

VIRGINIA:

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

**IN THE MATTER OF
RULE OF PROFESSIONAL CONDUCT 1.8**

PETITION OF THE VIRGINIA STATE BAR

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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 proposed changes to Rule of Professional Conduct 1.8 as set forth below. The proposed changes 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 Rule 1.8(b), changing the scope of the information protected by the rule to mirror the definition of confidential information in Rule 1.6, and adding a new Comment [2] to provide some context for the application of the rule. Minor revisions to Comment [1] remove redundancy in light of new Comment [2].

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.

The proposed rule changes are included below in Section III.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed amendments at its meeting on February 27, 2020 (Appendix, Page 4). 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 5). Notice of the proposed rule amendments was also published in the Bar's March 2020 newsletter (Appendix, Page 7), on the Bar's website on the "Actions on Rule Changes and Legal Ethics Opinions" page (Appendix, Page 8), and on the Bar's "News and Information" page on February 28, 2020 (Appendix, Page 12).

One comment was received, from Leo Rogers (on behalf of the Local Government Attorneys) (Appendix, Page 14).

III. Proposed Rule Changes

RULE 1.8 Conflict of Interest: Prohibited Transactions

(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.

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.

[32-5] *ABA Model Rule* Comments not adopted.

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 Rule 1.8 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

A handwritten signature in black ink, appearing to read "J. B. Myerson". The signature is written in a cursive style with a long horizontal stroke at the bottom.

Jay B. Myerson, President

A handwritten signature in black ink, appearing to read "Karen A. Gould". The signature is written in a cursive style with a large loop at the end.

Karen A. Gould, Executive Director

Dated this 1st day of October, 2021.