THE VIRGINIA BEACH BAR ASSOCIATION
JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT SUBCOMMITTEE

PRESENTS

Juvenile Sex Offenders, Restoration and Competency, Transfer and Certification, CHKD Services, Representing Incapacitated People, Military Providers, and a Panel of the Agencies Involved with the JDR Court System

****Estimated 6.5 CLE (4 IDC & 1 ETHICS/? GAL))**

8:45 - Registration and Welcome

9:00–10:00 Juvenile Sex Offender Cases

Psychosexual evaluations and polygraphs, Sex offender treatment, Issues where victim resides with the alleged offender, Re-Integration of offender back into home with Victim

Amy Couch, CSOTP, DHS C & Y
James Thorton, Director, C & Y
Kyle Massey, VBDHS

10:00-10:30 Transfer and Certification

Paul Powers, Esq., Assistant Commonwealth's Attorney

10:30-11:00 Restoration of Incompetent Juveniles

Annette Miller, Esq., Senior Assistant Public Defender

11:00-11:15 Break

11:15-12:15 CHKD Services Available

Carter McKay, CHKD Community Outreach

12:15 LUNCH (Provided) & PRESENTATION BY THE NOBLEMEN

1:00-2:00 ETHICS: Representing an incapacitated person

Civil and Criminal case concerns

Paul Georgiadis, Esq., Virginia State Bar

2:00-3:00 Military Members in the JDRC

Court ordered services in criminal and civil cases, Resources available to Military members, Use of Military providers in Court, Subpoenas to Military Providers, Criminal and Civil cases, DV and Protective Orders

Matt Hamel, Former JAG

Jodi Flavin, Fleet and Family

3:00-3:15 Break

3:15-4:15 Deciphering the Alphabet Soup of Agencies that participate in the JDR process

Moderator: Christianna Cunningham, Esq.- Associate City Attorney

CSU – Court Services Unit, Intake, Probation, Chins

Olymphia Perkins, CSU Director

DHS, CPS

Intake and Investigations: Jami Kruger

On-Going: Marvin Satchell

Foster Care: Jennifer Bond

MH- C&Y: James Thorton, C&Y

CASA

Season Roberts, Director

4:15-5:00 Panel Discussion and Q & A

Judge Deborah Bryan
Peter Imbrogno, Esq. – GAL
Kyle Massey, DHS
Olymphia Perkins, CSU
Christianna Cunningham, Esq, Associate City Attorney
Season Roberts, CASA
Paul Powers, Esq, Assistant Commonwealth's Attorney
Afshin Farashahi, Esq.

5:00 ADJOURN

Deciphering the Alphabet Soup of Agencies that Participate in the JDR Process

COURT

SERVICE

UNIT

QUICK LINKS

ABOUT DJJ

ADMINISTRATIVE UNITS

COMMUNITY PROGRAMS

COURT SERVICE UNITS

DIRECTOR'S MESSAGE

FOIA REQUESTS

FOR DJJ FAMILIES

HIGH SCHOOLS

JOBS

PRESS ROOM

RESIDENTIAL PROGRAMS

COMMUNITY PROGRAMS - COURT SERVICE UNITS

Judges Directions Data Resource Guide - CSU Volunteers

Second District Court Service Unit - Virginia Beach CSU

Olymphia A. Perkins

Director: Olymphia A. Perkins
Address: 2425 Nimmo Parkway, Building 10-A, Virginia Beach, Virginia 23456
Phone: (757) 385-4361
Fax: (757) 385-5628
Hours: 8:00 A.M. - 5:00 P.M.

The 2nd District Court Service Unit serves the City of Virginia Beach, which has a population of about 433,000 with about 71,000 school age children. The city has a mixed population of suburban and rural areas without a typical central downtown type of environment. The city also has a large military population, a large tourist industry, and maintains a fairly large agricultural environment. The Court Service Unit operates multiple Probation and Parole Units, an Intake Unit, and a Chins Unit. The Probation and parole Units offer mandated supervision, as well as, securing many community based services; such as outpatient sex offender services, in-home services, substance abuse services, community based Group Homes, as well as residential treatment services through Comprehensive Services Act funding. Our Intake Unit processes more than 13,000 cases each year. We also provide status offender and first offender groups for children, and a support and educational group for the parents of group members. Currently provided are groups for identified gang members and a support group for their parents. We also offer a spouse abuse support program (FANS), which is fully staffed by volunteers. We maintain a very active volunteer program that utilizes about 80 volunteers on a regular basis. We also provide a Street Law education Group as well as a Status Offender Seminar, which offers groups to both the child and parents. All service areas receive support from our Clerical Unit. The CSU has a main office located in the Juvenile Court Building in the Judicial Complex at the Municipal Center, and an Annex located in Princess Anne Executive Park, which is located across the street from the Municipal Center. Administrative offices, intake, Chins Unit and most Probation services are located in the main office. Parole and some Probation services are located at the Annex Office.

Branch Office:

Office	Hours	Phone	Fax	Address	Directions
Bayside Branch Office	8:00 A.M. - 5:00 P.M.	(757) 275-9392	(757) 275-9588	Executive Cove 5602 Virginia Beach Blvd. Suite 104 Virginia Beach, Virginia 23462	

Judges:

Honorable Deborah Bryan, ~~Chief Judge~~
Second Judicial District - Serving J&DR Court(s): Virginia Beach
Municipal Center
Judicial Complex, Building 10 A
2425 Nimmo Parkway
Virginia Beach, Virginia 23456-9058
Phone: (757) 385-4391
Fax: (757) 385-5683

Honorable ~~Gerrit Benson~~ Phillip C. Hollowell
Second Judicial District - Serving J&DR Court(s): Virginia Beach
Municipal Center
Judicial Complex, Building 10 A
2425 Nimmo Parkway
Virginia Beach, Virginia 23456-9058
Phone: (757) 385-4391
Fax: (757) 385-5683

Honorable Randall M. Blow
Second Judicial District - Serving J&DR Court(s): Virginia Beach
Municipal Center
Judicial Complex, Building 10 A
2425 Nimmo Parkway
Virginia Beach, Virginia 23456-9058
Phone: (757) 385-4391
Fax: (757) 385-5683

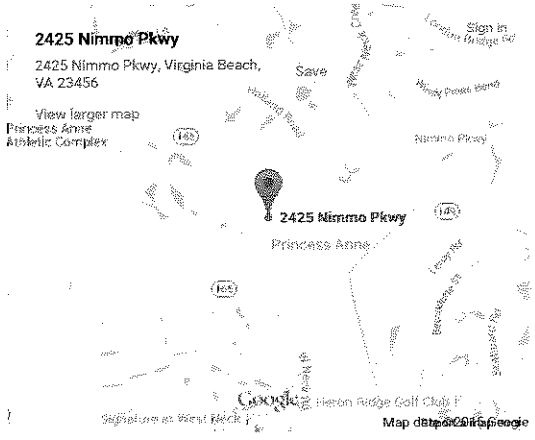
Honorable Tanya Bullock, Chief Judge
Second Judicial District - Serving J&DR Court(s): Virginia Beach Municipal Center
Judicial Complex, Building 10 A
2425 Nimmo Parkway
Virginia Beach, Virginia 23456-9058
Phone: (757) 385-4391
Fax: (757) 385-5683

Honorable Deborah M. Paxson
Second Judicial District - Serving J&DR Court(s): Virginia Beach Municipal Center
Judicial Complex, Building 10 A
2425 Nimmo Parkway
Virginia Beach, Virginia 23456-9058
Phone: (757) 385-4391
Fax: (757) 385-5683

Honorable Deborah L. Rawls
Second Judicial District - Serving J&DR Court(s): Virginia Beach Municipal Center
Judicial Complex, Building 10 A
2425 Nimmo Parkway
Virginia Beach, Virginia 23456-9058
Phone: (757) 385-4391
Fax: (757) 385-5683

Honorable Winship C. Tower
Second Judicial District - Serving J&DR Court(s): Virginia Beach Municipal Center
Judicial Complex, Building 10 A
2425 Nimmo Parkway
Virginia Beach, Virginia 23456-9058
Phone: (757) 385-4391
Fax: (757) 385-5683

Directions & Map



View Larger Map

QUICK LINKS

ABOUT DJJ

ADMINISTRATIVE UNITS

COMMUNITY PROGRAMS

COURT SERVICE UNITS

DIRECTOR'S MESSAGE

FOIA REQUESTS

FOR DJJ FAMILIES

HIGH SCHOOLS

JOBS

PRESS ROOM

RESIDENTIAL PROGRAMS

COMMUNITY PROGRAMS

CSU Functions List of Regulated Residential Programs and CSUs

Court Service Units (CSU)

- District 1 - Chesapeake
- District 2 - Virginia Beach
- District 2A - Accomac
- District 3 - Portsmouth
- District 4 - Norfolk
- District 5 - Suffolk
- District 6 - Hopewell
- District 7 - Newport News
- District 8 - Hampton
- District 9 - Williamsburg
- District 10 - Appomattox
- District 11 - Petersburg
- District 12 - Chesterfield
- District 13 - Richmond
- District 14 - Henrico
- District 15 - Fredericksburg
- District 16 - Charlottesville
- District 17A - Arlington (Locally Operated)
- District 17F - Falls Church (Locally Operated)
- District 18 - Alexandria
- District 19 - Fairfax (Locally Operated)
- District 20W - Warrenton
- District 20L - Loudoun
- District 21 - Martinsville
- District 22 - Rocky Mount
- District 23 - Salem
- District 23A - Roanoke
- District 24 - Lynchburg
- District 25 - Staunton
- District 26 - Winchester
- District 27 - Pulaski
- District 28 - Abingdon
- District 29 - Pearisburg
- District 30 - Gate City
- District 31 - Manassas

Court Services Support

- Interstate Compact
- Juvenile Detention Alternatives Initiative
- Virginia Juvenile Community Crime Control Act (VJCCCA)
- Community-based Vendors

Section 294 (§16.1-294 of the *Code of Virginia*) funding is used to provide treatment services to juveniles released from juvenile correctional centers (JCC) and placed on parole supervision. The survey found at the link below is intended for parole officers to complete and provide feedback on parole supervision services provided to juveniles through the 294 funding stream. Responses to the survey will assist support staff in determining areas of need with regard to the services

provided by private contractors. If you have any questions regarding this survey, please contact Beth Stinnett. Thank you in advance for taking the time to complete the survey.

Community-based Vendor Satisfaction Survey

Court Service Unit Functions

Juvenile Intake

Intake services are provided 24 hours a day at each of the 35 court service units (CSUs) across the state. The intake officer on duty, or on-call after business hours, has the authority to receive, review, and process complaints. Based on the information gathered, a determination is made whether a petition should be filed with the juvenile court and, if so, whether the juvenile should be released to the parents or detained pending a court hearing. The agency provides diversion and referral to other community resources to first-time offenders.

Investigations and Reports

Social histories make up the majority of the reports that CSU personnel complete. These court-ordered investigations describe the social adjustment of the youth before the court and provide timely, relevant, and accurate data. This information helps the court select the most appropriate disposition for the case and provides the basis for the CSU to develop appropriate services for the juvenile and the family. Other reports and investigations completed by CSU personnel include case summaries to the Family Assessment and Planning Teams, commitment packets for the Reception and Diagnostic Center, interstate compact reports, transfer reports, parole transition reports, ongoing case documentation, and transitional services referral packets.

Domestic Relations

In addition to handling delinquency and Child in Need of Service/Supervision complaints, CSUs provide intake services for domestic relations complaints. These complaints include non-support, family abuse, adjudication of custody (permanent and temporary), abuse and neglect, termination of parental rights, visitation rights, paternity, and emancipation. In some CSUs, services such as treatment referral, supervision, and counseling are provided in adult cases of domestic violence.

Custody Investigations

Although the majority of custody investigations for the court are performed by the local Department of Social Services' staff, some CSUs also perform investigations to provide recommendations to the court on parental custody and visitation based on the best interests of the youth and defined criteria in the Virginia Code. The investigation includes an extensive review of the home environment and background of the youth's parents or caretakers, including any individuals living in the home, and the role and relationship of the parents and caretakers of the child.

Probation

The most frequently used disposition for those juveniles adjudicated guilty of a charge filed against them is probation supervision. Virginia juvenile probation strives to achieve a "balanced approach." This approach focuses on the principles of community protection (public safety), accountability, and competency development.

Parole Services

Upon release from the Department's JCCs or private placement, offenders are provided parole services to assist in the transition back to the community. Parole officers are assigned to offenders to provide case management services, broker appropriate transitional services, and monitor the offender's adjustment to the communities. Juveniles may receive family and individual counseling, referral to other community services, vocational services, or specialized educational services.

Virginia Department of Juvenile Justice | 600 East Main Street, 20th Floor, Richmond, VA 23219
804.371.0700 | 1.866.603.7143 (Toll Free) | | Web Policy

1 of 100 DOCUMENTS

** Current through the 2015 Regular Session of the General Assembly. ***

TITLE 16.1. COURTS NOT OF RECORD
CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS
ARTICLE 9. DISPOSITION

GO TO CODE OF VIRGINIA ARCHIVE DIRECTORY

Va. Code Ann. § 16.1-278.4 (2015)

§ 16.1-278.4. Children in need of services

If a child is found to be in need of services or a status offender, the juvenile court or the circuit court may make any of the following orders of disposition for the supervision, care and rehabilitation of the child:

1. Enter an order pursuant to the provisions of § 16.1-278.

2. Permit the child to remain with his parent subject to such conditions and limitations as the court may order with respect to such child and his parent.

3. Order the parent with whom the child is living to participate in such programs, cooperate in such treatment or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the child and his parent.

4. Beginning July 1, 1992, in the case of any child fourteen years of age or older, where the court finds that the child is not able to benefit appreciably from further schooling, the court may excuse the child from further compliance with any legal requirement of compulsory school attendance as provided under § 22.1-254 or authorize the child, notwithstanding the provisions of any other law, to be employed in any occupation which is not legally declared hazardous for children under the age of eighteen.

5. Permit the local board of social services or a public agency designated by the community policy and management team to place the child, subject to the provisions of § 16.1-281, in suitable family homes, child caring-institutions, residential facilities, or independent living arrangements with legal custody remaining with the parents or guardians. The local board or public agency and the parents or guardians shall enter into an agreement which shall specify the responsibilities of each for the care and control of the child. The board or public agency that places the child shall have the final authority to determine the appropriate placement for the child.

Any order allowing a local board or public agency to place a child where legal custody remains with the parents or guardians as provided in this section shall be entered only upon a finding by the court that reasonable efforts have been made to prevent placement out of the home and that continued placement in the home would be contrary to the welfare of the child, and the order shall so state.

6. Transfer legal custody to any of the following:

a. A relative or other individual who, after study, is found by the court to be qualified to receive and care for the child;

b. A child welfare agency, private organization or facility that is licensed or otherwise authorized by law to receive and provide care for such child. The court shall not transfer legal custody of a child in need of services to an agency, organization or facility out of the Commonwealth without the approval of the Commissioner of Social Services; or

c. The local board of social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the child has residence if other than the county or city in which the court has jurisdiction. The local board shall accept the child for care and custody, provided that it has been given reasonable notice of the pendency of the case and an opportunity to be heard. However, in an emergency in the county or city in which the court has jurisdiction, the local board may be required to accept a child for a period not to exceed fourteen days without prior notice or an opportunity to be heard if the judge entering the placement order describes the emergency and the need for such temporary placement in the order. Nothing in this subdivision shall prohibit the commitment of a child to any local board of social services in the Commonwealth when the local board consents to the commitment. The board to which the child is committed shall have the final authority to determine the appropriate placement for the child.

Any order authorizing removal from the home and transferring legal custody of a child to a local board of social services as provided in this subdivision shall be entered only upon a finding by the court that reasonable efforts have been made to prevent removal and that continued placement in the home would be contrary to the welfare of the child, and the order shall so state.

7. Require the child to participate in a public service project under such conditions as the court prescribes.

HISTORY: 1991, c. 534; 1994, c. 865; 1997, c. 463; 1999, cc. 488, 552; 2002, c. 747.

NOTES: CROSS REFERENCES. --As to foster care plans, placement of child, permissible plan goals, and court review of foster children, see § 63.2-906.

