VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
RULES OF PROFESSIONAL CONDUCT 1.8, 1.10, AND 1.15

PETITION OF THE VIRGINIA STATE BAR

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed changes to Rules of Professional Conduct 1.8, 1.10, and 1.15, as set forth below. The proposed changes to Rule 1.8(k) and associated re-enumeration of Rule 1.10(d) were approved by a vote of 55 to 2, and the proposed changes to Rule 1.8(b), Comment [1] to Rule 1.10 and to Comment [1] to Rule 1.15 were approved by unanimous vote of the Council of the Virginia State Bar on April 21, 2021 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed amendments to Rules 1.8, 1.10, and 1.15. The proposed changes fall into three categories: a prohibition on sexual

relationships with clients under Rule 1.8(k) and an associated renumbering of Rule 1.10's cross-reference to Rule 1.8; a revision to Rule 1.8(b) that modifies the scope of information protected under that rule; and revisions to comments to Rules 1.10 and 1.15 to clarify that certain conduct is mandatory by replacing the word "should" with "must".

A. <u>Rule 1.8(k)</u>

This proposed rule amendment would add a paragraph to Rule 1.8, Conflict of Interest: Prohibited Transactions, to explicitly forbid a lawyer from having sexual relations with a client during the representation. This proposal would bring the rules in line with the ABA model rules and over 40 jurisdictions that address this issue as part of Rule 1.8 rather than only through an advisory ethics opinion.

The issue of sexual relationships with clients is currently addressed in LEO 1853 (Appendix, Page 74), which does not expressly forbid the conduct but rather identifies several different conflicts of interest or other concerns that might be present in specific situations where a lawyer has a sexual relationship with a client. Because the risk of violating other rules of professional conduct is so significant, LEO 1853 ultimately concludes that a lawyer *should not* have sex with a client but is not prohibited from entering a sexual relationship with a client. While much of the reasoning in LEO

1853 supports a bright line prohibition, LEO 1853 stops short:

> Rules 1.3(c), 1.8(b), and 1.7(a)(2) reflect the fundamental fiduciary obligation of a lawyer not to exploit a client's trust for the lawyer's benefit, which implies that the lawyer *should not* abuse the client's trust by taking sexual or emotional advantage of a client.

While the Committee agrees with LEO 1853's reasoning, it believes that the best position is that a lawyer must not abuse the client's trust by having sexual relations with a client during the professional engagement, unless the sexual relationship predated the professional engagement and the lawyer's representation of that client is not "materially limited" by the lawyer's personal relationship with that client. *See* Rule 1.7(a)(2). This result is exactly what the proposed rule would achieve.

Although courts and disciplinary cases have condemned lawyer-client sex, lawyers have continued to engage in sexual relations after commencement of the professional relationship, asserting that if the sexual relationship is between two consenting adults, the matter is none of the regulatory bar's business[1], that the client's case was not prejudiced, or that no harm to the client had occurred. But the concept that these relationships

[1] The proposed Rule 1.8(k) is not an attempt by the VSB to regulate personal decisions by the lawyer and client to have a sexual relationship. The proposed rule regulates the professional conduct of a lawyer during the legal representation of the client which falls squarely within the bar's regulatory objectives. If the lawyer and client wish to pursue a sexual relationship, then the lawyer must withdraw from the professional relationship.

are truly consensual is untenable. Where is the client's ability to say "no" when her attorney tells her he will abandon her lawsuit to keep her home unless she agrees to have sex? Reported cases are filled with clients who have said that they submitted to their attorney's sexual advances out of fear that refusing to submit would affect the quality of their representation at a time of vulnerability and dependence on the attorney.[2]

LEO 1853 essentially puts the burden on the client, and in turn the Bar discipline system, to prove that the representation of the client was adversely affected by the existence of the sexual relationship that the Respondent lawyer will claim was "consensual." While the burden is always (appropriately) on the Bar to prove disciplinary offenses by clear and convincing evidence, the offense here should properly be considered the existence of the sexual relationship itself, not any follow-on effects it had on the lawyer's representation of the client. Those effects are separate offenses and should be treated as such, rather than as necessary to prove the misconduct of the sexual relationship itself.

