This is a DRAFT OPINION and may be revised or withdrawn until finalized by the Ethics Committee – 12-17-2020

**LEO 1878:**

**SUCCESSOR COUNSEL'S ETHICAL DUTY TO INCLUDE IN A WRITTEN ENGAGEMENT AGREEMENT PROVISIONS RELATING TO PREDECESSOR COUNSEL'S *QUANTUM MERUIT* LEGAL FEE CLAIM IN A CONTINGENT FEE MATTER**

## I. INTRODUCTION

This opinion examines the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a *quantum meruit* basis against the proceeds of a recovery.[1]

A lawyer discharged without cause from representation in a contingent fee matter may assert a lien upon the proceeds of a recovery ultimately obtained in the same matter by successor counsel. The Virginia cases[2] which address a discharged attorney's *quantum meruit* fee entitlement do not set forth ~~a legal principle which states~~ how a successor attorney's legal fee should be calculated under these circumstances.[3]

It is beyond the purview of this Committee to advocate a legal principle which limits either counsel's fee to a given percentage or dollar amount of the recovered sums, or to a particular method of calculation. Lawyers must, however, observe the *ethical* requirements in the Rules of Professional Conduct to adequately explain fees charged to a client, how those fees are calculated and to impose only reasonable fees. Successor counsel in a contingent fee matter must adequately explain at the *inception* of the

[1] *See,* § 54.1-3932 of the 1950 Code of Virginia, as amended, and Virginia Legal Ethics Opinion 1865 "Obligations of a Lawyer in Handling Settlement Funds when a Third Party Lien or Claim Is Asserted."

[2] *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 234 S.E.2d 282 (1977); *Fary v. Aquino*, 218 Va. 889 , 241 S.E.2d 799(1978); *Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820 (1996).

[3] In contrast, for example, Louisiana has identified a governing legal principle that the total fee charged by both attorneys could not exceed the largest fee to which the client had agreed. *See, Saucier v. Hayes Dairy Products, Inc.,* 373 So.2d 102 (1979) wherein the Supreme Court of Louisiana remanded a case to the trial court to adjudicate *both* original counsel's and successor counsel's respective fee entitlements.

representation the client's *potential* obligation to all counsel, and should ensure that her fee ultimately charged to the client is reasonable. Rules 1.5(a) and (b) provide:

> **RULE 1.5. Fees.**
>
> (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.
>
> (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. [Emphasis is supplied.]

## II. QUESTIONS AND ANALYSES

### A. What must successor counsel address in her written contingent fee agreement when predecessor counsel may be entitled to a fee based on *quantum meruit*?

An attorney who accepts a case wherein predecessor counsel has performed legal services toward effecting the ultimate recovery must advise the client of potential liability to predecessor counsel for work performed by the latter prior to discharge. Successor counsel may not have knowledge of the nature and extent of the work performed by the client's former attorney or the opportunity to review predecessor counsel's complete file before being engaged by the client. For example, the client may have engaged or consulted with successor counsel before discharging the predecessor counsel. Successor counsel's information about the status of the claim at the time she is engaged may be limited or even non-existent. The successor attorney nonetheless must ~~warn~~ advise the client that the predecessor attorney may have an enforceable lien for fees which will be in addition to successor counsel's legal fees.

The Committee recognizes that the successor attorney may lack information sufficient to advise the client of the value of predecessor counsel's services. Even if the predecessor counsel has identified a dollar amount for his claimed lien,[4] ~~that lien or dollar amount~~ the amount of the lien or the lien itself may be in dispute or challenged. Under some circumstances, it may be difficult for the client, predecessor counsel, and successor counsel to agree upon how predecessor counsel is to be

[4] *See,* Legal Ethics Opinion 1812, "Can Lawyer Include in a Fee Agreement a Provision Allowing for Alternative Fee Arrangements Should Client Terminate Representation Mid-Case without Cause". There are instances when a discharged counsel's compensation based on his hourly rate would result in an unreasonable fee.

compensated when a recovery is achieved. In addition to the "unknown" of the recovery to be had, if any, there are other "unknowns," such as the balance of work which will actually be required to complete the matter and the extent to which predecessor counsel's legal services will have contributed to the recovery and relieved successor counsel from performing services otherwise required. Without knowledge of what tasks were performed by the discharged lawyer, it is also possible that the successor lawyer will duplicate those tasks.