EDITOR'S NOTE. --Acts 1993, c. 930, cl. 3, as amended by Acts 1994, c. 564, cl. 2, and Acts 1996, c. 616, cl. 4, provides that the amendment to this section by Acts 1993, c. 930, cl. 1, shall become effective June 1, 1998, "if state funds are provided, including all local costs, to carry out the purposes of this bill by the General Assembly." The funding was not provided.

THE 1999 AMENDMENTS. --The 1999 amendments by cc. 488 and 552 are identical, and substituted "§ 22.1-254" for "§ 22.1-257" in subdivision 4.

THE 2002 AMENDMENTS. --The 2002 amendment by c. 747, effective October 1, 2002, substituted "that" for "which"' following "agency" in the last sentence of the first paragraph of subdivision 5; substituted "that" for "which" following "facility" in the first sentence of subdivision 6 b; and deleted "public welfare or" following "local board of" three times in subdivision 6 c.

LAW REVIEW. --For an article, "Legal Issues Involving Children," see 32 U. Rich. L. Rev. 1345 (1998).

AUTHORITY TO ORDER PLACEMENT AND COST OF RESIDENTIAL TREATMENT. --A juvenile court judge may order Social Services to place a minor in a facility for treatment when custody of the child has been granted to Social Services pursuant to this section. S.G. ex rel. v. Prince William County Dep't of Social Servs., 25 Va. App. 356, 488 S.E.2d 653 (1997).

The juvenile court judge had the authority to enter the decree ordering Social Services to provide treatment for the minor in a residential treatment facility. S.G. ex rel. v. Prince William County Dep't of Social Servs., 25 Va. App. 356, 488 S.E.2d 653 (1997).

OPINIONS OF THE ATTORNEY GENERAL

NONCUSTODIAL ENTRUSTMENT OF CHILD IN NEED OF SERVICES. --A juvenile court judge has the authority to order a local board of social services to accept noncustodial entrustment of a child found to be in need of services. See opinion of Attorney General to The Honorable Frank D. Hargrove, Sr., Member, House of Delegates, 04-012 (3/22/04).

THIS STATUTE DOES NOT REQUIRE THE ISSUANCE OF A SUBPOENA TO A LOCAL DEPARTMENT OF SOCIAL SERVICES, because the department, as a non-party, is not required to attend any proceeding. However, should a court want the local department to be present for such proceedings, then a subpoena or other court order can be issued to compel the local department to appear. See opinion of Attorney General to The Honorable Gayl Branum Carr, Juvenile and Domestic Relations District Court, 19th Judicial District, 12-027, 2012 Va. AG LEXIS 19 (5/25/12).

DHS

THE DHS DOCKET

I am appointed by the Court on a case on the DHS docket. What happens next? What can I expect? Where should I start? See attachment 1 for acronyms.

1.) Know your role- CAC or GAL?

2.) Who is your client? child, parent, former caretaker?

3.) What was filed? PO or Removal?

4.) Why? Look at the affidavit

5.) What happens when? Know the timeline! ***IT HAS BEEN ACCELERATED!!***

a. ERO/EPO (day1)
b. PRO/PPO (day5)
c. ADJ (day35 <30 days from PPO/PRO>)
d. DISP (day 65 ,60 days from PPO/PRO>)**********
    i. *Disposition is your first final order!!*
e. FCR (4 months from DISP)
f. PPH (5 months from FCR)
g. PPH2 (5 months from PPH1) ******GOAL CHANGE******
    i. *** if the goal is APPLA, timeline stretches to 6 month FCRs and not PPHs until child is out of congregate care/RTC
h. TPR (12+ months from day5)
i. AFCR (Every 12 months until C adopted or ages out unless Child is in RTC then every 6 months till goal changes to adoption or PFC, then every 12 months)

** *For the most part, each new hearing after DISP, results in a final order.* (***You can turn in a LOA and get paid! ☺)***

6.) Who do I need to keep in contact with?

a. City attorney ** **subject to change**
    i. JDR1- Ilardi 385-1930
    ii. JDR2-Cunningham 385-8456
    iii. JDR3-Cunningham
    iv. JDR4-Evans 385-4539
    v. JDR5-Ilardi
    vi. JDR6-Evans
    vii. JDR8-Ilardi

b. Family Services Specialist (new word for social worker)
    i. ERO through ADJ: CPS investigator
    ii. DISP through CPO CPS on-going (non-foster care cases)
    iii. DISP through AFCR Foster Care Worker

c. CASA
d. GAL
e. Other CACs
f. Your client

i. If your are GAL for the child- the foster care worker will be able to ensure you know where the child is placed and how to see him or her and speak with the foster parent

7.) Can I get a continuance?

*** **Not in foster care cases.** Funding for the child is solely dependent upon adherence to the timeline. Even *nunc pro tunc* orders will not work.

****But I can't make it- now what? The best way for us to handle this is for the order to be entered timely and an interim hearing held to address any concerns you may have.

****Please be mindful—in VBJDR, each courtroom only has 2-3 DHS days per month in which to work this timeline, and it is up to each individual judge whether to set a case outside the normal DHS docket.

****Rules for continuances in protective order cases:**

** While a protective order case may be continued without fear of funding loss, it is up to the Court whether to waive the timeline. Moreover, because each protective order expires on the stated review date, the parties must still appear and be served with the new interim protective order continuing the case. Thus, you may be able to get leave not to appear, but the parties must still appear.

VIRGINIA CODE REFERENCE GUIDE TO DHS CASES

1.) ERO Va. Code §16.1-251

2.) PRO Va. Code §16.2-252

3.) PPO/CPO Va. Code §16.1-253

4.) ADJ

   a. Removal Va. Code §16.1-252(G)

   b. PPO/CPO Va. Code §16.1-253(F)

5.) DISP Va. Code §16.1-282.2

6.) FCR Va. Code §16.1-282

7.) PPH Va. Code §16.1-282.1

8.) AFCR Va. Code §16.1-282.2

9.) Invol. TPR Va. Code §16.1-283

   Vol. TPR Va. Code §16.1-277.01

FREQUENTLY USED ACRONYMS AND PHRASES IN THE WORLD OF DSS CASES

Hearings/Orders

ERO	emergency removal order	(usually done ex parte)
EPO	emergency protective order	(usually done ex parte)
PRO	preliminary removal order	("the five day" or a removal filed with notice given)
PPO	preliminary protective order	("the five day" or a p.o. filed with notice given)
ADJ	adjudicatory order	
DISP	dispositional order	
FCR	foster care review	
PPH	permanency planning	
TPR	termination of parental rights	
AFCR	annual foster care review	

Goals/Plans/Treatment/Placement

APPLA	another permanent planned living arrangement (usually RTC/group home/congregate care)	
RTC	residential treatment center	
PFC	permanent foster care***	(being phased out)
ADOPT	adoption	
FSP	foster care service pan	
ICPC	interstate compact on the placement of children	
RETURN	return to parent	
RELTV PLC	relative placement	
PCE	parent capacity evaluation (usually includes psychological testing component)	
SA	substance abuse	
EVAL	evaluation	
MH	mental health	

IL	independent living (no longer a goal but a service)
sup	supervised
unsup	unsupervised
psych	psychological (eval or treatment)
med mg	medicine management
screens	SA screening - hair follicle or urine
F.I.T.	fathers in training (class)
co-parent	co-parenting (class/therapy)
CSB	community services board
I&T	Infant and Toddler (sub-division of VBDHS)
P6	Pembroke 6 (MH/SA services)
Child & Youth	VBDHS- intake for MH & SA services for children and teens
Magic Hollow	VBDHS- MH/SA services (adult only)
Recovery Center	VBDEHS-MH/SA services (adult only)
CQI	(f/k/a "QA") VBDHS records division
CSOTP	certified sex offender treatment program

<u>Parties</u>

C= child

M= mother

F= father

b/f= boyfriend

g/f= girlfriend

s/f= step-father

s/m=step-mother

mgm/mgf= maternal grandmother/father

pgm/pgf= paternal grandmother/father

mgp/pgp= maternal/paternal grandparents

DHS- CPS

City of Virginia Beach Virginia
A Community for a Lifetime

Child Protective Services

The mission of the Virginia Beach Human Services ChildWelfare Division is to protect children from abuse and neglect, promote theirwell-being in stable living situations and provide permanent familyconnections. Through the provision of family-centered, community basedservices, we engage families to strengthen their self-sufficiency and capacityto protect, nurture and care for their children.

When the Department of Human Services receives a report of suspected child abuse or neglect, the Social Services Division must decide whether the report meets the legal definition of child abuse or neglect.

Under the Virginia State law, an abused or neglected child is any child under 18 whose parent or other person responsible for the care of the child:

- causes, or threatens to cause, a physical or mental injury except for an accident
- fails to provide adequate food, clothing, shelter, or medical care
- abandons the child
- fails to provide the kind of supervision necessary for the child's age or level of development
- commits, or allows to be committed, any illegal sexual act involving the child (including incest, rape, fondling, indecent exposure, prostitution) or allows the child to be used in any sexually explicit visual material

For more information on State services, click here: Virginia Department of Social Services

Child Abuse/Neglect Hotlines

- **Toll free (in Virginia): (800) 552-7096**
- **Out-of-state: (804) 786-8536**
- **Hearing-impaired: (800) 828-1120**
- **Local (in Virginia Beach): (757) 385-3400**

Contact Information

Human Services Department, Adult & Family Services

Direct: (757) 385-3200 | Fax: (757) 385-3311 | Contact Us

DHS-

FOSTER

CARE

City of Virginia Beach Virginia
A Community for a Lifetime

Foster Care Program

The mission of the Virginia Beach Human Services ChildWelfare Division is to protect children from abuse and neglect, promote theirwell-being in stable living situations and provide permanent familyconnections. Through the provision of family-centered, community basedservices, we engage families to strengthen their self-sufficiency and capacityto protect, nurture and care for their children.

The foster care program is a state mandated service that provides a full range of casework, treatment and community services to a child who is abused or neglected. Foster care placement is intended to be a temporary, rather than a long-term, solution to family problems. The Juvenile and Domestic Relations Court hears petitions for custody. Specific foster care requirements are set forth in federal law and state laws.

Placements may be with a foster family, in a group living arrangement, in a residential treatment facility, or in an independent living situation. There are two types of foster care:

- Residential Foster Care
- Therapeutic Foster Care

Services provided to children and their families may include counseling and treatment, day care, medical, education, employment, family planning, independent living, housing, respite care, legal, socialization and recreation services. Independent living services are services provided to older foster children to prepare them for transition into adulthood.

When selecting a foster or adoptive family for a child, cultural, ethnic, and racial background may be considered as one of a number of factors in determining the best interest of the child.

To achieve permanency for children in foster care the welfare of the child is of paramount interest and children have the right to a safe, stable, and permanent home. Children have a right to be reared by their families when their parents and relatives are able to do so in an adequate manner.

Recognizing that some families are unable or unwilling to resume their parenting responsibilities, services should be provided to ensure a safe, stable, and permanent home. This should be done by placement of the child with relatives accompanied by transfer of legal custody, adoption, or by placement in a permanent foster home.

Federal and State law require that reasonable efforts are made to prevent or eliminate the need for removal

of the child from the home and to make it possible for the child to be returned home. Reasonable efforts are efforts to provide services to children and their families utilizing community resources with the goal of preserving family unity. They include efforts to prevent or eliminate the need for removal of a child from their home and to reunite the child with their family.

At the time of the initial court hearing to commit a child to the custody of the agency, a judicial determination must be made as to whether reasonable efforts have been made.

After an agency receives custody of a child they must document reasonable efforts to reunify the child and family or achieve a permanent placement for the child. During the temporary placement in foster care, a range of services is offered to children and parents designed to improve conditions and return the child home, or to place the child in another permanent living arrangement as soon as possible.

Exceptions to the requirement to make reasonable effort to reunite children with a parent are when:

- The parental rights of a sibling of the child in foster care have been previously involuntarily terminated.
- The parent has been convicted of murder or voluntary manslaughter, or a felony attempt, conspiracy, or solicitation to commit such an offense against a child of the parent, a child with whom the parent resided, or the other parent of the child.
- The parent has been convicted of felony assault or bodily wounding resulting in serious bodily injury or felony sexual assault of a child of the parent or a child living with the parent. Serious bodily injury means bodily injury resulting in substantial risk of death, extreme physical pain, protracted or obvious disfigurement, or protracted loss or impairment of a bodily member, organ or faculty.

For frequently asked questions click here.

To learn more about how to become a foster parent click here.

For additional information, contact Misty Lee, (757) 385-3214

Contact Information

Human Services Department, Adult & Family Services

Direct: (757) 385-3200 | Fax: (757) 385-3311 | Contact Us

DHS-MHSA

CHILD &

YOUTH

City of Virginia Beach Virginia
A Community for a Lifetime

Mental Health

ADULT AND FAMILY SERVICES PROGRAMS

Child and Youth Treatment Services – A community based program whose mission is to enhance the lives of children, adolescents and their families. Child and Youth Services offers an array of services designed to assist children and adolescents who are experiencing emotional difficulties and/or behavioral problems.

- Case Management
- Day Treatment
- Intensive Outpatient Program (IOP)
- Substance Abuse Day Treatment
- Multi-Systemic Therapy (MST)
- Outpatient Services
- Therapeutic After-School Respite Program

Family Assessment and Planning Team (FAPT)
Assesses the strengths and needs of at-risk youths and families who are referred to the team.

- Identifies and determines the combination of services required to meet the child's unique needs.
- Recommended services include: psychological assessments, therapy, medical treatment, intensive in-home treatment, and therapeutic and residential care.

Medicaid/Family Access to Medical Insurance Security (FAMIS)
Eligibility for Medicaid is determined by local departments of social services.

- FAMIS provides health insurance to low-income children under the age of 19 who are not eligible for Medicaid and whose gross family income is less than or equal to 200% of the federal poverty level.

JUVENILE DETENTION CENTER PROGRAMS

Juvenile Detention Center

- This is a facility that houses up to 90 youth ages 10-17 that are charged with misdemeanor or felony offenses.
- The Center serves both male and female youth awaiting court hearings as well as those sentenced to detention.
- Most of the youth reside in Virginia Beach.

MENTAL HEALTH SUBSTANCE ABUSE PROGRAMS

Adult Correctional Services

- Curriculum-based mental health and substance abuse education, relapse prevention, re-entry planning and referrals to community resources including jail diversion, forensic services, competency restoration, advocacy, discharge planning, and referrals for inmates with serious mental illness.

Adult Day Treatment/Lynnhaven Center

- A community based, intensive daily program for adults serving individuals with substance dependence, acute psychiatric symptoms and those with co-occurring disorders.
- As clients progress through treatment, they may step down attendance from daily to several times per week, as appropriate.

Adult Outpatient Services

- Pembroke 6 - Treatment services provided for adults 18-60 including psychiatric evaluations, medication management, individual and group therapy for clients with mental health or substance abuse issues.
- Magic Hollow - Treatment Services provided for adults with serious mental illness and co-occurring disorders including psychiatric evaluations, medication management, individual and group therapy.

Beach House

- Psychosocial rehabilitation day program serviced in a clubhouse.
- Community for adults with serious mental illness and co-occurring disorders, opportunities for employment , education, socialization and living skills in a recovery-oriented atmosphere.

Case Management Services/Magic Hollow

- Assists children, adults and their families with access to medical, psychiatric, social, educational, vocational, financial, and other mental health support services.
- Provides discharge planning to individuals in local and state facilities.

Community Corrections and Pretrial Services

- Supervision is provided for adult pretrial defendants and probationers.
- The program coordinates referrals and service delivery for those who need treatment services.
- Investigations are conducted regarding defendants appearing at arraignment court

Emergency Services

- Immediate telephone and in-person crisis assessment, intervention and consultation available 24/7. Provides pre-screening for psychiatric hospitalization and crisis stabilization. Call 757-385-0888.

The Harbour

- Program provides adult residents eighteen years or older with integrated psychosocial support services to individuals with serious mental illnesses, substance abuse problems, and co-occurring disorders.
- It provides a variety of groups that focus on assisting the consumer in developing skills and providing support.
- Participation can be up to five days a week based upon the consumer's individual needs.

Office of Consumer and Family Affairs

- Provides education classes, support groups, consultation, resource linkage and advocacy for individuals and families affected by mental illness, substance use disorders and co-occurring

disorders.

- Staff coordinates the Virginia Beach Community Trust for individuals with mental illness.

Prevention Services

- Seek to enable individuals, families, and communities to work together, promoting their strengths and potentials.
- The services provided are designed for the enhancement of protective factors and the reduction of risks factors.

