

**VIRGINIA:**

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

**IN THE MATTER OF  
LEGAL ETHICS OPINION 1872**

**PETITION OF THE VIRGINIA STATE BAR**

Marni E. Byrum, President  
Karen A. Gould, Executive Director  
James M. McCauley, Ethics Counsel  
Emily F. Hedrick, Assistant Ethics Counsel  
Virginia State Bar  
1111 East Main Street, Suite 700  
Richmond, VA 23219-3565  
Phone (804) 775-0500  
Fax (804) 775-0501

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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 amendments to Legal Ethics Opinion 1872, as set forth below. The proposed amendments were approved by a unanimous vote of the Council of the Virginia State Bar on June 13, 2019 (Appendix, Page 1).

**I. Overview of the Issues**

The Virginia State Bar Standing Committee on Legal Ethics (“Committee”) has proposed amendments to LEO 1872. The proposed revisions to LEO 1872 update references to Rule of Professional Conduct 1.6(d), concerning a lawyer’s duty to protect confidential information, and Rule 7.1, on advertising. The revisions also remove references to former Regulation 7 Governing Applications for Admission to the Virginia Bar Pursuant to Rule 1A:1 of the Supreme Court of Virginia since that regulation has been modified and no longer requires that

lawyers admitted to practice by motion maintain a physical office space.

The proposed revisions also modify the discussion of when a lawyer may advertise a non-exclusive office space as a location of the firm. The revisions remove the “factors to be considered” in making that determination, which currently include frequency of use, whether nonlawyers use the space, and whether signage indicates that the space is used as a law office. Thus, the analysis in the opinion is narrowed to the question of whether the advertised location is an office where the lawyer provides legal services, and whether the advertised location is being used to mislead prospective clients that the lawyer’s practice or firm is more geographically diverse or larger than is actually the case. These proposed revisions, if approved by the Court, will conform LEO 1872 with revisions made to LEO 1750 last year (approved by this Court on April 20, 2018), which refers to and cites LEO 1872.

The proposed changes are included below in Section III, with deletions stippled and additions underlined.

## **II. Publication and Comments**

The Standing Committee on Legal Ethics approved the proposed amendments to LEO 1872 at its meeting on February 6, 2019 (Appendix, Page 4). The Virginia State Bar issued a publication release dated February 12, 2019, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix,

Page 5). Notice of the proposed amendments was also published on the bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 7) and on the bar's "News and Information" page on February 13, 2019 (Appendix, Page 12).

No comments were received.

### **III. Proposed Legal Ethics Opinion**

#### LEGAL ETHICS OPINION 1872      VIRTUAL LAW OFFICE AND USE OF EXECUTIVE OFFICE SUITES.

This opinion is an examination of the ethical issues involved in a lawyer or firm's use of a virtual law office, including cloud computing, and/or executive office suites. These issues include marketing, supervision of lawyers and nonlawyers in the firm, and competence and confidentiality when using technology to interact with or serve clients.

A virtual law practice involves a lawyer/firm interacting with clients partly or exclusively via secure Internet portals, emails, or other electronic messaging.<sup>1</sup> This practice may be combined with an executive office rental, where a lawyer rents access to a shared office suite or conference room. This space is generally

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<sup>1</sup> Stephanie Kimbro, a practitioner and scholar of virtual law offices, defines a virtual law practice as one where "[t]he use of an online client portal allows for the initiation of the attorney/client relationship through to completion and payment for legal services. Attorneys operate an online backend law office as a completely web-based practice or in conjunction with a traditional law office." <http://virtuallawpractice.org/about/>, accessed Jan. 22, 2013.

either unstaffed or staffed by an employee of the rental company who provides basic support services to all users of the space, rather than by an employee of the lawyer. The space is also not exclusive to the lawyer – even if she has exclusive access to a particular office or conference room, the suite is open to all other “tenants.” Lawyers who maintain a virtual practice, who work from home, or who wish to expand their geographic profile without the higher costs of exclusive office space and staff all use these spaces as client meeting locations. In other words, virtual law offices and executive office suites do not always go together, but they frequently do.

## APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 1.1<sup>2</sup>, 1.6(a) and (d)<sup>3</sup>,

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### <sup>2</sup> **Rule 1.1**      **Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### <sup>3</sup> **Rule 1.6**      **Confidentiality of Information**

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

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

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

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(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

5.1(a) and (b)<sup>4</sup>, 5.3(a) and (b)<sup>5</sup>, and 7.1<sup>6</sup>. The relevant legal ethics opinions are LEOs 1600, 1791, 1818, and 1850.

~~Finally, Regulation 7 Governing Applications for Admission to the Virginia Bar Pursuant to Rule 1A:1 of the Supreme Court of Virginia applies to lawyers who are admitted or seeking admission by motion to the Bar of Virginia.<sup>7</sup>~~

## ANALYSIS

Virtual law offices involve issues that are present in all types of law offices –

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### <sup>4</sup> Rule 5.1 Responsibilities of Partners and Supervisory Lawyers

- (a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct

### <sup>5</sup> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

- (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and...

