

# How Virginia Lawyers Self-Regulate: A View from Ethics Counsel

by James M. McCauley, ethics counsel for the Virginia State Bar

As I move into my 30th year of employment at the Virginia State Bar (VSB), I am given an opportunity to reflect on the significant changes in the Rules of Professional Conduct (RPC) and our regulation of the practice of law in Virginia — and how volunteer lawyers have served to shape these changes.

When I started at the VSB in 1989, we were governed by the former Code of Professional Responsibility (Code) with its Disciplinary Rules and Ethical Considerations. The Supreme Court of Virginia adopted the ABA Model Rules format on January 1, 2000, after a five-year study by a special committee, chaired first by Donald Lemons, now Chief Justice of the Supreme Court of Virginia, and succeeded by the late Dennis (“Denny”) W. Dohnal who took the task of drafting the new rules to completion. In comparing the Code to the ABA Model Rules, the special committee found itself keeping some of the old Code rules and language but adopting much more of the new Model Rule language. To this day, there remain some substantial differences between the Virginia Rules of Professional Conduct and the ABA Model Rules. Given a project of considerable scope and importance, the special committee obviously considered each rule before adopting language from the ABA Model Rules, or incorporating language from the former Code, or developing its own language for a particular rule.

The Model Rules adopted by the Court filled several gaps left in the former Code, including Rules 1.2 (scope of representation), 1.13 (organizational clients), 1.14 (clients with diminished capacity), 1.17 (sale of a law practice) and a set of rules for lawyer serving as third party neutrals in alternative dispute resolution (Rules 2.3, 2.10 and 2.11). The former Code also had no counterpart for Rules 4.4 (respect for rights of third persons), 5.1 and 5.3 (requiring supervision of subordinate lawyers and nonlawyer employees or agents), 6.3 (membership in legal services organizations), and 8.2 (criticism of judges). Virginia did not adopt some of the ABA Model Rules, for example, Rule 3.2 (expediting litigation), Rule 3.9 (advocate in non-adjudicative proceedings), Rule 5.2 (duties of subordinate lawyer), Rule 5.7 (responsibilities regarding law-related

services), and Rule 6.4 (law reform activities affecting client interests).

After the Court adopted the Virginia Rules of Professional Conduct effective January 1, 2000, the Standing Committee on Legal Ethics (Ethics Committee) was charged with the responsibility of reviewing and recommending any further proposed changes to the RPC. However, any proposals to amend the RPC may originate from other committees, sections, or constituencies of the bar, followed by review and recommendation by the Ethics Committee. Since the RPC are rules of the Supreme Court of Virginia, presumably the Court could adopt a new rule or amend a rule on its own initiative. Although the Court has never done that during my tenure, it has made modifications to rule amendments proposed by the VSB and has occasionally rejected rule amendment proposals submitted to the Court by the VSB.

After a 1998 California case<sup>1</sup> ruled that some New York lawyers committed unauthorized practice of law (UPL) in assisting a client in an arbitration in California, including work performed by the lawyers at their New York offices, state bar regulators began to study their own UPL rules in the early to mid-2000s. The VSB created task forces for corporate counsel, chaired by the late W. Scott Street III, and multijurisdictional practice, chaired by Marni E. Byrum, to study these issues and recommend changes to the RPC. Based on their work product, the Court adopted a Corporate Counsel rule to authorize out-of-state lawyers to serve their employers in Virginia and do pro bono work; and amended Rule 5.5 to allow out-of-state lawyers to engage in temporary practice in Virginia subject to certain conditions. These amendments, adopted in most other states, have given lawyers greater mobility and flexibility in multijurisdictional practice, without the necessity of seeking reciprocity or admission by examination into another state’s bar.

In more recent times, the VSB discontinued its Advertising and UPL committees, finding that the work of both committees could be handled by staff under the supervision of the Ethics Department and the Standing Committee on Legal Ethics. New rules were added to the RPC, including Rule 1.18, which addresses conflicts created by discussions with prospective clients and allows screening to avoid imputation, and Rule 5.8 that sets out rules for notification to clients when a lawyer leaves a law firm.