Project LINK

- Provides case management and other supportive services to pregnant and parenting women and their children whose lives have been affected by substance use and/or co-occurring disorders.
- Parenting education and support groups for mothers and fathers.
- Families Together provides targeted case management services to children birth through seven who are considered at risk of severe emotional disturbances due to parental/caregiver substance use, intellectual disabilities or mental illness.

Senior Adult Services

- Serves persons 60 years of age or older
- Individual and Group Therapy
- In-home supervision sitting for adults 60 and over living with family caregivers
- Medication Management

Supportive Residential Services

- Provides safe, affordable housing and support services for individuals receiving service through the MHSA Division.

PENDLETON CHILD SERVICE CENTER

Pendleton Child Service Center - A program designed to assist children between the ages of five and twelve and their families where the child is experiencing behavioral challenges at home, school or within the community.

- Outpatient, Day and Residential Treatment Services
- Parenting Skills Training
- Pendleton Academy
- Parental Capacity Evaluations/Psychological Evaluations
- Therapeutic Supervised Visitations
- Comprehensive Services Act (CSA)

Additional Information:

Applying for services

Community Trust - For more information click here

Contact Information

VB311

Direct: (757) 385-3111 | Email: VB311@vbgov.com | VB311 Site

City of Virginia Beach Virginia
A Community for a Lifetime

Child and Youth Mental Health Substance Abuse Services

A community based program whose mission is to enhance the lives of children, adolescents and their families. Child and Youth Services offers an array of services designed to assist children and adolescents who are experiencing emotional difficulties, behavior problems and/or substance abuse. The goal of most treatment plans is to help the child succeed while remaining in the family and in school.

- Case Management - Case managers assist children and their families with accessing needed medical, psychiatric, social, educational, vocational and other support services essential to meeting basic needs. Case managers assist in service planning and coordination, supportive counseling and advocacy on the consumer's behalf.
- After-school Therapeutic Day Treatment (ASTDT) - Provided to elementary aged children referred by the Virginia Beach City Public Schools and other sources. ASTDT includes mental health treatment and medication education in an after-school setting. The program also allows children the opportunity to practice and enhance their social skills. ASTDT serves children with serious emotional disturbance (SED) and is housed in strategically located Virginia Beach elementary schools. Transportation is provided from the child's home school to the treatment site, but parents are responsible for transportation home each evening. The goal is to help the child remain in the home and school without need for placement outside the home.
- Intensive Outpatient Program (IOP) - The IOP serves adolescents with co-occurring mental health and substance abuse problems. This intensive treatment program meets ten hours per week over a minimum of 14 weeks. Parents and guardians attend a weekly family group. The program uses the evidence-based treatment modality Seven Challenges.
- Multi-Systemic Therapy (MST) - MST is an evidence-based intensive home-based treatment modality designed to prevent youth placement outside the home. MST services are offered to families of youth who are referred to the program by the juvenile court system. Parents receive the support and guidance necessary for them to manage the behavior of their children, meaning the child would no longer need intensive services from the community. This program has maintained its license with MST, Inc. of South Carolina since 2001.
- Outpatient Services - Licensed therapists and board certified psychiatrists are available to assist with mental health and substance abuse problems for children, adolescents, and their families. Each client's needs are assessed at intake and an individualized treatment plan is created with the client and parent (s) or guardian(s). Outpatient treatment may include individual, family or group therapy; multi-family therapy (several families attend together); individualized substance abuse services; and psychiatric evaluation and medication management. Therapists also provide case management functions when needed, such as making referrals to other programs, corresponding with other service providers and family members, and consulting with a multi-disciplinary clinical team at case staffings.
- The Alliance for Youth (TAFY) - This is a therapeutic foster care program that is a joint effort between

Child and Youth MHSA Services and the Foster Care Unit. It is open only to children that need therapeutic services, are currently in foster care with a the Adult and Family Services Division, and referred by the foster care team.

- Virginia Independent Clinical Assessment Program (VICAP) – Individuals seeking Medicaid Children's Mental health services must have an independent assessment completed by a Department of Medical Assistance Services (DMAS) approved mental health Professional. DMAS has designated local Community Services Boards (CSB) as the agency to conduct these evaluations.

Contact Information

Location: 289 Independence Blvd, Pembroke 3, #245, Virginia Beach, VA 23462

Contact Number: 385-0850

To schedule a VICAP appointment: 385-0866

Contact Information

Human Services Department, Adult & Family Services

Direct: (757) 385-3200 | Fax: (757) 385-3311 | Contact Us

CASA

CASA
Court Appointed Special Advocates
FOR CHILDREN
VIRGINIA BEACH

ABOUT VIRGINIA BEACH CASA

Virginia Beach Court Appointed Special Advocates (CASA) is a private non-profit organization that recruits, trains and supports citizen-volunteers to advocate for the best interests of abused and neglected children in courtrooms and communities. Volunteer advocates—empowered directly by the courts—offer judges the critical information they need to ensure that each child's rights and needs are being attended during judicial proceedings.

Virginia Beach CASA volunteers have contributed thousands of hours visiting children in their homes or temporary placements, researching the child's circumstances to determine the best outcomes, and insuring the children are not experiencing continued abuse or neglect.

CASA Volunteers advocate for the children until they are placed in permanent homes. For many abused children, a CASA volunteer is the only constant adult presence in their lives.

Research shows that children with a CASA Volunteer:

- do better in school
- are less likely to re-enter the system or experience re-abuse
- get the services that they need to help them to thrive
- spend less time in foster care

VIRGINIA BEACH
CASA
Court Appointed Special Advocates
FOR CHILDREN

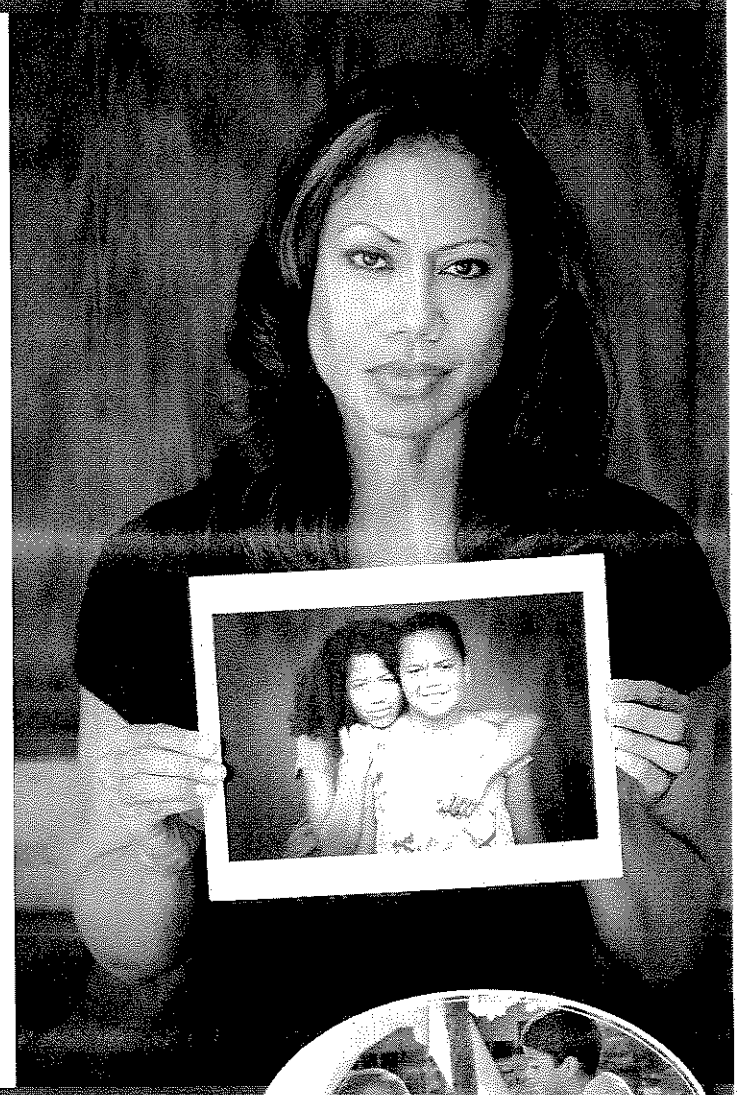
For more than 25 years, Virginia Beach Court Appointed Special Advocates (CASA) has recruited, trained, and supervised volunteers who advocate for child victims of abuse and neglect.

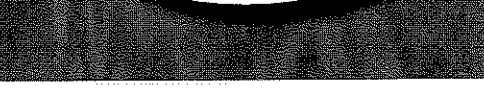
CASA volunteers are appointed by juvenile court judges. CASA Volunteers make sure these children don't get lost in the overburdened legal and social-services system, or languish in inappropriate group or foster homes. CASA volunteers stay with each case until it is closed and the child is placed in a safe, permanent home. For many abused children, their CASA volunteer will be the one constant adult presence in their lives.

Research shows that children with a CASA Volunteer:
- do better in school
- are less likely to re-enter the system or experience re-abuse
- get the services that they need to help them to thrive
- spend less time in foster care

For some children, a CASA volunteer is the one consistent adult in a child's life. "I knew you would find me..." was a recent quote from a child to a CASA volunteer after moving to his third foster home in two years.

Facts about CASA:
- Serve approximately 70% of eligible children for a CASA
- On average, more than 90% of CASA's budget goes directly into programming
- CASA saves $23 in foster-care expenses for every dollar invested.
- History has shown that a CASA volunteer can cut the amount of time a child languishes in foster care by an average of 7.5 months, a savings of $24,375 each year.





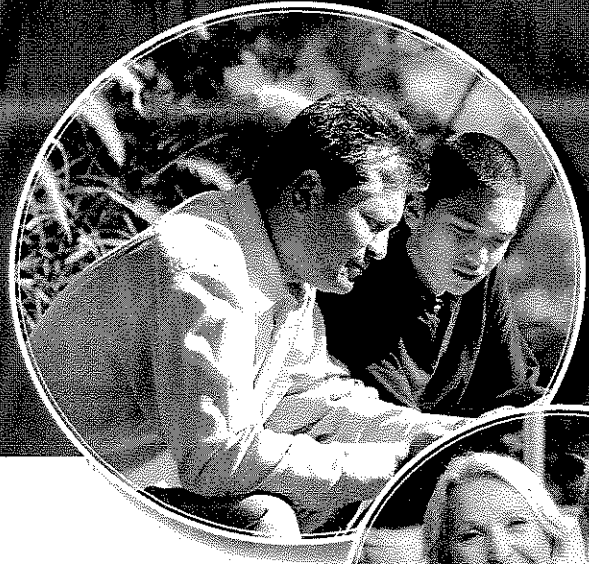
Virginia Beach CASA | Juvenile and Domestic Relations Court
2425 Nimmo Parkway | Virginia Beach, VA 23456
757.385.5616 | www.virginiabeachcasa.org | facebook.com/VirginiaBeachCASA

Advocate

CASA volunteers are ordinary citizens making an extraordinary difference in the lives of our community's most vulnerable children. Virginia Beach CASA is currently accepting applications for volunteers. After successful completion of a series of background checks and training, CASA volunteers are appointed by a judge to advocate for a child or group of siblings.

Donate

Virginia Beach CASA is a private, non-profit organization funded solely by grants and donations. With your support, we can continue to advocate for child victims of abuse and neglect. Virginia Beach CASA accepts monetary, in-kind, and planned contributions.



Educate

Per our mission, Virginia Beach CASA promotes safe, permanent homes for all children and seeks ways to educate the community concerning the needs of abused and neglected children. Friends of CASA is an ambassadors group of Virginia Beach Court Appointed Special Advocates established in 2013 to support the mission of Virginia Beach CASA through educational, social, and philanthropic opportunities. Friends of CASA shall support and create additional opportunities to advance the mission and goals of Virginia Beach CASA. For more information about Friends of CASA, contact the Virginia Beach CASA office.

So You've Received a Bar Complaint:
Now What?

Paul D. Georgiadis[1]
Assistant Bar Counsel
Virginia State Bar

[1] This outline is based in part upon a 2003 presentation, Bar Complaints and How to Avoid Them, by Assistant Ethics Counsel Seth Guggenheim.

I. The Virginia State Bar receives thousands of inquiries against Virginia attorneys each year—last year, the VSB received over 3,500 inquiries.

A. Fortunately, few involve serious misconduct or severe sanctions. However, all of them are very disruptive to the lawyers involved.

B. The VSB Intake Office dismisses close to 80% of the inquiries either through Proactive handling[2] or on a determination that the inquiry does not raise an ethical complaint.

C. The following are typically not deemed ethics violations subject to bar action: fee disputes, dissatisfaction with the quality of a lawyer's advice or strategy, rude behavior, complaints about judges and civil disputes, unless it appears that a lawyer has improperly handled client funds.

II. What is a bar complaint? A charge of misconduct is any oral or written communication to the bar that alleges a violation of the Virginia Code of Professional Responsibility or the Virginia Rules of Professional Conduct or from which such an allegation may reasonably be inferred. A written complaint by a client is not required for the initiation of a complaint. Delk v. Virginia State Bar, 233 Va. 187, 355 S.E.2d 558 (1987).

A. Members of the public can call the bar 24 hours a day at (804) 775-0570, and hear a detailed recorded message about the complaint process, and leave a message if they need further information or to request a complaint form and a pamphlet explaining the disciplinary process. The complaint form and pamphlet are also available on the Bar's website at www.vsb.org with an e-mail portal for complaints.

B. Clients, other attorneys, and members of the judiciary can submit inquiries. The bar itself can initiate an inquiry against an attorney.

III. Preliminary Investigation: begins after Intake forwards the matter as a formal Complaint to a bar counsel assigned to the geographic area from which the complaint emanated. Bar counsel

[2] Proactive handling typically involves resolving the matter by the attorney complying with the bar's request to communicate with the client and the bar as to case status.

conducts a preliminary investigation to determine if the complaint should be referred to the District Committee.

A. Answering the Bar Complaint: this second level of screening and review includes providing the respondent the opportunity to answer the complaint; an answer may afford bar counsel the only clear explanation of the gravamen of the complaint before bar counsel decides whether the complaint should be investigated.

1. You must answer the bar complaint or subject yourself to a further misconduct charge under RPC 8.1(c). The bar requires a written and signed response within 21 days of the complaint letter.
2. The failure to respond greatly increases the likelihood of a complaint being forwarded to the District Committee for a formal, detailed, and prolonged investigation.
3. Cooperation, candor, and acceptance of responsibility are all mitigating factors should a matter proceed to a finding of misconduct either by hearing or agreed disposition.

4. Self-aggrandizement – however true, does not serve your cause well. Your mother may still care about your numerous honors, but the bar wants you to address the merits of the complaint.

5. Stick to the issues in your answer. While retaining counsel is best, at minimum have a trusted colleague review your answer before you file it.[3]

B. 60 Day Disposition of the Complaint: Within sixty days of receipt of the complaint by the bar, bar counsel is tasked with deciding the disposition of the complaint in one of the following ways:

1. Dismiss the complaint if any of the following apply:

a) As a matter of law, the conduct questioned or alleged does not constitute misconduct;

[3] Lincoln's maxim is never more true in the case of a lawyer representing himself in a bar complaint, "he who represents himself has a fool for a client."

b) The evidence available shows that the respondent did not engage in the conduct questioned or alleged;
c) There is no credible evidence to support any allegation of misconduct by the respondent;
d) The evidence available could not reasonably be expected to support any allegation of misconduct under a clear and convincing evidentiary standard.

IV. Full Investigations: if a complaint cannot be dismissed on one of the above bases, it will be referred to the appropriate district committee for a detailed investigation. Fewer than half of the complaints assigned to bar counsel are referred for further investigation following completion of the preliminary investigation. Given current caseloads of the bar's investigators, investigations can take a minimum of four months and frequently can take up to one year before a matter is investigated and placed before a subcommittee for disposition.

A. Subpoena Duces Tecum. In the course of a full bar investigation, bar counsel may issue whatever summons or *subpoenae* deemed necessary for effective conduct of the investigation. In addition to being enforceable by a circuit court show cause proceeding, the bar can file a petition with its Disciplinary Board to show cause the respondent attorney for failure to challenge or respond to the subpoena and seek a sanction of an administrative suspension of the law license.
B. The Investigation typically involves the gathering of the case file from the attorney, the client/complainant, and the courthouse and interviews with the client, the attorney, and other witnesses.