### <sup>6</sup> Rule 7.1 Communications Concerning a Lawyer's Services

~~(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.~~

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~~<sup>7</sup>7. Intent to Practice Full Time in Virginia. An applicant must intend, promptly after being admitted to practice in Virginia without examination, to establish his or her office in Virginia and to practice full time from such Virginia office. Full time is defined as being engaged in the active practice of law (as defined above) as one's primary occupation for at least thirty five (35) hours weekly and having an office where clients can be seen on the premises. The Board shall not approve an application unless the applicant has verifiable plans to practice in Virginia (i.e., a job offer from a Virginia firm, a relocation to the Virginia office of the applicant's firm, an executed lease for office space in Virginia, etc.). Practice from one's residence shall not constitute satisfactory evidence of intent to practice law full time unless the applicant's residence is in a zoning classification which permits seeing clients on the premises and displaying an exterior sign identifying the law office. Virtual offices or shared occupancy arrangements shall not be acceptable. In addition, an applicant shall not divide his or her time between an office within Virginia and one in another jurisdiction. An applicant who is a member of or associated with a firm which has offices outside Virginia must be resident at such firm's Virginia office, shall not maintain an office at a location outside Virginia, and may work at one of his or her firm's other offices only on an occasional and not on a regular basis. The Court will monitor to determine whether an applicant maintains his or her Virginia office.~~

confidentiality, communication with clients, and supervision of employees – but that manifest themselves in a new way in this context. *See also* LEO 1850 (exploring similar concerns in context of outsourcing legal support services).

A lawyer must always act competently to protect the confidentiality of clients' information, regardless of how that information is stored/transmitted, but this task may be more difficult when the information is being transmitted and/or stored electronically through third-party software and storage providers. The lawyer is not required, of course, to absolutely guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to the representation of a client. *See* Rule 1.6(d). When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified

to make that determination.<sup>87</sup>

Similarly, although the method of communication does not affect the lawyer's duty to communicate with the client, if the communication will be conducted primarily or entirely electronically, the lawyer may need to take extra precautions to ensure that communication is adequate and that it is received and understood by the client. The Committee previously concluded in LEO 1791 that a lawyer could permissibly represent clients with whom he had no in-person contact, because Rule 1.4 "in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*." On the other hand, one of the aspects of communication required by Rule 1.4 is that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Use of the word "explain" necessarily implies that the lawyer must take some steps beyond merely providing information to make sure that the client actually is in a position to make informed decisions. A lawyer may not simply upload information to an Internet portal and assume that her duty of

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<sup>87</sup> See LEO 1818, where the Committee concluded that a lawyer could permissibly store files electronically and destroy all paper documents as long as the client was not prejudiced by this practice, but noted that the lawyer may need to consult outside technical assistance and support for assistance in using such a system.

communication is fulfilled without some confirmation from the client that he has received and understands the information provided.

Finally, the technology that enables a lawyer to practice “virtually” without any face-to-face contact with clients can also allow lawyers and their staff to work in separate locations rather than together in centralized offices. As with other issues discussed in this opinion, a partner or other managing lawyer in a firm always has the same responsibility to take reasonable steps to supervise subordinate lawyers and nonlawyer assistants, but the meaning of “reasonable” steps may vary depending upon the structure of the law firm and its practice. Additional measures may be necessary to supervise staff who are not physically present where the lawyer works.

The use of an executive office/suite rental or any other kind of shared, non-exclusive space, either in conjunction with a virtual law practice or as an addition to a “traditional” office-based practice, raises a separate issue. A non-exclusive office space or virtual law office that is advertised as a location of the firm must be an office where the lawyer provides legal services. ~~Depending on the facts and circumstances, it may be improper under Rule 7.1 for a lawyer to list or hold out a rented office space as her “law office” on letterhead or other public communications. Factors to be considered in making this determination include the frequency with which the lawyer uses the space, whether nonlawyers also use the~~

~~space, and whether signage indicates that the space is used as a law office. In addition, a~~<sup>A</sup> lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case. See Rule 7.1. As discussed above in the context of Internet-based service providers, a lawyer must also pay careful attention to protecting confidentiality if any client information is stored or received in a shared space staffed by nonlawyers who are not employees of the law firm and may not be aware of the nature or extent of the duty of confidentiality.

~~For lawyers who are licensed to practice in Virginia by motion rather than by bar exam, Regulation 7 of the Regulations Governing Applications for Admission to the Virginia Bar Pursuant to Rule 1A:1 of the Supreme Court of Virginia creates an additional difficulty in using an executive office rental or virtual office. This Regulation requires that a lawyer who is seeking admission, or who is already admitted, by motion maintain an office in Virginia where clients can be seen on the premises, and specifically provides that virtual office or shared occupancy arrangements are not acceptable for purposes of satisfying the office requirement.<sup>9</sup> Accordingly, a lawyer who is admitted by motion should first ensure~~

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<sup>9</sup> ~~But see~~ Proposed Amendments to Rules 1A:1 and 1A:3, proposed October 22, 2012, available at [http://courts.state.va.us/news/draft\\_revisions\\_rules/2012\\_rules\\_1\\_3\\_draft.pdf](http://courts.state.va.us/news/draft_revisions_rules/2012_rules_1_3_draft.pdf) (proposing change to

~~that any office space arrangement complies with Regulation 7 before there is any need to consider the ethics issues raised.~~

#### **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.

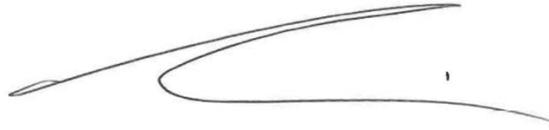
Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and the Rules of Professional Conduct are promulgated and implemented. The amendments to LEO 1872 were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed amendments to Legal Ethics Opinion 1872 for the reasons stated above.

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~~requirements for admission by waiver from “full time” practice requirement to “predominant” practice requirement).~~

Respectfully submitted,  
VIRGINIA STATE BAR

A handwritten signature in black ink, appearing to read 'Marni E. Byrum'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Marni E. Byrum, President

A handwritten signature in black ink, appearing to read 'Karen A. Gould'. The signature is cursive and includes a large, circular flourish at the end.

Karen A. Gould, Executive Director

Dated this 19th day of June, 2019.