Executive Director’s Message
by Karen A. Gould

New VSB Offices; New and Amended Rules

VSB New Headquarters
By the time this column is published in the December Virginia Lawyer, the Virginia State Bar should have executed a ten-year lease with the owner of the Bank of America building in downtown Richmond, at 1111 E. Main St. The bar’s offices will be on the seventh floor of the building, with additional office space on the sixth floor. The lease also includes two five-year options to extend the lease term. The bar has been located in its present office space, 707 E. Main St., since 1992.

New Admission Without Examination Rule (Reciprocity)
By order entered November 1, 2013, the Supreme Court of Virginia has adopted, effective February 1, 2014, a new Rule 1A:1, addressing admission to the Virginia bar without examination (often called “admission on motion”). Although the old and new rules are similar in many respects, there are several significant differences.

To continue encouraging other states to grant the same privilege to Virginia lawyers, the Court has retained the requirement that only lawyers who are admitted in jurisdictions that also admit Virginia lawyers without examination (i.e., “reciprocal” jurisdictions) are eligible for admission on motion. Although the old and new rules are similar in many respects, there are several significant differences.

Rule 1A:1 now reads as follows:

RULE 1A:1 New and Amended Rules
(a) A lawyer who holds public office shall not:
(1) use the public position to obtain, or attempt to obtain, a
special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer’s action as a public official.

(b) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and that the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter or unless the private client and the appropriate government agency consent after consultation; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) Paragraph (d) does not disqualify other lawyers in the disqualified lawyer’s agency.

(f) As used in this Rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client. A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[3] Paragraphs (b) and (d) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (b). Similarly, a lawyer who has pursued
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a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer’s professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The private client should be informed of the lawyer’s prior relationship with a public agency at the time of engagement of the lawyer’s services.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (b)(1) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney’s compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (b)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (b) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Virginia Code Comparison
Paragraph (a) is identical to DR 8-101(A).
Paragraph (b) is substantially similar to DR 9-101(B), except that the latter used the terms “in which he had substantial responsibility while he was a public employee.” The Rule also requires consent of both a current client and the former agency.

Paragraphs (c), (d), (e) and (f) have no counterparts in the Virginia Code.

Committee Commentary
The Committee believed that the ABA Model Rule provides more complete guidance regarding lawyers’ movement between the public and private sectors. However, the Committee added the language of DR 8-101(A) as paragraph (a) in order to make this Rule a more complete statement regarding the particular responsibilities of lawyers who are public officials. Additionally, to make paragraph (b) consistent with similar provisions under Rule 1.9(a) and (b), the Committee modified the paragraph to require consent to representation by both the current client and the lawyer’s former government agency.

Rule of Professional Conduct 1.15
The amendment to RPC 1.15 clarifies that money held by a lawyer on behalf of a client must be held in a trust account, while other property may be placed in a safe deposit box or other place of safekeeping. As it was previously written, Rules 1.15(a) appeared to permit a lawyer to place money held on behalf of a client into a safe deposit box rather than a trust account. The Court also replaced the word “monies” with “funds” in Comment 1 to be consistent with the language in the remainder of the Rules and Comments.

The rule now reads as follows, in pertinent part:

Rule 1.15 Safekeeping Property
(a) Depositing Funds.

Rule 5.4 continued on page 14
Rule 5.4 continued from page 12

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be or placed in a safe deposit box or other place of safekeeping as soon as practicable.

Rule of Professional Conduct 5.4
The amendments to Rule of Professional Conduct 5.4 bring subpart (d)(2) into alignment with Virginia Code § 54.1-3902(B)(1). The statute permits a nonlawyer to serve as the secretary, treasurer, office manager or business manager of a professional entity that is authority to practice law. The rule change now provides an exception when a nonlawyer corporate officer is authorized by law.

The rule now reads as follows:

Rule 5.4 Professional Independence of a Lawyer
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a nonlawyer owns any interest therein, except as provided in (a)(3) above, or except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof, except as permitted by law; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.