V. Subcommittee Actions

A. Subcommittees consist of three district committee members: a lay person, a district committee officer, and a second lawyer member. A subcommittee can conduct its business and take action by any practical means, but typically by telephone. All three members of the subcommittee must simultaneously participate in the deliberative process.

B. Subcommittees consider the reports and recommendations submitted by bar counsel in order to make a disposition of each of the complaints presented, in one of the following ways:

1. Dismissal
    a) As a matter of law when the conduct questioned or alleged does not constitute misconduct.
    b) When the evidence available shows that the respondent did not engage in the misconduct questioned or alleged.
    c) When there is no credible evidence to support any allegation of misconduct by the respondent.
    d) The evidence available could not reasonably be expected to support any allegation of misconduct under a clear and convincing evidentiary standard.
    e) The alleged misconduct is protected by superseding law.
2. Agreed Disposition
    a) Agreement between the respondent and bar counsel as to the facts, proposed resolution, and the disciplinary rules violated.
    b) Unanimous agreement is required by the subcommittee. If the subcommittee reaches such an agreement, a document entitled Subcommittee Determination will issue that records the disposition of the complaint. Any subcommittee member can reject a proposed agreed disposition and cause the matter to be set for a hearing before the full district committee.
    c) Certain Dismissals and Agreed Dispositions Become Part of an Attorneys Permanent Disciplinary Record
        (1) An attorney's disciplinary record includes any finding of misconduct, express or implied, irrespective of whether the respondent was disciplined. Thus, agreed dispositions and dismissals will become part of a respondents permanent disciplinary record if the subcommittee finds that the misconduct is not of sufficient magnitude to warrant discipline and that the respondent has taken measures to prevent a recurrence, or that exceptional circumstances exist for not proceeding further.
3. Certification to the Disciplinary Board

a) A direct Certification is effected when there is a reasonable belief that the respondent has engaged in misconduct which, if proved, would justify a suspension or revocation of the respondents license to practice law. Such a direct certification obviates the necessity of conducting a district committee hearing

4. Set for a Hearing before the Full District Committee
5. Determination – Admonitions without Terms
   a) A subcommittee is authorized to impose *sua sponte* an admonition without terms, without a hearing and in the absence of an agreed disposition.
6. An attorney may decline the imposition of such discipline, and request a full hearing before a district committee

VI. District Committee Hearings

A. Hearings before district committees have many of the trappings of a traditional civil trial, including issuance of process, opening statements by the parties, and presentation of witnesses and documentary evidence.
   1. Stipulations are encouraged.
   2. The committee chair rules on objections by the chairman, subject to being overruled by the panel.
   3. The burden of proof is upon the bar to show by clear and convincing evidence that the respondent has engaged in misconduct. Seventh District Committee v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1971).

B. There are some differences between civil litigation and disciplinary proceedings.
   1. A disciplinary proceeding is a civil proceeding, in the nature of an inquest into the conduct of the attorney. Maddy v. District Committee, 205 Va 652, 658, 139 S.E.2d 56, 58 (1964).
   2. Since a disciplinary proceeding is in the nature of an inquest, it is conducted much like an administrative proceeding. The rules of evidence are not applied strictly, but totally extraneous or irrelevant evidence should be excluded from the record.
   3. The Respondent has no procedural due process right to discovery in a disciplinary

proceeding. Gunter v. Virginia State Bar, 241 Va. 186, 399 S.E.2d 820 (1991).

4. Hearings are bifurcated. The committee will first determine if the bar has proved misconduct; if so, the committee will then hear evidence in mitigation or aggravation before determining the appropriate sanction.

C. Other Procedural Matters

1. The initial pleading or charging document is a notice pleading, not a fact pleading. Norfolk & Portsmouth Bar Ass'n v. Drewry, 161 Va. 833, 172 S.E.2d 282 (1933)
2. Summons – A district committee chair may quash any summons or subpoenas issued on behalf of the Committee for good cause. The chair may also refuse to issue summons or subpoena requested by the respondent.
3. Summonses and subpoenas issued by the committee can be enforced by a circuit court.

D. Who may attend a hearing? District committee hearings are open to the public, except for deliberations. The Clerk of the Virginia State Bar Disciplinary System maintains a docket of disciplinary hearings on the Bars website. Twenty-one days after a notice of a district committee hearing is issued, the Clerk places the hearing on the public docket, unless a subcommittee of the district committee has previously approved private discipline to which respondent attorney and bar counsel have agreed.

E. Only the district committee members can participate in committee deliberations that occur in the disposition phase of a hearing. If a committee member investigated the complaint or presented the evidence to the committee during the hearing, that committee member cannot participate in the committee's deliberations.

F. After concluding that the respondent has engaged in misconduct, the committee will return to the courtroom to inquire if the respondent has a disciplinary record.

G. Possible dispositions of cases heard by District Committees:

1. Dismiss the complaint because:
    a) The alleged misconduct does not violate the Virginia Rules of Professional Conduct;
    b) The evidence shows that the respondent did not engage in the alleged misconduct;
    c) The allegation of misconduct was not supported by credible evidence;

d) The bar did not meet its burden of proving the alleged misconduct by clear and convincing evidence;
e) The alleged misconduct was insignificant and the respondent has taken remedial measures;
f) The alleged misconduct is protected by superseding law; or
g) Exceptional circumstances exist which justify dismissal.

2. Impose an admonition, with or without terms;
3. Impose a public reprimand, with or without terms;
4. Certify the complaint to the Disciplinary Board; or
5. Request bar counsel to conduct further investigation of any new matter which comes to the committee's attention during the course of the hearing.

H. If bar counsel alleges that a respondent has failed to comply with terms of discipline imposed by a district committee (or subcommittee), a "show cause" hearing is conducted before a district committee to determine if an alternative sanction should be imposed. The respondent has the burden of proving compliance by clear and convincing evidence to avoid imposition of the alternative sanction.

VII. Disciplinary Board And Three –Judge Panel Hearings

A. Suspension and Revocations cases usually are initially heard before the Disciplinary Board convening in Richmond or upon election by the Respondent attorney before a three judge circuit court panel. Certification to the Board occurs upon the "reasonable belief that the Respondent has engaged or is engaging in Misconduct that, if proved, would justify a Suspension or Revocation."

B. A prior record of discipline is a key factor in the decision to certify a matter to the Disciplinary Board.

C. Procedures before the Disciplinary Board and a three judge panel mirror those for district committee hearings.

- Case Management and Advocacy
    - Coordinate services for victims of child abuse and their families
    - Function as a program liaison between CHKD's Child Abuse Program and its MDT partners
    - Facilitate monthly Multi-Disciplinary Team meetings to ensure a coordinated community response with child abuse cases
    - Meet with family's and explain CAP services
    - Who can make referrals to the Child Abuse Program?
    - Providing support and education to families by:
        - Relieving anxiety before the appointment
        - Meeting with the guardian during the child's forensic interview
        - Following up with families to ensure they get the services they need
        - Providing referrals when needed
- Forensic Interviews
    - Developmentally sensitive and legally sound method of gathering factual information regarding allegations of a crime
    - Conducted by a neutral professional certified interviewer utilizing research and practice informed techniques
    - Investigators only
    - Children 2-17 and delayed adults
    - Video and/or audio-taped
    - Child friendly CAC setting
    - Minimize trauma & reduces the number of interviewers
- Medical Services:
    - Clinic Services
        - Children ages 0-17
        - Primarily sexual abuse, some minor physical abuse

- Non-invasive exams/psychologically helpful to child and family

- Second Medical Opinions
  - Medical providers who have examined a child and have seen something medically questionable that may or may not be related to abuse

- Consultations
  - Inpatient:
    - Children ages 0-17, usually infants
    - Hospitalized patients
  - Investigative:
    - Physicians review outside records, photos and x-rays to assist in determining a cause of injury

- Acute Sexual Assault Examinations
  - Specially trained pediatric nurses respond to acute sexual assault of children 0-17
  - Obtain medical history, complete an exam and collect medical evidence, test for infection, document findings

- Mental Health:
  - Assessments:
    - Brief Clinical Assessments
      - A brief evaluation of a child's behavioral and/or emotional symptoms, predominantly to gather information about whether the child would benefit from therapy
    - Parenting Capacity Evaluations
      - Assessment of a caretaker when there is a question of his/her ability to nurture, protect and manage a child in his/her care
    - Comprehensive Psychological Assessments
      - To clarify questions about the child's symptoms and/or functioning and provide recommendations for interventions and services
  - Therapy:

- ☐ Child & Family Traumatic Stress Intervention (CFTSI)
    - ☐ Evidence-based early intervention for 7-18 year olds within 30-45 days of a potentially trauma event
    - ☐ Reduces trauma-related negative reactions or symptoms
    - ☐ Strengthens communication between caregiver & child to enhance emotional support
    - ☐ Teaches skills to help reduce trauma reactions
    - ☐ Helps families address practical needs, such as safety, legal issues, or medical care
    - ☐ Assesses whether the child needs longer-term treatment
- ☐ Trauma-Focused Cognitive Behavioral Therapy (TF-CBT)
    - ☐ Evidence-supported treatment for 3-18 year old victims of sexual abuse, witnessing domestic violence,
    - ☐ traumatic bereavement, physical abuse
    - ☐ Teaches strategies and skills for coping
    - ☐ Educates parent and child about trauma
    - ☐ Develops strategies to help parent manage behaviors and support the child
    - ☐ Decreases trauma symptoms
- ☐ Parent-Child Interaction Therapy (PCIT)
    - ☐ Evidence-supported treatment for children ages 2-7 (up to age 12) who have behavioral problems (defiance, tantrums)
    - ☐ Teaches parents to attend to and increase child's positive behaviors
    - ☐ Coaches parents in using effective discipline strategies
    - ☐ Reduces child's problem behaviors
- ☐ Coping-in-Court Therapy Module
    - ☐ Therapy module aimed to help victims of child abuse or neglect who are experiencing distress related to the court process

- ☐ Helps children manage this distress while still being sensitive to the legal process
- ☐ Can be provided alone or in combination with TF-CBT or PCIT

VIRGINIA STATE BAR MILITARY LAW SECTION
ETHICAL ISSUES IN REPRESENTING THE IMPAIRED CLIENT

Edward L. Davis
Bar Counsel, Virginia State Bar
May 22, 2015
Quantico, Virginia

1. Virginia State Bar's guidance on the treatment of clients with diminished capacities is found in Rule 1.14 of the Rules of Professional Conduct and its comments (attached).

2. Further guidance may be found in Legal Ethics Opinions (LEOs) 1789, 1769 and 1816.

3. The Army's version of Rule 1.14 is found in Army Regulation (AR) 27-26 (also attached). Effective since May 1, 1992, it predates many subsequent revisions to ABA Model Rule 1.14 that have been adopted by several states, including Virginia, which has adopted most of the Rule and its comments.

4. *Caveat:* one of the last Comments to AR 27-26, Rule 1.14, that there is no doctor-patient privilege in the military, may affect the Military Rules of Evidence, but does not necessarily override a lawyer's ethical obligation to maintain client confidences and secrets under Rule 1.6. This applies especially in state court proceedings, where state rules of evidence and professional conduct will apply. (See also LEO 1769.) The comments to Army Rule 1.14 suggest the need for the appointment of a guardian to address the best interests of the client, as per Rule 1.14(b).

5. Popular questions:

    - May a lawyer ethically seek and argue for the appointment of a guardian for his or her impaired client?
    - May a lawyer represent a third person on their motion to be appointed as guardian for the lawyer's impaired client? (References, LEO 1769, Rules 1.7 and 1.14, Rules of Professional Conduct).
    - May a lawyer ethically refuse to release damaging psychological reports to an impaired client at the request of the mental health provider? (References, LEO 1789, Rules 1.4a, 1.16e, Rules of Professional Conduct.)
    - Is a lawyer ethically bound by a suicidal but otherwise competent client's instructions not to present any defenses at the guilt and sentencing phases of the client's trial for capital murder? Is the client seeking an unlawful objective? (References, LEO 1816, LEO 1737, Comment 2 to Rule 1.2, Rule 1.14b.) (Fact that a professional evaluator has determined client to be competent does not necessarily remove attorney and client from the application of Rule 1.14.)

6. See also *In re Flack,* 33 P.3d 1281 (Kan. 2001) (lawyer's failure to abide by client's estate planning objectives, as far as reasonably possible, after being informed of client's medical and mental disability, violated Rule 1.14); *In re Lee,* 754 A.2d 426 (Md. Spec. App. 2000) (duty under Rule 1.14 to maintain normal client-lawyer relationship precludes lawyer from acting solely as arm of court, in nature of special master, and using assessment of client's best interests to justify waiving client's rights without consultation, divulging client's confidences, disregarding client's wishes, and presenting evidence against client in guardianship proceeding.)

7. When in doubt, call the Ethics Hotline (804) 775-0564, or by email: http://www.vsb.org/site/regulation/ethics for confidential advice from the experts.

FROM: VIRGINIA RULES OF PROFESSIONAL CONDUCT (2009)

RULE 1.14 Client With Impairment

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacities often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] *ABA Model Rule* Comments not adopted.

[4] If the client has a legal representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If there is no legal representative, the lawyer should seek such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

[5 - 7] *ABA Model Rule* Comments not adopted.

Disclosure of the Client's Condition

[8] Court Rules generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Virginia Code Comparison

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 7-11 stated that the "responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client.... Examples include the representation of an illiterate or an incompetent...." EC 7-12 stated that "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

Committee Commentary

The Committee adopted this Rule because it directly addresses matters only implicitly addressed in Ethical Considerations of the *Virginia Code*.

The amendments effective January 1, 2004, rewrote the rule.

Updated: October 29, 2009

Army Regulation 27–26

Legal Services

Rules of Professional Conduct for Lawyers

Headquarters
Department of the Army
Washington, DC
1 May 1992

Unclassified

FROM: ARMY REGULATION 27-26 (AR 27-26)

May 1, 1992

RULE 1.14 Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal clientlawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

COMMENT:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about the matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer should take action so that procedures are initiated for the appointment of a guardian by the person's relatives, civil authorities or the Veteran's Administration. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed,

the lawyer should consider recommending such an appointment where it would serve the client's best interests.

Disclosure of the Client's Conditions

Rules of procedure in civil litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment or to disclosure of information which would be to a client's detriment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician but military law does not recognize a doctor-patient privilege.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.3 Diligence
Rule 1.6 Confidentiality of Information
AR

LEO: Must an Attorney Comply with the Client's Request Not to Present a Defense, LE Op. 1816

MUST AN ATTORNEY COMPLY WITH THE CLIENT'S REQUEST NOT TO PRESENT A DEFENSE AT TRIAL WHEN THE CLIENT IS SUICIDAL?

August 17, 2005

You have presented a hypothetical involving an attorney's defense of a criminal defendant charged with capital murder. The client displays suicidal tendencies. He was suicidal before and during the time of the alleged crime. He has attempted to commit suicide not only prior to incarceration but also while in jail for the present charges. He has explained to the attorney that as those attempts were unsuccessful, he now intends to "commit suicide by state" by allowing the state to succeed in its efforts to have the death penalty imposed upon him. The client says that he does not believe that his actions necessarily meet all of the requirements for capital murder, since his actions were neither premeditated nor intentional. The client wants to plead not guilty and request a trial by jury because he believes that a jury is more likely to sentence him to death. In furtherance of that objective, the client has instructed the defense attorney not to present any evidence or defense during either the guilt or the penalty phases of the trial. The client has previously been evaluated for competency; the forensic psychologist concluded that the client met the legal standard for competency at that time. The defense attorney has developed evidence for both the guilt and penalty phases of the trial. This attorney does not believe that the client is making a rational, stable and informed decision since his actions are motivated by his suicidal tendencies.

Under the facts you have presented, you have asked the committee to opine as to the following:

1) Is the lawyer ethically bound by his client's instructions that the lawyer is not to present any evidence or argument during either the guilt or penalty phase of the trial?

2) What actions should the lawyer take if he believes that his client is not making an informed, rational and stable decision?

3) What action should the lawyer take if he believes that this client is pursuing an unlawful objective?

This committee first analyzed this phenomenon of criminal defendants electing execution in LEO 1737 [LE Op. 1737]. That opinion involved a competent client requesting that the attorney refrain from presenting mitigating evidence at sentencing. The opinion acknowledged the difficulty of these situations as involving

both moral and ethical issues for the attorney. Also adding to the complexity of the analysis of such situations are the constitutional issues regarding criminal defendants.[1]

In LEO 1737 [LE Op. 1737], the analysis focused on the attorney's duty to pursue the lawful objectives of his client. The conclusion of that analysis was that

> Where the attorney has a reasonable basis to believe that the client's preference for the death penalty is rational and stable, the client's decision controls.