The presence of unknowns may require that how predecessor counsel will be compensated must await the time of recovery upon the claim. Nevertheless, if ~~replacement~~ successor counsel accepts a contingent fee client knowing that the client has discharged their former attorney, ~~replacement~~ successor counsel must advise the client of the ~~former~~ predecessor attorney's potential lien for fees against the settlement or recovery obtained by ~~replacement~~ successor counsel.

ABA Formal Opinion 487, issued on June 18, 2019,[5] speaks to successor counsel's obligation to provide an adequate explanation of her fees thusly:

> **Although Rules 1.5(b) and 1.5(c) do not specifically address obligations when one counsel replaces another, both rules are designed to ensure that the client has a clear understanding of the total legal fee, how it is to be computed, when it is to be paid, and by whom.** ***** ~~A contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel in circumstances addressed by this opinion is inconsistent with these requirements of Rule 1.5(b) and (c).~~ To avoid client confusion, making the disclosure in the fee agreement itself is the better practice, but this disclosure may be made

[5] Fee Division with Client's Prior Counsel
https://www.americanbar.org/content/dam/aba/images/news/2019/06/FormalOpinion487.pdf

> in a separate document associated with the contingent fee agreement and provided to the client at the same time. [Emphasis and ellipsis supplied.]

In 1989, the San Francisco Bar Association issued LEO 1989-1, which answered, among others, the question under review here: "Where a client discharges Lawyer A in a contingency fee case and consults Lawyer B, may Lawyer B replace Lawyer A on a contingency fee basis without advising the client of Lawyer A's claim for fees?" The opinion concluded that

> a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney. This will enable the client to knowingly and intelligently determine whether to pursue litigation and choose an appropriate attorney.

In reaching that conclusion, the writers stated that

> it is better practice for an attorney who proposes to succeed a discharged attorney in a contingency fee matter to advise the client concerning the discharged attorney's *quantum meruit* claim for fees, particularly under current California law **where the client's obligation to the discharged attorney for payment of the *quantum meruit* claim could be in addition to the contingency fee paid the successor attorney**. *** [Emphasis and ellipsis supplied.]

This Committee endorses the view expressed in San Francisco Bar Association issued LEO 1989-1 and ABA Formal Opinion 487, and further

opines that Virginia Rules of Professional Conduct 1.5(b) and (c)[6] *require* that successor counsel, at the inception of proposed representation in a contingent fee matter, advise her client in writing of the client's potential obligation to pay legal fees based upon *quantum meruit* to prior counsel. Successor counsel should address both the client's potential fee obligation to prior counsel and to successor counsel under ~~the~~ her contingency fee agreement. Although *each* attorney's fee must be reasonable under Rule 1.5(a), a client who discharges her first counsel without cause may be obligated to pay combined fees in excess of the contingent fee which applied to her engagement with predecessor counsel. The important consideration is that successor counsel make the client aware of that possibility. See also Rule 1.4(b) which requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Formatted: Font: Italic

In order to document compliance with the obligations imposed by Rules1.4, 1.5(b) and (c), the Committee recommends that successor counsel in a contingent fee matter include in her proposed contingent fee agreement with the client, the following general principles (but this exact language is not required):

a. the state of the law in Virginia regarding perfection of attorneys' liens and *quantum meruit* awards available to attorneys discharged without cause;

b. a statement that the client's recovery may be subject to both the discharged lawyer's attorney's lien and the contingent fee charged by the successor lawyer; and whether the discharged lawyer's lien would be included within or in addition to the successor lawyer's contingency fee;

[6] Rule 1.5(c), pertaining to contingent fee agreements, requires that "A contingent fee agreement shall state in writing the method by which the fee is to be determined. . ." Thus, to the extent possible, the agreement should identify the means of determining the reasonable fee required by Rule 1.5(a) in view of predecessor counsel's agreed or adjudicated *quantum meruit* fee entitlement in the event of a recovery via settlement or trial.

c. who bears the expense (legal fees and court costs, if any) of determining predecessor counsel's fee entitlement, to include the cost of adjudicating the validity and amount of any claimed lien, through an interpleader action or otherwise.