Beyond that, adopting proposed Rule 1.8(k) sends a clear message

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2 *See, e.g., In re Vogel*, 482 S.W.3d 520 (Tenn. 2016); *Iowa Supreme Court Atty. Disciplinary Bd. v. Moothart*, 860 N.W.2d 598 (Iowa 2015); *Disciplinary Counsel v. Detweiler*, 135 Ohio St.3d 447, 989 N.E.2d 41 (2013); *Disciplinary Counsel v. Moore*, 101 Ohio St.3d 261, 804 N.E.2d 423 (2004); *Akron Bar Ass'n v. Williams*, 104 Ohio St.3d 317, 819 N.E.2d 677 (2004); *Matter of Berg*, 264 Kan. 254, 955 P.2d 1240 (1998); *In re Rinella*, 175 Ill.2d 504, 677 N.E.2d 909 (1997).

that this conduct is not acceptable under any circumstances. On a practical level, many lawyers might expect to see this topic addressed in Rule 1.8, since that is how a majority of jurisdictions approach the issue, and do not necessarily know or appreciate that they also need to consider LEOs on this topic. And on a symbolic level, it reaffirms the Bar's commitment to protecting clients from predatory behavior.

Rule 1.8(b)

Rule 1.8(b) currently uses the phrase "information relating to the representation of a client," which is the same as the ABA standard for confidentiality but is broader than our Rule 1.6; the proposal amends 1.8(b) to mirror 1.6 and then adds new Comment [2] (which is adapted from ABA Model Comment [5]) to provide some context for 1.8(b). This is a substantive change to the rule, since it changes the standard for information protected under the rule from "information relating to the representation of a client" to "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," and it effectively equalizes the standard between Rules 1.6 and 1.8. Under the current rules, Rule 1.8(b) protects a different

set of information than Rule 1.6 does, and since Rule 1.6 is the primary rule on confidentiality, the Committee determined that its standard should be applied throughout the rules.

Rule 1.10

If Rule 1.8(k) is adopted (banning sexual relations with a client) then current Rule 1.8(k) will become Rule 1.8(l). This in turn will require an amendment to Rule 1.10(d) to say that "[t]he imputed prohibition of improper transactions is governed by Rule 1.8(l)," instead of Rule 1.8(k).

Rule 1.10 Comment [1] defines what makes a group of lawyers a "firm." The last sentence, discussing the *per se* conflict under Rule 1.7(b)(3), refers to "the Rule that the same lawyer *should* not represent opposing parties in litigation." [Emphasis added.] The proposal replaces "should" with "must" as it is not permissible for the same firm to represent opposing parties in the same litigation.

Rule 1.15

Rule 1.15 Comment [1] repeatedly uses the word "should" to describe what is required. As above, the proposed amendments replace "should" with "must" to clarify that these are mandatory obligations.

The proposed rule changes are included below in Section III.

II. Publication and Comments

A. Rule 1.8(k)

The Standing Committee on Legal Ethics approved proposed Rule 1.8(k) at its meeting on December 12, 2019 (Appendix, Page 4). The Virginia State Bar issued a publication release dated December 13, 2019, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 6). Notice of proposed Rule 1.8(k) was also published in the bar's January 2020 newsletter (Appendix, Page 10), on the bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 23), on the bar's "News and Information" page on January 7, 2020 (Appendix, Page 34), and in the *Virginia Lawyer Register*, February 2020 issue, Volume 68 (Appendix, Page 38).

Eleven comments were received, from Kevin Martingayle, Sandra Bowen, Andrew Straw, deez132@yahoo.com (no other identification provided), Amy McDougal, James Wrenn, Leo Rogers (on behalf of the Local Government Attorneys), Leslie Haley, Hilton Oliver, Peter Owen, and John Crouch (Appendix, Page 39). The only change the Committee made in response to the comments was to remove the phrase "or regularly consults with" from proposed Comment [19], based on the suggestion in Leslie Haley's comment. This change narrows the scope of the rule as

applied to counsel for an entity, which the Committee agreed was an appropriate limitation for the reasons stated in Ms. Haley's comment. This change also addresses some of the scenarios raised by Mr. Owen's comment.