The present scenario differs from that of LEO 1737 [LE Op. 1737] in two ways. First, the client is asking the attorney to forgo the presentation of evidence not only at sentencing but also at the guilt phase of the trial. Second, while the client has been found competent, the attorney, in whole or in part because of the suicidal tendencies, does not consider his client able to make a rational decision about this important matter.

Is the ethical dilemma different for this attorney considering evidence for trial than for the LEO 1737 [LE Op. 1737] attorney, asked only to refrain from presenting mitigating evidence at sentencing? You inquiry raises a question of the scope of the attorney's authority. Who gets to decide what, if any, evidence should be put forward – the attorney or the client? Rule 1.2 [Prof. Conduct Rule 1.2] governs issues of scope. That rule, in pertinent part, states as follows:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer may limit the objectives of the representation if the client consents after consultation.

Comment One to the rule elaborates upon this distinction between means and objectives:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages,

> disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

As acknowledged in that Comment, distinguishing between means and objectives in a particular instance is not always easy to make.

The committee does not read Rule 1.2(a)'s [Prof. Conduct Rule 1.2(a)] list of four decisions that must be made by the client in criminal cases as an exclusive list. To the contrary, as quoted above, Comment One suggests other possible examples that could arise: "questions as to the expenses to be incurred and concern for third persons." The committee concludes that Rule 1.2 [Prof. Conduct Rule 1.2] presents no exhaustive list of decisions that must be made by the client; rather, the rule and its comments provide a standard and guidance for that determination to be made on a case-by-case basis.

The Criminal Justice Section of the American Bar Association provides similar guidance for defense attorneys in the form of Standards. Pertinent here are paragraphs (a) and (b) of Standard 4-5.2, "Control and Direction of the Case," stating:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused; others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation include:
>
> (i) what pleas to enter;
>
> (ii) whether to accept a plea agreement;
>
> (iii) whether to waive jury trial;
>
> (iv) whether to testify in his or her own behalf; and
>
> (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

Thus, rather like Rule 1.2's [Prof. Conduct Rule 1.2] delineation of decisions involving means as within the purview of the attorney, this standard places "strategic and tactical decisions" in that category.[2] The judicial decisions addressing this issue, frequently in the context of ineffective assistance of counsel claims, make similar distinctions. Courts have identified a number of decisions involving the basic objectives of the representation, and therefore in the purview of the client: whether to plead guilty[3], whether to waive a jury trial[4], whether to testify[5], whether to take an appeal[6], whether to be represented by counsel[7], what types of defenses to present[8], whether to submit a lesser-included-offense instruction[9], and whether to refrain from presenting mitigating evidence at sentencing.[10] In contrast, identified as tactical decisions of strategy, within the purview of the attorney, are which witnesses to call[11], how to conduct cross-examination[12], choice of jurors[13], which motions to file[14], whether to request a mistrial[15], whether to stipulate to easily provable facts[16], and when to schedule court appearances.[17] The judicial decisions provide two categories, which are consistent with the distinction made in Rule 1.2 [Prof. Conduct Rule 1.2] between "objectives" and "means."

The answer to your first question involves this difficult distinction regarding the scope of the attorney/client relationship. Critical to that determination for the attorney in this hypothetical is the issue raised in your second question: what if the attorney does not believe his client is able to make an informed, rational and stable decision on this matter. The facts of the hypothetical suggest that the client has had repeated suicide attempts and is seeking to limit the representation in his case as just one more suicide effort.

A client's mental state is relevant to the scope determination discussed above. Specifically, Comment 2 to Rule 1.2 [Prof. Conduct Rule 1.2] states as follows:

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14 [Prof. Conduct Rule 1.14].

Rule 1.14 [Prof. Conduct Rule 1.14] addresses how an attorney's representation is affected when the client has impairment. That rule provides the following direction:

(a) When a client's ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or some other

reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [Prof. Conduct Rule 1.6]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) [Prof. Conduct Rule 1.6(a)] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Thus, the committee opines that the answers to questions 1 and 2 for this attorney are inextricably linked. The committee concludes, based on both the facts and the particular questions asked in this request, that this attorney does consider that, as described in Rule 1.14(a) [Prof. Conduct Rule 1.14(a)], his "client's ability to make adequately considered decisions in connection with the representation is diminished," as contemplated in Rule 1.14(a) [Prof. Conduct Rule 1.14(a)]. The facts state that a forensic psychologist evaluated the client and concluded that he is competent to stand trial. The committee suggests that the evaluation's conclusion does not necessarily remove this attorney and client from the application of Rule 1.14 [Prof. Conduct Rule 1.14]. The determination of competency to stand trial is specific enough such that a client may have been determined competent for trial but nonetheless under impairment with regard to making decisions involving the matter. Also, the facts do not state when the evaluation was done; if the client's mental state has deteriorated since that time, the attorney again should consider obtaining a new evaluation.

LEO 1737 [LE Op. 1737] suggests that for an attorney properly to follow a client's directive regarding an important decision, the attorney should have a reasonable basis to believe that the client is able to make a rational, stable decision. In contrast, the attorney in the present scenario believes that the client is unable to make such a decision. Accordingly, assuming the attorney has a rational basis for that belief, Rule 1.14 [Prof. Conduct Rule 1.14] permits this attorney to take such protective action as is necessary to protect his client. Such action may properly include, but is not limited to, seeking further evaluation of the client's mental state, seeking an appointment of a guardian, and/or going forth with a defense in spite of the client's directive to the contrary. The precise steps appropriate will depend on the attorney's conclusion regarding the degree of the client's impairment.

Finally, your third question suggests that perhaps the attorney need not follow this client directive as it seeks an unlawful objective. The committee disagrees with that characterization. The imposition by the state of the death penalty is a lawful process, governed by constitutional parameters. A client's election preference for that penalty does not convert the imposition of that sentence to an unlawful act. As one commentator explained it, a client's preference for the death penalty is not "state-assisted suicide" as the state's imposition of the penalty is not a homicide.[1][5] In LEO 1737 [LE Op. 1737], the committee concluded that an attorney should respect a client's wishes to refrain from presenting mitigating evidence at the sentencing hearing, so long as the client was capable of a rational decision, even where that decision was "tantamount to a death wish." As the committee does not consider this client's objective "unlawful," the committee rejects the suggestion raised by the third question. However, as stated above, Rule [illegible] [Prof. Conduct Rule [illegible]] may nonetheless support this attorney disregarding this particular directive of his client should the attorney conclude, as discussed above, that his client cannot make "adequately considered decisions" regarding the representation such that protective action is needed.

This opinion is advisory only, based on the facts you presented and not binding on any court or tribunal.

Committee Opinion
August 17, 2005

FOOTNOTES

[1] A distinction can be made between the questions of what decisions should all attorneys leave to their clients to comply with Rule 1.2's [Prof. Conduct Rule 1.2] concept of scope and what decisions must any defense attorney leave to a criminal defendant to preserve that client's constitutional protections. This opinion addresses the first question, but of course any decisions of the latter variety would necessarily come within the category established by the first question. For discussion of those decisions derived from constitutional protections, such as the right to a jury trial, *see Jones v. Barnes*, 463 U.S. 745 (1983).

[2] As with Rule 1.2 [Prof. Conduct Rule 1.2], the committee reads neither category presented in Standard 4-5.2 as establishing an exhaustive list; both paragraphs (a) and (b) use the word "include" before listing examples. Decisions not listed in that standard's examples could, depending on the character of the decision, belong to either category.

[3] *See Jones v. Barnes*, 463 U.S. 745 (1963)

[4] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See, e.g., U.S. v. Boyd*, 86 F.3d 719 (7th Cir. 1996).

[9] *See, e.g. Meeks v. Berg*, 749 F.2d 322 (6th Cir. 1984); *State v. Hedges*, 8 P.3d 1259 (Kan. 2000); *State v. Debler*, 856 S.W.2d 641 (Mo. 1993); *People v. Frierson*, 705 P.2d 396 (Cal. 1985).

[10] *People v. Segoviano*, 725 N.E.2d 1275 (Ill. 2000).

[11] *See LEO 1737 [LE Op. 1737] and cases cited therein.*

[12] *See, e.g., People v. McKenzie*, 668 P.2d 769 (Cal. 1983); *State v. Davis*, 506 A.2d 86 (Conn.1986).

[13] *Id. and see, e.g., United States v. Claiborne*, 509 F.2d 473 (D.C. Cir. 1974).

[14] *Id. and see, e.g., State v. Burnette*, 583 N.W.2d 174 (Wis. Ct. App. 1998).

[15] *Id.; and see Sexton v. French*, 163 F.3d 874 (4th Cir. 1998); *State v. Gibbs*, 758 A.2d 327 (Conn. 2000); *State v. Mecham*, 9 P.3d 777 (Utah 2000); *State v. Oswald*, 606 N.W.2d 207 (Wis. Ct. App. 1999).

[16] *See, e.g., United States v. Washington*, 198 F.3d 721 (8th Cir. 1999).

[17] *See Poole v. United States*, 832 F.2d 561 (11th Cir. 1987).

[18] *New York v. Hill*, 528 U.S. 110 (2000).

[19] Bonnie, "The Dignity of the Condemned", 74 Va. L. Rev. 1363, 1375 (1988).

LEO: Client File - Whether an Attorney can Refuse to Release Information, LE Op. 1789

CLIENT FILE - WHETHER AN ATTORNEY CAN REFUSE TO RELEASE INFORMATION AND MEDICAL REPORTS TO CLIENT AT HIS REQUEST

February 20, 2004

Your request presented a hypothetical situation involving a lawyer representing a client before the Social Security Administration. The client is seeking disability benefits under Title II of the Social Security Act. The client has disabling mental impairments affecting both personality and judgment. In the course of this representation, the attorney secured a copy of a report developed by the client's treating psychologist. The psychologist had prepared the report specifically at the direction of the client's long-term disability insurance carrier to determine the client's eligibility for those benefits. The carrier paid for the report.

The attorney's standard practice is to have the client secure the report directly from the evaluator so that the evaluator can discuss with the patient the implications of any findings or opinions expressed in the medical records. However, in the present instance, the carrier directed the psychologist not to release a copy of the report to the client. The psychologist refuses to authorize release of the report to the client; the attorney cannot ascertain whether this is for medical reasons or due to the carrier's instructions. The attorney is mindful of the client's right to obtain the record from his own Social Security file were he to so request.

Under the facts you have presented, you have asked this Committee to opine as to the following questions:

1. Is a medical record obtained in the course of litigation and submitted to the tribunal in support of the client's case part of the "client's file" requiring disclosure to the client pursuant to Rule 1.16(e) [Prof. Conduct Rule 1.16(e)]?

2. Can the insurance carrier and/or the psychologist prohibit the lawyer from providing this report to the client?

When a lawyer's client requests the contents of the file, the appropriate response for the lawyer hinges on whether the representation has terminated. The ethical duty of response to such a request varies depending on whether the requester is a current or a former client. During the course of the representation, an attorney's duty to provide information to his client is governed by Rule 1.4(a) [Prof. Conduct Rule

1.4(a)], regarding communication. However, upon termination of the representation, the lawyer must follow the directives of Rule 1.16(e) [Prof. Conduct Rule 1.16(e)] regarding the disposition of the client's file.

Throughout representation of a client, Rule 1.4 [Prof. Conduct Rule 1.4] requires the attorney to ensure proper attorney/client communication, outlined as follows:

> RULE 1.4 Communication
>
> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Generally, the rule does not direct the means by which an attorney may "keep a client reasonably informed." Depending on the circumstances, information may reasonably be provided, for example, at a meeting, in a telephone call, in a letter or other document, or via e-mail correspondence. Nevertheless, the rule requires more than just this general duty to keep the client reasonably informed; the lawyer is also required to "promptly comply with reasonable requests for information." A client's request for a copy of a particular document or documents in the file must be considered in light of that duty. While a lawyer may not be required to provide all file contents whenever requested, the lawyer must be sure to comply with 1.4(b) [Prof. Conduct Rule 1.4(b)] in responding to any reasonable client request for documents during the course of the representation. Additionally, the Committee notes that the attorney also has a duty to the client under Rule 1.15(c) [Prof. Conduct Rule 1.15(c)] to return client property received by the attorney to the client upon request.

The lawyer's obligations regarding file contents change upon termination of the representation. Rule 1.16 [Prof. Conduct Rule 1.16] governs the termination of an attorney/client relationship. Paragraph (e) of that rule specifically addresses a lawyer's obligations regarding provision of file contents to a client upon request at the end of the representation. That paragraph states as follows:

> RULE 1.16 Declining Or Terminating Representation
>
> (e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of

the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

The thrust of this rule is to require an attorney to provide the file at the termination of the representation, upon request of the client, one time. Paragraph (e) specifically addresses how to handle the client's file, with language breaking file contents into three categories.

The first is "all original, client-furnished documents and any originals of legal instruments or official documents." Those documents are deemed to be the client's property; the attorney must unconditionally return them to the client upon request. While the attorney may make a copy of such documents for his own use, he may not charge that copying expense to the client.

The second category includes lawyer/client and lawyer/third-party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client, research materials, and copies of prior bills. For this second category, a lawyer may charge the client for the expense of the lawyer's making a copy of the items for his

own retention. However, the attorney may not condition the release of the documents upon the client's prepayment of copying expenses.

A third category presented in Rule 1.16(e) [Prof. Conduct Rule 1.16(e)] includes copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising with the attorney/client relationship. A lawyer is not required to provide those items to the client.

In applying paragraph (e)'s categories to the medical report at issue, the key category is the second one. That category in paragraph (e) includes "documents prepared by or collected for the client in the course of the representation." That language clarifies that the directive of the provision applies not only to material developed by the attorney himself but also to those documents obtained from others for the representation. A medical report from the client's treating psychologist is just such a document. Thus, the Committee opines that this medical report is part of the client file for purposes of Rule 1.16(e) [Prof. Conduct Rule 1.16(e)].

This request questions further whether either the carrier or the doctor can prohibit the attorney from providing the client with a copy of this report. In considering that question, this Committee references its previous opinion regarding carrier directives to insureds' attorneys. *See*, LEO 1723 [LE Op. 1723]. In that opinion, which dealt with a carrier's directives to an insured's attorney to work with certain limitations on the scope of representation, the Committee noted that the attorney must remain mindful that he represents the insured, not the carrier. Accordingly, in rejecting the attorney's acceptance of the restrictions, the Committee noted:

> [I]t is ethically impermissible for an attorney to agree to an insurance carrier's restrictions on the right of the insured absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client's rights will not be materially impaired by the restrictions.

Similarly, the present attorney must be mindful of the fact that he represents the patient, and not the carrier or the psychologist. This attorney should not follow the instruction of these nonclients to breach the attorney's ethical duties owed to his client, such as provision of file contents pursuant to Rule 1.16(e) [Prof. Conduct Rule 1.16(e)].

The Committee notes that while question two does not make express mention of mental health concerns as the reason for the psychologist's directive in this matter, the facts in the hypothetical do raise that possibility. Were the attorney to determine that the psychologist wants to preclude client access to the

report out of concern for the effect on the client of such disclosure, the attorney may wish to consider whether Rule 1.[illegible] [Prof. Conduct Rule 1.[illegible]] is implicated in his situation.

Rule 1.[illegible] [Prof. Conduct Rule 1.[illegible]] provides guidance to an attorney with a client with impairment. In particular, the rule allows an attorney to take protective action with regard to his client under certain circumstances when the client cannot act in his own interest. The limited facts presented do not allow for analysis of whether Rule 1.[illegible] [Prof. Conduct Rule 1.[illegible]] is triggered in this particular situation. However, the Committee does note that while an attorney may never withhold a medical report from a client merely at the request of some other party, in rare instances, an attorney may appropriately consider whether the client is able to act in his own interest with respect to requesting the information.