The Court adopted amendments to Rules 1.1 (competence) and 1.6 (confidentiality) to recognize that lawyers have duties with respect to using technology and exercising reasonable care to safeguard confidential information from interception, theft, inadvertent disclosure, and unauthorized access or destruction by hackers. On the recommendation of the Ethics Committee, the Court has streamlined and simplified the lawyer advertising rules, beginning in 2013 with the removal of the unqualified ban on in-person solicitation in cases involving personal injury or wrongful death, and later in 2017 by removing the disclaimers required for advertising specific case results and specialization certifications awarded lawyers by accrediting organizations. The changes also recognize the more contemporary means by which a lawyer may market legal services and develop clients in the digital age, i.e., social networking, lead generation, online attorney-client matching, and referral services. Most importantly, the overhaul of the lawyer advertising rules rebalances the VSB's interest in policing advertising that is false and misleading with the lawyer's right of commercial speech, by removing technical and unnecessary requirements that do not advance an important regulatory objective.

A special study committee, chaired by Former UPL Committee Chair Adam Elfenbein and composed of persons with expertise and experience with the UPL rules and UPL investigations, met over a two-year period with the goal of rewriting the UPL rules to make them more concise and easier

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to read. Their work product, if adopted by the Court, will produce a more user-friendly regulatory document for judges, lawyers, and members of the public to follow. The proposal may be studied here: [www.vsb.org/docs/prop-UPL-050318.pdf](http://www.vsb.org/docs/prop-UPL-050318.pdf)

The VSB currently has four full-time lawyers and an executive assistant working the Ethics Hotline and serving several committees and task forces. The Ethics Department is now a separate operation that reports to the executive director and is no longer a part of the Professional Regulation Department. The Ethics Department resides on a different floor and has separate, restricted servers to maintain the confidentiality of all its data. On average, the Ethics Hotline gets 25–30 inquiries per day by telephone or email ([ethicshotline@vsb.org](mailto:ethicshotline@vsb.org)). Lawyers can access the hotline at the VSB website here: [www.vsb.org/site/regulation/ethics](http://www.vsb.org/site/regulation/ethics). Lawyers may expect a response within hours of their inquiry and generally on the same day.

There were significant changes in the manner that the VSB and the Court promulgate new rules, amendments to the RPCs, and Legal Ethics Opinions (LEOs). When I started as ethics counsel, in 1995, LEOs were issued by the Standing Committee on Legal Ethics, and they were effective when issued, although they were non-binding and advisory only. There was no opportunity for public comment, except in rare instances where the particular LEO was sent to the VSB Council and the Court for approval. Now, all LEOs must be reviewed and approved by Council and the Court before they become effective. Once the Court adopts a LEO, it has the effect of a decision of the Court. The Committee releases a proposed LEO and publishes it for public comment to start the promulgation process. This same procedure is required for new rules added to the RPC or rule amendments. This enables the committee to consider comments that have been made before submitting the proposed LEO or rule amendment to Council. Both Council and the Court are given all the comments to a proposed LEO or rule change. This process slows down the pace of the rule-making and LEO promulgation, but it results in a more deliberate and thoroughly vetted rule or LEO.

A more recent and noteworthy change is a national movement that focuses on lawyer well-being. This movement grew out of two studies published in 2016 revealing that lawyers and law students are 2–3 times more likely to suffer from anxiety, depression, substance abuse, and suicide than

the general population. Based on these studies, the Ethics Committee issued two LEOs, 1886 and 1887, which discuss a lawyer's ethical obligations when faced with a lawyer that appears to have impairment. A national task force on lawyer well-being issued a report<sup>2</sup> in August 2017 urging a call to action by all stakeholders in our legal system — regulators, insurers, law schools, lawyers' assistance programs, judges, public and private employers, admissions officials — to address what might be described as a “wellness crisis” for the legal profession. Our Chief Justice