**B. May successor counsel represent the client in negotiations and litigation involving the prior counsel's claim of lien?**

One of the circumstances giving rise to a concurrent conflict of interest under Rule 1.7(a)(2)[7] is when "a personal interest of the lawyer" presents a "significant risk" that her competent and diligent representation of the client would be "materially limited." Thus, there may be instances when successor counsel cannot provide diligent and competent representation to a client because successor counsel herself would not be capable of exercising the independent professional judgment and objectivity required to assess the value of the relative contributions which she and the predecessor attorney made in effecting the recovery. The client may need independent legal advice and advocacy regarding the calculation of successor counsel's fee, the value of predecessor counsel's *quantum meruit* lien, ~~and~~ or the apportionment of any recovery ~~between them~~among counsel claiming a lien on the recovery and the client.

Contracts between attorneys and their clients stand on a different footing than conventional contracts:

> Contracts for legal services are not the same as other contracts.

---

[7] **RULE 1.7 Conflict of Interest: General Rule.**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

> "(I)t is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each." *Krippner v. Matz*, 205 Minn. 497, 506, 287 N.W. 19, 24 (1939).

*Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. at 962, 234 S.E.2d at 285, (1977). Although the *Heinzman* court was speaking to the issue of the enforceability of a discharged attorney's contract, the principle that contracts between lawyers and clients stand on a different footing than ordinary commercial contracts applies equally to successor counsel.

Whether a concurrent conflict of interest exists for successor counsel to represent her client in the determination of fees to be paid~~, both~~ predecessor counsel must be assessed on a case-by-case basis. For example, a successor attorney, whose contingent fee agreement contains a provision for adjustment of her own fee by the amount of the predecessor attorney's *quantum meruit* claim so as to limit the client's liability to payment of a specific total fee ~~which is reasonable in light of predecessor counsel's agreed or adjudicated *quantum meruit* compensation~~, may ethically represent the client in negotiations with or litigation against prior counsel, but at no additional charge to the client. ABA Formal Opinion 487 addresses the ethical issues involved when successor counsel seeks to charge her client fees related to any dispute with predecessor counsel regarding his fees:

> Successor counsel's compensation for representing the client in the client's dispute with predecessor counsel must be reasonable, which in this context means, at a minimum, that the successor counsel

> cannot charge the client for work that only increases the successor counsel's share of the contingent fee and does not increase the client's recovery. Successor counsel must also obtain the client's informed consent to any conflict of interest that exists due to successor counsel's dual roles as counsel for the client *and* a party interested in a portion of the proceeds.

The "informed consent" referred to in the hypothetical posed in ABA Formal Opinion 487 must ~~above quotation should~~ be obtained under Rule 1.7(b).[8] But, as stated above, whether a concurrent conflict of interest exists with its commensurate duty to obtain informed consent must be assessed on a case-by-case basis.

In sum, successor counsel may represent the client in negotiations and litigation involving the prior counsel's claim of lien, provided she has explained to the client ~~the~~ any potential material limitations conflict by acting in ~~the~~ a dual role. In these situations where successor counsel's representation is materially limited by a concurrent conflict of interest, the

---

[8] **RULE 1.7 Conflict of Interest: General Rule.**

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

client's informed consent must be obtained~~,~~ pursuant to Rule 1.7(b). ~~(a)(2) with the client's informed consent.~~

## ~~III.~~ CONCLUSION

Formatted: Normal, No bullets or numbering

Successor counsel in a contingent fee matter must charge a reasonable fee and must adequately explain her fee to the client. If the client, predecessor counsel, and successor counsel cannot determine or agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel must advise the client of the client's potential obligation to pay fees on a *quantum meruit* basis to discharged counsel, as well as the successor counsel's fees under ~~the~~her contingent fee agreement, each of which ~~both of which~~ must be reasonable using the factors identified in Rule 1.5(a). When applicable, successor counsel should advise the client that the combined fees of both counsel may exceed the amount which would have been paid to predecessor counsel in the event the client had not changed counsel. Successor counsel may represent the client in negotiations and litigation involving the predecessor counsel's claim of lien, provided that there is no conflict under Rule 1.7(a)(2) or that she obtains informed consent to a potential conflict in accordance with Rule 1.7(b).