The Committee further notes that the conclusions drawn in this opinion are only those within the purview of this Committee to interpret the Rules of Professional Conduct. Comment 11 to Rule 1.16 [Prof. Conduct Rule 1.16] tates that "the requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law." Interpretations of authority other than the Rules of Professional conduct would be beyond this Committee's purview. Accordingly, this opinion does not address legal questions of permissibility of disclosure of medical records under legal authority such as Virginia Code §§ 8.01-413 and 32.1-127.1:03 or the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 42 U.S.C. § 1301 *et. seq.*

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
February 20, 2004

Filename:	/var/casefinder/data/html/va_lep/2000/va_lep001830.gml

LEO: Conflict — Whether an Attorney Can Represent the Daughter, LE Op. [illegible]

CONFLICT — WHETHER AN ATTORNEY CAN REPRESENT THE DAUGHTER IN GAINING GUARDIANSHIP OF INCOMPETENT MOTHER WHO IS CURRENTLY A CLIENT IN AN OTHER MATTER.

February 10, 2003

You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Under the facts you have presented, you have asked the committee to opine as to whether the acceptance of the daughter as a client for this guardianship petition would trigger an impermissible conflict of interest for the legal aid office.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7 [Prof. Conduct Rule 1.7], which governs concurrent conflicts of interest, and Rule 1.14 [Prof. Conduct Rule 1.14], which addresses representing a client with a disability. Rule 1.7 [Prof. Conduct Rule 1.7] squarely addresses the conflict triggered by an attorney representing adverse parties in the same matter:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely effect the relationship with the other client; and
>
> (2) each client consents after consultation.

The committee notes that under Rule 1.10(a) [Prof. Conduct Rule 1.10(a)], any conflict arising under Rule 1.7 [Prof. Conduct Rule 1.7] for one attorney would be imputed to every other attorney in the office.

Applying Rule 1.7(a) [Prof. Conduct Rule 1.7(a)] to the attorney in the present hypothetical presents insurmountable problems. This committee does not see how that attorney could fulfill either of the two requirements listed under paragraph (a), above. As for the first requirement, that the representations not be adversely affected, it seems unlikely that the representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence. Even were that hurdle cleared, the second requirement can not be met. This committee sees no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

Should the attorney in this hypothetical actually consider his client to be incompetent, that attorney can look to Rule 1.14 [Prof. Conduct Rule 1.14] for guidance. That rule specifically addresses the difficulties in representing a client under a disability. The rule does suggest that the lawyer should, "as far as reasonably possible, maintain a normal client-lawyer relationship." However, should the lawyer reasonably believe that "the client cannot adequately act in the client's own interest," then the lawyer "may seek the appointment of a guardian or take other protective action." Rule 1.14(a) [Prof. Conduct Rule 1.14(a)] and (b) [Prof. Conduct Rule 1.14(b)]. Thus, should the attorney in this hypothetical reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

This committee's two conclusions in this matter — that there would be an impermissible conflict of interest for the attorney to represent the daughter in seeking a guardian and that, under certain circumstances, the attorney may permissibly seek appointment of a guardian under Rule 1.14 [Prof. Conduct Rule 1.14] — are not contradictory. This committee believes that in addressing this same dilemma regarding Rule 1.7 [Prof. Conduct Rule 1.7] and Rule 1.14 [Prof. Conduct Rule 1.14], the ABA correctly made a critical distinction. *See*, ABA96-404 (1997)[1]. In its opinion on this same question, the ABA distinguished between an attorney representing a third party petitioner and filing the petition himself:

> Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to this client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a) . . .

This committee concurs with the ABA's analysis of the interplay between Rule 1.7 [Prof. Conduct Rule 1.7] and Rule 1.14 [Prof. Conduct Rule 1.14] in the present context. Neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney's office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by the daughter regarding the mother in determining this attorney's duties toward the mother with regard to Rule 1.14 [Prof. Conduct Rule 1.14]. That rule would be the proper source for guidance for this attorney should he believe the mother's competence is questionable.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion

February 10, 2003

FOOTNOTES

[1] The ABA, in this opinion, is interpreting Model Rules 1.7 and 1.14, which are substantially similar to Virginia's corresponding rules.

Filename:	/var/casefinder/data/html/va_lep/2000/va_lep001816.gml

Matt Hamel, a licensed attorney in three states (Virginia, Pennsylvania & New Jersey), is the founder of Military Divorce, P.C. Military Divorce, P.C. is a Virginia law firm dedicated to serving military service-members and spouses of service-members who are seeking attorneys with first-hand knowledge of the military and military-specific, family law issues.

Prior to establishing Military Divorce, P.C., Matt was affiliated with one of the largest law firms in Virginia Beach that focused solely on divorce and child custody matters.

Before practicing in the Virginia, civilian court system, Matt served for six years on active duty as a Navy JAG Attorney and he is still an active, drilling Navy JAG Reservist. Matt is currently a Lieutenant Commander in the U.S. Navy Reserve and he is assigned as a Staff JAG to U.S. Fleet Forces Command.

Matt served his first two years on active duty in the Navy's busiest litigation office as a prosecutor and then volunteered for a tour of duty in Iraq during the "surge." He was stationed on board Forward Operating Base Camp Cropper in Baghdad, Iraq and worked inside a theater internment facility there. He was attached to Task Force 134, which handled Detainee Operations – and he was responsible for the "parole-style" review boards of the highest value detainees to include the former Ba'athist Party members and "Deck of Cards" detainees.

Upon his return from Iraq, Matt served his last few years of active military service as the Staff Judge Advocate to the Commodore, Destroyer Class Squadron and as the Assistant Force JAG to Commander, Naval Surface Force U.S. Atlantic Fleet.

As a prosecutor and again as a Staff JAG, Matt served on dozens of Case Review Committees at Navy Fleet and Family Service Centers in Norfolk, Oceana, Little Creek, Northwest Annex and Yorktown. He had the great opportunity to work with social workers and licensed clinicians whose sole purpose is to assist military service-members and their dependents through very emotionally difficult and oftentimes physically abusive relationships.

On top of his professional and military experience, Matt knows what "divorce" feels like from a child's perspective…although he was an adult-child when this occurred. His parents were divorced after 33 years of marriage – and the divorce occurred even after he, as the adult-child, was married. This major family event was traumatic and it filled him with a sense of compassion for younger children going through this process.

Education
Rutgers University School of Law, The State University of New Jersey
Juris Doctor (J.D.)
College of the Holy Cross
B.A., Worcester, Massachusetts

Military Awards & Decorations
Joint Service Commendation Medal, Navy and Marine Corps Commendation Medal (3 awards), Navy and Marine Corps Achievement Medal (3 awards), Iraq Campaign Medal, Expert Pistol Shot Medal, and various unit and service awards.

9-24-15 JDRC CLE Outline
Juvenile Certification and Transfer to Circuit Court

Paul J. Powers

I. Certification or Transfer
   A. 16.1-269.1
      1. Read it!
      2. Read it again!
      3. Juvenile must be at least 14 years old at time of offense
   B. Transfer 16.1-269.1(A)
      1. Non-violent felonies
      2. Notice
      3. Contact juvenile probation first for recommendation
      4. Probable Cause Hearing first
      5. Juvenile presumed to be competent
         a. Can challenge
         b. Burden on party alleging incompetence
      6. Court may now read transfer report
      7. Hearing on whether juvenile is a proper person to remain within juvenile court jurisdiction
         a. Really means is juvenile amenable to juvenile disposition
         b. 10 factors – handout
      8. Specific Court Orders
      9. Appeal
         a. If transferred, juvenile may appeal within 10 days
         b. If transfer denied, Commonwealth may appeal within 10 days
         c. In Circuit Court 16.1-269.6
            1. If no appeal, Commonwealth may indict
            2. Cannot challenge probable cause
            3. Hearing on transfer factors and amenability
            4. Several Different Orders
            5. Time requirements
      10. If court denies transfer and case remains in JDRC, a different judge must hear case – 16.1-269.3
   C. Certification
      1. Automatic under 16.1-269.1(B)
         a. No notice required
         b. Only for Murder and Aggravated Malicious Wounding

c. Preliminary Hearing
d. Once court finds probable cause, court Shall certify to grand jury

2. Other violent and drug felonies 16.1-269.1(C)
   a. Specific list of offenses
   b. Notice of intent to certify required
      1. Filed with court
      2. Copy to defense attorney, if none, then serve juvenile and parent
      3. 7 days prior to Hearing
   c. Can withdraw notice to certify and still request transfer
   d. Once court finds probable cause, court Shall certify to grand jury
      1. Ancillary charges go with certifiable felonies
      2. Divests juvenile court of jurisdiction of this case only
   e. If no probable cause
      1. Court dismisses
      2. Commonwealth can seek direct indictment
   f. If Commonwealth nolle proses
      1. Cannot seek direct indictment
      2. Must obtain new petitions and have prelim in JDRC
3. Commonwealth Policy – Certify any gun cases
4. Specific Court Orders
5. No Appeal
6. An indictment in Circuit Court cures any lower court defects or errors
7. Once in Circuit Court Commonwealth may nolle prose and direct indict

D. Placement of Juvenile 16.1-269.5
   1. Remain in VB Detention Center
   2. May be sent to jail
E. Adult speedy trial 19.2-243
F. Circuit Court Trial 16.1-272
G. Circuit Court Sentencing 16.1-272
   1. Serious offender and adult sentence 16.1-285.1
   2. Adult sentence
   3. Suspended adult sentence on juvenile sentence conditions
   4. Juvenile sentence for non-violent felonies
   5. Mandatory minimums apply
   6. Misdemeanors must be juvenile sentence 16.1-278.8

7. Jury will not sentence

H. After conviction (sentencing) in Circuit Court 16.1-271
   1. All future crimes are as an adult
   2. JDRC loses jurisdiction over any pending matters

Virginia:

IN THE JUVENILE AND DOMESTIC RELATIONS COURT OF THE CITY OF VIRGINIA BEACH

Commonwealth of Virginia, **Plaintiff** **v.** **,** **Defendant**	**In Re: Statutory Burglary of a Dwelling w/I Larceny/Assault/Battery (3 Counts), Larceny of a Firearm (2 Counts), Grand Larceny, Robbery of a Gun/Simulated Gun (Attempt) (3 Counts), Use of a Firearm in the Commission of a Felony (3 Counts), Possess Handgun/Assault Rifle by Minor** **Offense Dates: March 23, 2015; March 24, 2015; March 25, 2015; April 23, 2015; April 27, 2015; May 6, 2015;** **Docket#: J-**

Notice

TAKE NOTICE that on the **28th day of May, 2015 at 10:30 a.m.**, or as soon thereafter as counsel may be heard, the undersigned will move this Honorable Court to transfer this matter, pursuant to Section 16.1-269.1(A) of the Code of Virginia (1950), as amended, to the Circuit Court for trial.

By: _____

Assistant Commonwealth's Attorney

Office of the
Commonwealth's
Attorney
Municipal Center
Virginia Beach, Virginia
23456-9050
(757) 385-4401

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Notice was faxed/mailed to, and faxed to the Virginia Beach Court Services Unit (385-5628) on this _____ day of May, 2015.

_____

Assistant Commonwealth's Attorney

16.2-269.1 (A)(4)Transfer hearing Factors:

a. Juvenile Age
b. Seriousness and # of alleged offenses
    i. committed in aggressive, violent, premeditated , willful manner
    ii. offense was against person or property
    iii. maximum punishment for offense is greater than 20 years for adult
    iv. involved use of firearm or dangerous weapon by brandishing, threatening, displaying, or employing weapon
    v. nature of juvenile's participation in offense
c. Whether juvenile can be retained in juvenile justice system long enough for effective treatment and rehab
d. appropriateness and avail of services and dispositional alternatives in crim justice and juv justice systems for dealing with juvenile's problems
e. record and previous history of juv in all jurisdiction including
    i. number/nature of previous contacts
    ii. number/nature of prior probations
    iii. number/nature of prior commitments to djj
    iv. number/nature of previous residential and community based treatments
    v. whether previous acts include serious bodily injury
    vi. alleged offense is aprt of repetitive pattern of similar adjudicated offenses
f. if juv previously absconded from legal custody
g. extent of mental retardation/illness
h. school record and education
i. mental and emotional maturity
j. physical condition and maturity

Ct. can consider any or all factors – lack of one does not preclude/reverse transfer

WAIVER OF JURISDICTION

Commonwealth of Virginia
Va. Code §§ 16.1-269.1(A), -270

Case No. _____

_____ Juvenile and Domestic Relations District Court

In re: _____

I am 14 years of age or older and have been charged with the following offenses which if committed by an adult, would be felonies and could be punishable by confinement in a state correctional facility:

_____

A hearing adjudicating my case has not yet been held.

I understand that, pursuant to § 16.1-269.1(A), I have a right to a hearing to determine whether or not my case should be transferred to the Circuit Court for consideration by the Grand Jury of a criminal indictment or whether it should be adjudicated in this Court.

I have discussed my right to a transfer hearing with

_____, my lawyer. With his consent, I hereby voluntarily waive my
NAME OF LAWYER

rights to such a hearing and waive this Court's jurisdiction over my case.

I request that this court transfer my case to the Circuit Court of

_____, there to be dealt with in the same manner as if it had been
NAME OF CITY/COUNTY

transferred pursuant to Va. Code §§ 16.1-269.1 to –269.6.

_____ _____
DATE JUVENILE'S SIGNATURE

I, the above-named lawyer, have discussed this waiver with my client and hereby agree and consent to his waiver.

_____
LAWYER'S SIGNATURE

TRANSFER/RETENTION ORDER

COMMONWEALTH OF VIRGINIA VA. CODE ANN. § 16.1-269.1 (A) CASE NO.: [redacted]

VIRGINIA BEACH J&DR Juvenile and Domestic Relations District Court

In re: [redacted]

Present: [X] Juvenile [ ] Mother DECEASED [ ] Father [redacted]

[X] Attorney for Juvenile [redacted] [X] Commonwealth's Attorney POWERS, PAUL [ ] Other

The above-named juvenile is within the jurisdiction of this Court by reasons of a verified petition filed against the juvenile in this cause, alleging the commission of an offense, namely:
18.2-91 BURGLARY, 18.2-95 GRAND LARCENY, 18.2-22/91 CONSPIRACY TO COMMIT BURGLARY

Which if committed by an adult would be a felony, punishable by confinement in a state correctional facility.

[ ] Pursuant to Virginia Code § 16.1-270, the above-named juvenile, with consent of counsel, waived in writing the jurisdiction of the Juvenile and Domestic Relations District Court. (Executed Waiver of Jurisdiction attached.)

[ ] In compliance with the Code of Virginia and on motion of the Commonwealth's Attorney, a transfer hearing was conducted following proper notice pursuant to Va. Code §§ 16.1-263 and 16.1-264 having been given to the juvenile, the juvenile's parents, guardian, legal custodian or other person standing in loco parentis or attorney.

[X] Prior to this transfer hearing, a written study report to the court was prepared by the probation services or other qualified agency designated by the Court as required by the Code of Virginia; this report and study together with any other data and reports concerning the juvenile which were available to the Court were also made available to counsel for the juvenile.

[ ] The Commonwealth withdraws the motion to transfer.

[X] The Court finds from the evidence presented that there is probable cause to believe the juvenile committed the

[X] delinquent act(s) alleged.

[ ] following lesser-included delinquent acts

[ ] The Court finds that the evidence is insufficient to establish probable cause to believe that the juvenile committed the alleged delinquent act, and therefore the case is dismissed.

From the evidence and upon consideration of the study and report (which was not considered until the finding concerning probable cause was made), the Court finds:

[X] That the juvenile was fourteen or more years of age at the time of the alleged commission of the offense; the juvenile is competent to stand trial; and the juvenile is not a proper person to remain in the juvenile court.

[X] the statutory factors in § 16.1-269.1 (A)(4) have been considered. (See reverse)

[ ] That the requirements for transfer have not been satisfied.

The Court

[ ] Hereby RETAINS jurisdiction of the charge against the juvenile.

[X] TRANSFERS and so certifies the juvenile for proper criminal proceedings to the Circuit Court of VIRGINIA BEACH Virginia, which court of record has jurisdiction of this offense and that the juvenile was notified of his right to appeal this decision.

The Court further orders that the juvenile be:

[ ] Remanded to jail [ ]

[X] Detained in the VIRGINIA BEACH DETENTION CENTER
NAME OF DETENTION FACILITY

[ ] Released into the care and custody of the juvenile's parent(s), guardian, or person standing in loco parentis.