Several comments asked whether there is a need for a rule to address this issue and whether something has changed since LEO 1853 was adopted. The reasons for the Committee's determination that a rule is necessary and appropriate are addressed above in the first section of this petition.

Several comments also raised, in different ways, questions about whether "sexual relationship" should be defined in the rule or comments. The Committee considered this both before and after receiving comments on the proposal and concluded that a specific definition is not necessary at this time. There is no shortage of resources that attempt to define a sexual relationship, and the Committee, bar counsel, and disciplinary tribunals will be able to use standard methods of rule interpretation to apply the rule as specific factual scenarios arise. Should problems arise with this approach as the rule is applied, the Committee can revisit the comments equipped with better knowledge about what needs to be clarified.

B. Rules 1.8(b), 1.10, and 1.15

The Standing Committee on Legal Ethics approved the amendments to Rules 1.8(b), 1.10, and 1.15 at its meeting on February 27, 2020 (Appendix, Page 5). The Virginia State Bar issued a publication release dated February 27, 2020, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 8). Notice of the proposed rule amendments was also published in the bar's March 2020 newsletter (Appendix, Page 13), on the bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 28), and on the bar's "News and Information" page on February 28, 2020 (Appendix, Page 36).

Two comments were received, from John Crouch and Leo Rogers (on behalf of the Local Government Attorneys) (Appendix, Page 68). The substance of Mr. Crouch's comment addressed a proposal to amend Comment [11] to Rule 3.3, which is not before the Court at this time.

III. Proposed Rule Changes

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information ~~relating to representation of a client~~ protected under Rule 1.6 for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas,

unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(l~~k~~) While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

COMMENT

Transactions Between Client and Lawyer

[1] Rule 1.8(a) states the general principle that ~~As a general principle,~~ all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products

manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. ~~Similarly, paragraph (b) does not limit an attorney's use of information obtained independently outside the attorney-client relationship.~~

[2] Use of information protected by Rule 1.6 for the advantage of the lawyer or a third person or to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client or third party make such a purchase. Paragraph (b) prohibits the use of a client's confidential information for the advantage of the lawyer or a third party or to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b). Paragraph (b) does not limit an attorney's use of information obtained independently outside the attorney-client relationship.

[3~~2~~-5] *ABA Model Rule* Comments not adopted.

[6] A lawyer may accept ordinary gifts from a client. For example, an ordinary gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[7-8] *ABA Model Rule* Comments not adopted.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue

lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality, Rule 1.7 concerning conflict of interest, and Rule 5.4(c) concerning the professional independence of a lawyer. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[12] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

[13-15] *ABA Model Rule* Comments not adopted.

Acquisition of Interest in Litigation

[16] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances or payment of the costs of litigation set forth in paragraph (e).

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client

confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Like a conflict arising under paragraph (i) of this Rule, this conflict is personal to the lawyer and is not imputed to other lawyers in the firm with which the lawyer is associated.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (k) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from

having a sexual relationship with a constituent of the organization who supervises or directs that lawyer concerning the organization's legal matters.

RULE 1.10 Imputed Disqualification: General Rule

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(d) The imputed prohibition of improper transactions is governed by Rule 1.8(~~k~~l).

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COMMENT

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm as defined in the Terminology section can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule

that the same lawyer ~~should~~ must not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other.

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RULE 1.15 Safekeeping Property

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COMMENT

[1] A lawyer ~~should~~ must hold property of others with the care required of a professional fiduciary. Securities ~~should~~ must be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. For purposes of this Rule, the term “fiduciary” includes personal representative, trustee, receiver, guardian, committee, custodian, and attorney-in-fact. All property that is the property of clients or third persons ~~should~~ must be kept separate from the lawyer's business and personal property and, if funds, in one or more trust accounts. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

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IV. Conclusion

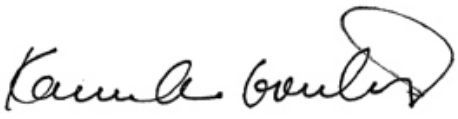
The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The proposed rule changes were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed changes to Rules 1.8, 1.10, and 1.15 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

Brian L. Buniva, President



Karen A. Gould, Executive Director

Dated this 7th day of May, 2021.