**From:** McCauley, Jim
**To:** Hall, Kristi
**Cc:** Hedrick, Emily
**Subject:** FW: EXTERNAL SENDER RE: Proposed LEO 1878
**Date:** Tuesday, December 15, 2020 12:05:33 PM
**Attachments:** image861365.png
image535093.png
image891211.png

---

Please add this email string to the EC materials for Thursday, Kristi. Thanks.

**James McCauley, Ethics Counsel**
Virginia State Bar
1111 East Main Street, Suite 700 | Richmond, Virginia 23219-0026
(804) 775-0565
www.vsb.org | mccauley@vsb.org

COVID-19 Update: The VSB continues to provide essential services to Virginia's lawyers and the public. However, we have taken steps to keep the health and safety of our members, employees, and the general public at the forefront of our actions during this rapidly changing situation. The VSB ethics hotline is fully operational and you may either call 804-775-0564 or send an email to ethicshotline@vsb.org Ethics hotline inquires are for lawyers and judges only and are strictly confidential. We will not share any information about an inquiry without the express written consent of the inquirer.

---

**From:** Konvicka, Jason W. <Jason.Konvicka@AllenandAllen.com>
**Sent:** Tuesday, December 15, 2020 11:53 AM
**To:** McCauley, Jim <mccauley@vsb.org>
**Cc:** Valerie OBrien <vobrien@vtla.com>; Elliott Buckner <ebuckner@breitcantor.com>
**Subject:** EXTERNAL SENDER RE: Proposed LEO 1878

Jim,

Thank you for your reaching out.

I forwarded your e-mail to Elliott Buckner, Mark Dix and Valerie O'Brien at VTLA.

I also re-reviewed everything again.

VTLA has no further comments or objections to Proposed LEO 1878 as currently drafted.

Best regards,

Jason

**Jason W. Konvicka**
**Attorney**

Allen, Allen, Allen & Allen


Tel: 804.257.7528 | 800.768.2222
804.257.7589 fax
1809 Staples Mill Road | Richmond, VA 23230




**From:** McCauley, Jim <mccauley@vsb.org>
**Sent:** Monday, December 14, 2020 11:03 AM
**To:** Konvicka, Jason W. <Jason.Konvicka@AllenandAllen.com>
**Subject:** Proposed LEO 1878

Dear Mr. Konvicka,

I am reaching out to you because you were kind enough to submit a comment on behalf of the VTLA regarding Proposed LEO 1878 which addresses the duty of an attorney representing a client in a contingent fee case, to advise the client that the lawyer the client discharged may have a lien on the recovery or settlement obtained by the successor attorney. The proposed LEO has been substantially rewritten since the version you reviewed when submitting your comment. I had some guidance from my friend and colleague, Josh Silverman, who was most helpful.

I am sending you the latest version that the committee will be reviewing on Thursday of this week. I am hoping you will have an opportunity before then to review the opinion and share your thoughts; however, if that is not possible if you can review it at you earlier opportunity, I would be most thankful.

Jim McCauley

**James McCauley, Ethics Counsel**
Virginia State Bar
1111 East Main Street, Suite 700 | Richmond, Virginia 23219-0026
(804) 775-0565
www.vsb.org | mccauley@vsb.org

COVID-19 Update: The VSB continues to provide essential services to Virginia's lawyers and the public. However, we have taken steps to keep the health and safety of our members, employees, and the general public at the forefront of our actions during this rapidly changing situation. The VSB ethics hotline is fully operational and you may either call 804-775-0564 or send an email to ethicshotline@vsb.org Ethics hotline inquires are for lawyers and judges only and are strictly confidential. We will not share any information about an inquiry without the express written consent of the inquirer.

# 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 proposed LEO 1878.

Given under my hand this 5th day of March 2021.

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 5th day of March 2021.

Notary Public

My Commission Expires: December 31, 2025.