Donald Lemons and Katie Uston, assistant bar counsel, sat on that national task force, so Virginia is playing an active role in this movement. Our Supreme Court appointed a Committee on Lawyer Well-Being chaired by Justice Mims which issued its report<sup>3</sup> in September 2018 recommending changes designed to improve lawyer well-being. The most significant change is a call for increased funding of Lawyers Helping Lawyers, a Virginia non-profit organization whose clinician, executive director, and 150 lawyer volunteers throughout the state help lawyers with mental health and substance abuse issues get assessments, referrals, support, treatment, and counselling. Another important recommendation is mandatory continuing education to improve lawyers' awareness and knowledge of wellness, and to learn how to reach out and be proactive when we see a colleague at risk. To this end the VSB is amending its MCLE rules and regulations to enable lawyers to earn MCLE

## VSB Ethics Department Staff

Left to right: James M. McCauley, Seth M. Guggenheim, Barbara B. Saunders, Emily F. Hedrick, and Kristi R. Hall



credit for courses that focus on lawyer wellness issues. The Ethics Committee had already embraced a recommendation of the national task force to amend Rule 1.1 (competence) to call attention to the fact that well-being is an aspect of providing competent representation to clients; and the fact that lawyers must be aware of the role of well-being in maintaining competence to practice law. The proposed amendment was submitted to the Court in June 2018.

As I grow closer to the end of my career at the VSB, I am extremely grateful to all the volunteers that have served the VSB as members of its many different committees and task forces. The Ethics Committee, though, has enjoyed most of my time and attention. The Ethics Committee, currently chaired by Eric Page, struggles with some of the most difficult questions on a regular basis. All the easy questions have been asked and answered. The “black and white” situations do not go to the Ethics Committee. The committee’s composition changes regularly but the VSB has kept diversity in the forefront. Every volunteer that has served on the committee and has shared their opinion with me has said that serving on the committee was by far the most fulfilling and intellectually stimulating experience of all their service to the bar. That committee has the important responsibility and privilege of drawing the ethical boundaries in which lawyers practice law by interpreting and applying the RPC to a given factual scenario and by recommending changes to the rules when necessary.<sup>4</sup>

The ability of members of the bar to write and enforce the rules by which they are governed is a unique privilege, especially when compared to how other occupations and professions are regulated. But the privilege of self-regulation has its price — the sacrifice of the time, hard work, and talent of the many wonderful volunteers who contribute to maintaining public confidence in our bar as a *profession*, not a business. The price of self-regulation also means serving the public and our clients by regulating the profession with fairness, efficiency and transparency to the fullest extent possible. The privilege of

self-regulation also demands that we advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system.

I look forward to a few more years working with the Ethics Committee and my hard-working, talented and energetic colleagues: Kristi Hall, Emily Hedrick, Barbara Saunders, and Seth Guggenheim. Each of them, in addition to handling the Ethics Hotline, wear other special hats in serving other committees, task forces, and sections within the VSB. In addition, they all write articles, teach CLE seminars, draft opinions, and provide resources on legal ethics to the VSB website. Kristi Hall, our executive assistant, coordinates, supports and interacts with all of our VSB staff internally and with our lawyer volunteers externally; and she keeps our operation running smoothly and effectively. They do all of this consistently with enthusiasm and professionalism. I am grateful for their support, comradery, and friendship. ♡

### Endnotes:

- 1 *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 2 Cal.3d 535, 543, 86 Cal.Rptr. 673, 469 P.2d 353 (1998)
- 2 [www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf)
- 3 [www.vsb.org/docs/A\\_Profession\\_At\\_Risk\\_Report.pdf](http://www.vsb.org/docs/A_Profession_At_Risk_Report.pdf)
- 4 See page 67 for a committee preference form. President-elect Marni E. Byrum seeks volunteers to serve on committees, including legal ethics.