[ ] Bail is set in the amount of $ 0.00 [ ] Continued bail in the amount of $ 0.00

03/05/2015
DATE

Rebecca B. Habel
JUDGE

FORM DC-518 (MASTER, PAGE ONE OF TWO) 12/03

In determining whether a juvenile is a proper person to remain within the jurisdiction of the juvenile court, the court shall consider, but not be limited to, the following factors:

a. The juvenile's age;

b. The seriousness and number of alleged offenses, including (i) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (ii) whether the alleged offense was against persons or property, with greater weight being given to offenses against persons, especially if death or bodily injury resulted; (iii) whether the maximum punishment for such an offense is greater than twenty years confinement if committed by an adult; (iv) whether the alleged offense involved the use of a firearm or other dangerous weapon by brandishing, threatening, displaying or otherwise employing such weapon; and (v) the nature of the juvenile's participation in the alleged offense;

c. Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation;

d. The appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the juvenile's problems;

e. The record and previous history of the juvenile in this or other jurisdictions, including (i) the number and nature of previous contacts with juvenile or circuit courts, (ii) the number and nature of prior periods of probation, (iii) the number and nature of prior commitments to learning centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses;

f. Whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity in this or any other jurisdiction;

g. The extent, if any, of the juvenile's degree of intellectual disability or mental illness;

h. The juvenile's school record and education;

i. The juvenile's mental and emotional maturity; and

j. The juvenile's physical condition and physical maturity.

Reasons for decision

JUVENILE WAIVED BOTH PROBABLE CAUSE AND TRANSFER TO CIRCUIT COURT.

03/05/2015
DATE

Rebecca R Haberl
JUDGE

DATE September 23, 2002 (replaces September 21, 1994 policy)

TO Lisa
Phyllis
FYI: Courtroom Clerks

SUBJECT Juvenile Transferred Case

PROCEDURE

We will no longer make a determination as to whether a case has been properly/timely sent to us from the JDRDC.

If NO APPEAL of the transferred case had been taken at the time we receive the paperwork:
Upon receipt of the case from juvenile court, the criminal supervisory or their designate, shall enter the case into the **sealed indictment section** of the Case Management System.

After the 10th day following the hearing in the JDRDC, the Commonwealth's attorney or their designate, will prepare and bring to us a ***Juvenile Transfer*** *Order* (order allowing commonwealth to seek indictment).

Before the Commonwealth attorney or their designate leave the front counter, the criminal supervisory or their designate will check with the juvenile side of our court to determine if an appeal of the transfer has been taken.

If an appeal was taken, the clerk will return the order to the Commonwealth attorney or their designate, who will set a hearing date and place the case on the docket.

If an appeal was not taken, the clerk will forward the order and file to the Law Clerk for review and entry of order by the Judge.

NOTE TO CRIMINAL SUPERVISOR OR DESIGNATE: If an APPEAL of the transfer of the case has been taken after the transfer had been sent to us, delete the case from the sealed indictment section and give the paperwork to the Chancery supervisor or their designate. The case will then be entered into the ***juvenile section*** *of the Case Management System.*

If an APPEAL of the transfer of the case has been TAKEN when the papers are received by us:

Upon receipt of the case from juvenile court, the juvenile supervisor or their designate, shall enter the case into the **juvenile section** of the Case Management System. The juvenile supervisor or their designate shall notify the commonwealth attorney handling the case advising them of the appeal and to place the case on the docket.

After the hearing conducted by the court, the courtroom clerk shall prepare the ***Appeal of Transfer Order***, if one is not submitted by counsel.

If the juvenile is in custody at the appeal of the transfer hearing and (i) the court allows the Commonwealth to seek an indictment, the juvenile is to be transferred to the Jail of this City. Make such notation on the jail form. (ii) the court remands the case to juvenile court, the juvenile is to be returned to TDH (or other juvenile facility). Make such notation on the jail form.

NOTE TO COURTROOM CLERK: Have jail form and order reviewed by the criminal supervisor or their designate.

NOTE TO ALL: *Criminal supervisory...Gigi Smith Designate...Lisa Matyas*
Chancery/Juvenile supervisory Phyllis Styron Designate: Kathy Brothers

cc: *Juvenile Court Attn: Peggy Davy*
Commonwealth's Attorney Attn: Pat Connolly

orders directory-transfer.ord

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA

vs CASE NUMBER:

*, DEFENDANT

ORDER - JUVENILE TRANSFER

This court, in accordance with § 16.1-269.6 subsection B, has examined and considered all papers, reports and orders of the Juvenile and Domestic Relations District Court of this City. The Court ORDERS that the attorney for the Commonwealth may seek an indictment against the defendant on the charges of (set forth charges). The juvenile court is divested of its jurisdiction over this case as well as any other allegations of delinquency arising from the same act, transaction or scheme giving rise to the charge(s) for which the juvenile has been transferred pursuant to § 16.1-269.6 (c).

The Court further ORDERS that the defendant, if in confinement in a juvenile detention facility, be transferred to the Jail of this City.

The Clerk of this Court shall forward a copy of this order to the attorney for the Commonwealth, the attorney for the defendant, and the Sheriff of this City.

The Clerk of this Court shall forward a copy of this order to the juvenile court of this City.

ENTERED: _____

_____
JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA

vs CASE NUMBER:

*. Defendant

CHARGE(S): OFFENSE DATE(S):

ORDER - APPEAL OF TRANSFER OF CASE PURSUANT TO § 16.1-269.6

This court has examined and considered all papers, reports and orders of the Juvenile and Domestic Relations District Court of this City. On (DATE), this court conducted a hearing to take further evidence on the issue of transfer. On this date came the attorney for the Commonwealth, the defendant, and counsel for the defendant.

[OPTION ONE]

The Court determined that there has been substantial compliance with § 16.1-269.1. The Court ORDERS that the attorney for the Commonwealth may seek an indictment against the defendant on the charge(s) of *. The juvenile court is divested of its jurisdiction over this case as well as any other allegations of delinquency arising from the same act, transaction or scheme giving rise to the charge(s) for which the juvenile has been transferred pursuant to § 16.1-269.6 (c).

The Court further ORDERS that the defendant, if in confinement in a juvenile detention facility, be transferred to the Jail of this City.

The Clerk of this Court shall forward a copy of this order to the juvenile court of this City, the attorney for the Commonwealth, the attorney for the defendant, and the Sheriff of this City.

[OPTION TWO]

The Court ORDERS that this case is remanded to the juvenile court and that the defendant be remanded back to the juvenile detention facility.

The Clerk of this Court shall forward a copy of this order, along with all papers filed in this case, to the juvenile court.

The Clerk of this Court shall forward a copy of this order to the attorney for the Commonwealth, and the attorney for the defendant.

ENTERED: _____

_____

JUDGE

Virginia:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT OF THE CITY OF VIRGINIA BEACH

Commonwealth of Virginia, **Plaintiff**	**Docket #: «Docket_»**
v.	**Court Date: «Court_Date»**
«Defendant», **Defendant**	**Victim(s): «Victim»**

Notice Of Intent To Certify

COMES NOW the Commonwealth, by counsel, and notifies the above named juvenile of its intent to certify this case to the Circuit Court of the City of Virginia Beach for trial and sentencing in accordance with the provisions of Section 16.1-269.1(C). In support thereof, the Commonwealth states:

1. «Defendant» is charged with «Charges» in violation of §«Code_Section» offenses listed in Virginia Code §16.1-269.1(C). These offenses occurred on «Offense_Date», which was after the above named juvenile, having been born on «Def_dob», attained the age of fourteen (14).

2. The preliminary hearing is set for «Court_Date».

WHEREFORE, having given notice as provided for in Section 16.1-269.1(C), Code of Virginia (1950 as amended), the Commonwealth will seek an indictment on the aforementioned charge/s upon the completion of the preliminary hearing.

BY: _____
«Prosecutor»
«Title» Commonwealth's Attorney

OFFICE OF THE
COMMONWEALTH'S
ATTORNEY
2425 NIMMO PARKWAY,
VIRGINIA BEACH, VIRGINIA
23456-9050
(757) 385-4401

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Intent to Certify was faxed/mailed to the «Defense_Atty_Name», Esquire, «Firm_Name», «Address»; mailed to «Parents_name», at «Parents_Address»; and faxed to the Virginia Beach Court Services Unit (385-5628) on this _____ day of «Month», 2015.

_____
«Prosecutor»
«Title» Commonwealth's Attorney

WAIVER OF PRELIMINARY HEARING AND CERTIFICATION

Case No. .....

Commonwealth of Virginia VA. CODE § 16.1-269.1(B) & (C)

Virginia Beach

..... Juvenile and Domestic Relations District Court

In re:

.....

I am fourteen years of age or older and have been charged with the following offenses which if committed by an adult, would be felonies and could be punishable by confinement in a state correctional facility:

.....

.....

I understand that I have the right to a preliminary hearing before the Court named above to determine whether there is probable cause to believe that I committed a felony AND having the consequences of my waiver explained to me by the Judge of this Court, I nevertheless WAIVE MY RIGHT TO A PRELIMINARY HEARING on the felony offenses named above.

..... _____

DATE JUVENILE'S SIGNATURE

_____

ATTORNEY FOR THE JUVENILE

ORDER

[ ] The above-named felony offenses

[ ] and the following ancillary charges: .....

.....

are ORDERED certified to the grand jury of the Circuit Court of this jurisdiction.

The Court further ORDERS that the juvenile be:

[ ] Remanded to jail. [ ] .....

[ ] Released into the care and custody of the juvenile's parent(s), guardian or person standing *in loco parentis.*

[ ] Bail is set in the amount of $ ..... [ ] Continued on bail in the amount of $ .....

[ ] Detained in the ..... detention facility.

..... _____

DATE JUDGE

CERTIFICATION OF JUVEN E FELONY CHARGE

VA. CODE ANN. § 16.1-269.1 B and C

CASE NO(S).: [redacted]

VIRGINIA BEACH J&DR Juvenile and Domestic Relations District Court

In re: [redacted]

Present: [X] Juvenile [ ] Mother [redacted] [ ] Father UNKNOWN, UNKNOWN

[ ] _____ [X] Attorney for the juvenile [redacted] [X] Commonwealth's Attorney POWERS, PAUL

The above-named juvenile is within the jurisdiction of this Court by reason of a verified petition or warrant filed against the juvenile, alleging the commission of an offense [ ] as enumerated in Va. Code § 16.1-269.1(B) **OR** [X] as enumerated Va. Code § 16.1-269.1(C), namely:

Code Section	Charge
18.2-58	ROBBERY: BUSINESS W/GUN

[X] If proceeding pursuant to § 16.1-269.1(C), notice of intent has been given by the Commonwealth's Attorney at least seven days prior to the preliminary hearing

[X] The Court finds from the evidence presented that the said juvenile was fourteen (14) years of age or older at the time of the alleged offense and that there is probable cause to believe that the juvenile committed the offense alleged in the petition or warrant. The said charge and the following ancillary charge(s):

18.2-53.1 USE FIREARM IN FELONY 1ST OFF
18.2-22 CONSPIRACY

are ORDERED certified to the grand jury of the Circuit Court of this jurisdiction.

[ ] The Court ORDERS the warrant or petition amended to charge the following lesser-included offense(s):

[ ] The Commonwealth's Attorney has elected to withdraw the notice of intent prior to certification, and may proceed pursuant to § 16.1-269.1(A).

[ ] The Court finds that the evidence is insufficient to establish probable cause to believe that the juvenile committed the alleged offense(s) and therefore the case is dismissed.

[ ] A nolle prosequi is ordered on the motion of the Commonwealth's Attorney.

[ ] The Court finds that the juvenile was not fourteen (14) years of age or older at the time of the alleged offense(s).

The Court further ORDERS that the juvenile be:

[ ] Remanded to jail. [ ] _____

[ ] Released into the care and custody of the juvenile's parent(s), guardian, or person standing in loco parentis.

[ ] Bail is set in the amount of $ 0.00 [ ] Continued on bail in the amount of $ 0.00

[X] Detained in the VIRGINIA BEACH detention facility.

03/05/2015
DATE

Rebecca R Habel
JUDGE

FORM DC-520 (PAGE ONE OF ONE) 7/96 PDF

VIRGINIA STATE BAR ETHICAL ISSUES IN REPRESENTING THE IMPAIRED CLIENT[1]

VIRGINIA BEACH BAR ASSOCIATION SEPTEMBER 24, 2015

Paul D. Georgiadis

Assistant Bar Counsel, Virginia State Bar

[1] This is adapted from a program originally presented to the Military Law Section by Bar Counsel Edward L. Davis

Virginia State Bar's guidance on the treatment of clients with diminished capacities is found in Rule 1.14 of the Rules of Professional Conduct and its comments (attached). Further guidance may be found in Legal Ethics Opinions (LEOs) 1769, 1789, and 1816.

When in doubt, consult the Virginia State Bar Legal Ethics Hotline for a confidential consultation at 804.775.0564 or by e-mail to http://www.vsb.org/site/regulation/ethics

DISCUSSION QUESTIONS:

1) **MAY A LAWYER ETHICALLY SEEK AND ARGUE FOR THE APPOINTMENT OF A GUARDIAN FOR HIS OR HER IMPAIRED CLIENT?** (References: RPC 1.14, RPC 1.7a)

RULE 1.14 CLIENT WITH IMPAIRMENT:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacities often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that

some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] *ABA Model Rule* Comments not adopted.

[4] If the client has a legal representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If there is no legal representative, the lawyer should seek such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

[5-7] *ABA Model Rule* Comments not adopted.

DISCLOSURE OF THE CLIENT'S CONDITION:

[8] Court Rules generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

VIRGINIA CODE COMPARISON:

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 7-11 stated that the "responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client.... Examples include the representation of an illiterate or an incompetent. . . ." EC 7-12 stated that "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of

the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

COMMITTEE COMMENTARY:

The Committee adopted this Rule because it directly addresses matters only implicitly addressed in Ethical Considerations of the *Virginia Code*.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation,

2) **MAY A LAWYER REPRESENT A THIRD PERSON ON THEIR MOTION TO BE APPOINTED AS GUARDIAN FOR THE LAWYER'S IMPAIRED CLIENT?** (References: LEO 1769, RPCs 1.7 AND 1.14).

LEO: Conflict — Whether an Attorney Can Represent the Daughter, LE Op. 1769

CONFLICT — WHETHER AN ATTORNEY CAN REPRESENT THE DAUGHTER IN GAINING GUARDIANSHIP OF INCOMPETENT MOTHER WHO IS CURRENTLY A CLIENT IN AN OTHER MATTER.

February 10, 2003

You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Under the facts you have presented, you have asked the committee to opine as to whether the acceptance of the daughter as a client for this guardianship petition would trigger an impermissible conflict of interest for the legal aid office.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7 [Prof. Conduct Rule 1.7], which governs concurrent conflicts of interest, and Rule 1.14 [Prof. Conduct Rule 1.14], which addresses representing a client with a disability. Rule 1.7 [Prof. Conduct Rule 1.7] squarely addresses the conflict triggered by an attorney representing adverse parties in the same matter:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:

1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
2) each client consents after consultation.

The committee notes that under Rule 1.10(a) [Prof. Conduct Rule 1.10(a)], any conflict arising under Rule 1.7 [Prof. Conduct Rule 1.7] for one attorney would be imputed to every other attorney in the office.

Applying Rule 1.7(a) [Prof. Conduct Rule 1.7(a)] to the attorney in the present hypothetical presents insurmountable problems. This committee does not see how that attorney could fulfill either of the two requirements listed under paragraph (a), above. As for the first requirement, that the representations not be adversely affected, it seems unlikely that the representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence. Even were that hurdle cleared, the second requirement cannot be met. This committee sees no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

Should the attorney in this hypothetical actually consider his client to be incompetent, that attorney can look to Rule 1.14 [Prof. Conduct Rule 1.14] for guidance. That rule specifically addresses the difficulties in representing a client under a disability. The rule does suggest that the lawyer should, "as far as reasonably possible, maintain a normal client-lawyer relationship." However, should the lawyer reasonably believe that "the client cannot adequately act in the client's own interest," then the lawyer "may seek the appointment of a guardian or take other protective action." Rule 1.14(a) [Prof. Conduct Rule 1.14(a)] and (b) [Prof. Conduct Rule 1.14(b)]. Thus, should the attorney in this hypothetical reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

This committee's two conclusions in this matter — that there would be an impermissible conflict of interest for the attorney to represent the daughter in seeking a guardian and that, under certain circumstances, the attorney may permissibly seek appointment of a guardian under Rule 1.14 [Prof. Conduct Rule 1.14] — are not contradictory. This committee believes that in addressing this same dilemma regarding Rule 1.7 [Prof. Conduct Rule 1.7] and Rule 1.14 [Prof. Conduct Rule 1.14], the ABA correctly made a critical distinction. *See*, ABA96-404 (1997)[1]. In its opinion on this same question, the ABA distinguished between an attorney representing a third party petitioner and filing the petition himself:

> Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to this client, and certainly does not abrogate the lawyer-client relationship.

> In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a) . . .

This committee concurs with the ABA's analysis of the interplay between Rule 1.7 [Prof. Conduct Rule 1.7] and Rule 1.14 [Prof. Conduct Rule 1.14] in the present context. Neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney's office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by the daughter regarding the mother in determining this attorney's duties toward the mother with regard to Rule 1.14 [Prof. Conduct Rule 1.14]. That rule would be the proper source for guidance for this attorney should he believe the mother's competence is questionable.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
February 10, 2003

FOOTNOTES:

[1] The ABA, in this opinion, is interpreting Model Rules 1.7 and 1.14, which are substantially similar to Virginia's corresponding rules.

3) **MAY A LAWYER ETHICALLY REFUSE TO RELEASE DAMAGING PSYCHOLOGICAL REPORTS TO AN IMPAIRED CLIENT AT THE REQUEST OF THE MENTAL HEALTH PROVIDER?** (References: LEO 1789, RPCs 1.4a, 1.16e)

LEO: Client File - Whether an Attorney can Refuse to Release Information, LE Op. 1789

CLIENT FILE - WHETHER AN ATTORNEY CAN REFUSE TO RELEASE INFORMATION AND MEDICAL REPORTS TO CLIENT AT HIS REQUEST

February 20, 2004

Your request presented a hypothetical situation involving a lawyer representing a client before the Social Security Administration. The client is seeking disability benefits under Title II of the Social Security Act. The client has disabling mental impairments affecting both personality and judgment. In the course of this representation, the attorney secured a copy of a report developed by the client's treating psychologist. The psychologist had prepared the report specifically at the direction of the client's long-term disability insurance carrier to determine the client's eligibility for those benefits. The carrier paid for the report.

The attorney's standard practice is to have the client secure the report directly from the evaluator so that the evaluator can discuss with the patient the implications of any findings or opinions expressed in the medical records. However, in the present instance, the carrier directed the psychologist not to release a copy of the report to the client. The psychologist refuses to authorize release of the report to the client; the attorney cannot ascertain whether this is for medical reasons or due to the carrier's instructions. The attorney is mindful of the client's right to obtain the record from his own Social Security file were he to so request.

Under the facts you have presented, you have asked this Committee to opine as to the following questions:

1) Is a medical record obtained in the course of litigation and submitted to the tribunal in support of the client's case part of the "client's file" requiring disclosure to the client pursuant to Rule 1.16(e) [Prof. Conduct Rule 1.16(e)]?
2) Can the insurance carrier and/or the psychologist prohibit the lawyer from providing this report to the client?

When a lawyer's client requests the contents of the file, the appropriate response for the lawyer hinges on whether the representation has terminated. The ethical duty of response to such a request varies depending on whether the requester is a current or a former client. During the course of the representation, an attorney's duty to provide information to his client is governed by Rule 1.4(a) [Prof. Conduct Rule 1.4(a)], regarding communication. However, upon termination of the representation, the lawyer must follow the directives of Rule 1.16(e) [Prof. Conduct Rule 1.16(e)] regarding the disposition of the client's file.

Throughout representation of a client, Rule 1.4 [Prof. Conduct Rule 1.4] requires the attorney to ensure proper attorney/client communication, outlined as follows:

RULE 1.4 COMMUNICATION:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Generally, the rule does not direct the means by which an attorney may "keep a client reasonably informed." Depending on the circumstances, information may reasonably be provided, for example, at a meeting, in a telephone call, in a letter or other document, or via e-mail correspondence. Nevertheless, the rule requires more than just this general duty to keep the client reasonably informed; the lawyer is also required to "promptly comply with reasonable requests for information." A client's request for a copy of a particular document or documents in the file must be considered in light of that duty. While a lawyer may not be required to provide all file contents whenever requested, the lawyer must be sure to comply with 1.4(b) [Prof. Conduct Rule 1.4(b)] in responding to any reasonable client request for documents during the course of the representation. Additionally, the Committee notes that the attorney also has a duty

to the client under Rule 1.15(c) [Prof. Conduct Rule 1.15(c)] to return client property received by the attorney to the client upon request.

The lawyer's obligations regarding file contents change upon termination of the representation. Rule 1.16 [Prof. Conduct Rule 1.16] governs the termination of an attorney/client relationship. Paragraph (e) of that rule specifically addresses a lawyer's obligations regarding provision of file contents to a client upon request at the end of the representation. That paragraph states as follows:

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION:

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

The thrust of this rule is to require an attorney to provide the file at the termination of the representation, upon request of the client, one time. Paragraph (e) specifically addresses how to handle the client's file, with language breaking file contents into three categories.

The first is "all original, client-furnished documents and any originals of legal instruments or official documents." Those documents are deemed to be the client's property; the attorney must unconditionally return them to the client upon request. While the attorney may make a copy of such documents for his own use, he may not charge that copying expense to the client.

The second category includes lawyer/client and lawyer/third-party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client, research materials, and copies of prior bills. For this second category, a lawyer may charge the client for the expense of the lawyer's making a copy of the items for his own retention. However, the attorney may not condition the release of the documents upon the client's prepayment of copying expenses.

A third category presented in Rule 1.16(e) [Prof. Conduct Rule 1.16(e)] includes copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising with the attorney/client relationship. A lawyer is not required to provide those items to the client.

In applying paragraph (e)'s categories to the medical report at issue, the key category is the second one. That category in paragraph (e) includes "documents prepared by or collected for the client in the course of the representation." That language clarifies that the directive of the provision applies not only to material developed by the attorney himself but also to those documents obtained from others for the representation. A medical report from the client's treating psychologist is just such a document. Thus, the Committee opines that this medical report is part of the client file for purposes of Rule 1.16(e) [Prof. Conduct Rule 1.16(e)].

This request questions further whether either the carrier or the doctor can prohibit the attorney from providing the client with a copy of this report. In considering that question, this Committee references its previous opinion regarding carrier directives to insureds' attorneys. *See*, LEO 1723 [LE Op. 1723]. In that opinion, which dealt with a carrier's directives to an insured's attorney to work with certain limitations on the scope of representation, the Committee noted that the attorney must remain mindful that he represents the insured, not the carrier. Accordingly, in rejecting the attorney's acceptance of the restrictions, the Committee noted:

> [I]t is ethically impermissible for an attorney to agree to an insurance carrier's restrictions on the right of the insured absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client's rights will not be materially impaired by the restrictions.

Similarly, the present attorney must be mindful of the fact that he represents the patient, and not the carrier or the psychologist. This attorney should not follow the instruction of these non-clients to breach the attorney's ethical duties owed to his client, such as provision of file contents pursuant to Rule 1.16(e) [Prof. Conduct Rule 1.16(e)].

The Committee notes that while question two does not make express mention of mental health concerns as the reason for the psychologist's directive in this matter, the facts in the hypothetical do raise that possibility. Were the attorney to determine that the psychologist wants to preclude client access to the report out of concern for the effect on the client of such disclosure, the attorney may wish to consider whether Rule 1.14 [Prof. Conduct Rule 1.14] is implicated in his situation.

Rule 1.14 [Prof. Conduct Rule 1.14] provides guidance to an attorney with a client with impairment. In particular, the rule allows an attorney to take protective action with regard to his client under certain circumstances when the client cannot act in his own interest. The limited facts presented do not allow for analysis of whether Rule 1.14 [Prof. Conduct Rule 1.14] is triggered in this particular situation. However, the Committee does note that while an attorney may never withhold a medical report from a client merely at the request of some other party, in rare instances, an attorney may appropriately consider whether the client is able to act in his own interest with respect to requesting the information.

The Committee further notes that the conclusions drawn in this opinion are only those within the purview of this Committee to interpret the Rules of Professional Conduct. Comment 11 to Rule 1.16 [Prof. Conduct Rule 1.16] states that "the requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law." Interpretations of authority other than the Rules of Professional conduct would be beyond this Committee's purview. Accordingly, this opinion does not address legal questions of permissibility of disclosure of medical records under legal authority such as Virginia Code §§ 8.01-413 and 32.1-127.1:03 or the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 42 U.S.C. § 1301 *et. seq.*

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
February 20, 2004

4) **IS A LAWYER ETHICALLY BOUND BY A SUICIDAL BUT OTHERWISE COMPETENT CLIENT'S INSTRUCTIONS NOT TO PRESENT ANY DEFENSES AT THE GUILT AND SENTENCING PHASES OF THE CLIENT'S TRIAL FOR CAPITAL MURDER? IS THE CLIENT SEEKING AN UNLAWFUL OBJECTIVE? (**References: LEO 1816, LEO 1737, COMMENT 2 TO RPC 1.2, RULE 1.14b.)

LEO: Must an Attorney Comply with the Client's Request Not to Present a Defense, LE Op. 1816

MUST AN ATTORNEY COMPLY WITH THE CLIENT'S REQUEST NOT TO PRESENT A DEFENSE AT TRIAL WHEN THE CLIENT IS SUICIDAL?

August 17, 2005

You have presented a hypothetical involving an attorney's defense of a criminal defendant charged with capital murder. The client displays suicidal tendencies. He was suicidal before and during the time of the alleged crime. He has attempted to commit suicide not only prior to incarceration but also while in jail for the present charges. He has explained to the attorney that as those attempts were unsuccessful, he now intends to "commit suicide by state" by allowing the state to succeed in its efforts to have the death penalty imposed upon him. The client says that he does not believe that his actions necessarily meet all of the requirements for capital murder, since his actions were neither premeditated nor intentional. The client wants to plead not guilty and request a trial by jury because he believes that a jury is more likely to sentence him to death. In furtherance of that objective, the client has instructed the defense attorney not to present any evidence or defense during either the guilt or the penalty phases of the trial. The client has previously been evaluated for competency; the forensic psychologist concluded that the client met the legal standard for competency at that time. The defense attorney has developed evidence for both the guilt and penalty phases of the trial. This attorney does not believe that the client is making a rational, stable and informed decision since his actions are motivated by his suicidal tendencies.

Under the facts you have presented, you have asked the committee to opine as to the following:

1) Is the lawyer ethically bound by his client's instructions that the lawyer is not to present any evidence or argument during either the guilt or penalty phase of the trial?

2) What actions should the lawyer take if he believes that his client is not making an informed, rational and stable decision?
3) What action should the lawyer take if he believes that this client is pursuing an unlawful objective?

This committee first analyzed this phenomenon of criminal defendants electing execution in LEO 1737 [LE Op. 1737]. That opinion involved a competent client requesting that the attorney refrain from presenting mitigating evidence at sentencing. The opinion acknowledged the difficulty of these situations as involving both moral and ethical issues for the attorney. Also adding to the complexity of the analysis of such situations are the constitutional issues regarding criminal defendants.[1]

In LEO 1737 [LE Op. 1737], the analysis focused on the attorney's duty to pursue the lawful objectives of his client. The conclusion of that analysis was that:

> Where the attorney has a reasonable basis to believe that the client's preference for the death penalty is rational and stable, the client's decision controls.

The present scenario differs from that of LEO 1737 [LE Op. 1737] in two ways. First, the client is asking the attorney to forgo the presentation of evidence not only at sentencing but also at the guilt phase of the trial. Second, while the client has been found competent, the attorney, in whole or in part because of the suicidal tendencies, does not consider his client able to make a rational decision about this important matter.

Is the ethical dilemma different for this attorney considering evidence for trial than for the LEO 1737 [LE Op. 1737] attorney, asked only to refrain from presenting mitigating evidence at sentencing? You inquiry raises a question of the scope of the attorney's authority. Who gets to decide what, if any, evidence should be put forward : the attorney or the client? Rule 1.2 [Prof. Conduct Rule 1.2] governs issues of scope. That rule, in pertinent part, states as follows:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

Comment One to the rule elaborates upon this distinction between means and objectives:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

As acknowledged in that Comment, distinguishing between means and objectives in a particular instance is not always easy to make.

The committee does not read Rule 1.2(a)'s [Prof. Conduct Rule 1.2(a)] list of four decisions that must be made by the client in criminal cases as an exclusive list. To the contrary, as quoted above, Comment One suggests other possible examples that could arise: "questions as to the expenses to be incurred and concern for third persons." The committee concludes that Rule 1.2 [Prof. Conduct Rule 1.2] presents no exhaustive list of decisions that must be made by the client; rather, the rule and its comments provide a standard and guidance for that determination to be made on a case-by-case basis.

The Criminal Justice Section of the American Bar Association provides similar guidance for defense attorneys in the form of Standards. Pertinent here are paragraphs (a) and (b) of Standard 4-5.2, "Control and Direction of the Case," stating:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused; others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation include:

(i) what pleas to enter;
(ii) whether to accept a plea agreement;
(iii) whether to waive jury trial;
(iv) whether to testify in his or her own behalf; and
(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

Thus, rather like Rule 1.2's [Prof. Conduct Rule 1.2] delineation of decisions involving means as within the purview of the attorney, this standard places "strategic and tactical decisions" in that category.[2] The judicial decisions addressing this issue, frequently in the context of ineffective assistance of counsel claims, make similar distinctions. Courts have identified a number of decisions involving the basic objectives of the representation, and therefore in the purview of the client: whether to plead guilty[3], whether to waive a jury trial[4], whether to testify[5], whether to take an appeal[6], whether to be represented by counsel[7], what types of defenses to present[8], whether to submit a lesser-included-offense instruction[9], and whether to refrain from presenting mitigating evidence at sentencing.[10] In contrast, identified as tactical decisions of strategy, within the purview of the attorney, are which witnesses to call[11], how to conduct cross-examination[12], choice of jurors[13], which motions to file[14], whether to request a mistrial[15], whether to stipulate to easily provable facts[16], and when to schedule court appearances.[17] The judicial decisions provide two categories, which are consistent with the distinction made in Rule 1.2 [Prof. Conduct Rule 1.2] between "objectives" and "means."

The answer to your first question involves this difficult distinction regarding the scope of the attorney/client relationship. Critical to that determination for the attorney in this hypothetical is the issue raised in your second question: what if the attorney does not believe his client is able to make an informed, rational and stable decision on this matter. The facts of the hypothetical suggest that the client has had repeated suicide attempts and is seeking to limit the representation in his case as just one more suicide effort.

A client's mental state is relevant to the scope determination discussed above. Specifically, Comment 2 to Rule 1.2 [Prof. Conduct Rule 1.2] states as follows:

> In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14 [Prof. Conduct Rule 1.14].

Rule 1.14 [Prof. Conduct Rule 1.14] addresses how an attorney's representation is affected when the client has impairment. That rule provides the following direction:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [Prof. Conduct Rule 1.6]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) [Prof. Conduct Rule 1.6(a)] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Thus, the committee opines that the answers to questions 1 and 2 for this attorney are inextricably linked. The committee concludes, based on both the facts and the particular questions asked in this request, that this attorney does consider that, as described in Rule 1.14(a) [Prof. Conduct Rule 1.14(a)], his "client's ability to make adequately considered decisions in connection with the representation is diminished," as contemplated in Rule 1.14(a) [Prof. Conduct Rule 1.14(a)]. The facts state that a forensic psychologist evaluated the client and concluded that he is competent to stand trial. The committee suggests that the evaluation's conclusion does not necessarily remove this attorney and client from the application of Rule 1.14 [Prof. Conduct Rule 1.14]. The determination of competency to stand trial is specific enough such that a client may have been determined competent for trial but nonetheless under

impairment with regard to making decisions involving the matter. Also, the facts do not state when the evaluation was done; if the client's mental state has deteriorated since that time, the attorney again should consider obtaining a new evaluation.

LEO 1737 [LE Op. 1737] suggests that for an attorney properly to follow a client's directive regarding an important decision, the attorney should have a reasonable basis to believe that the client is able to make a rational, stable decision. In contrast, the attorney in the present scenario believes that the client is unable to make such a decision. Accordingly, Finally, your third question suggests that perhaps the attorney need not follow this client directive as it seeks an unlawful objective. The committee disagrees with that characterization. The imposition by the state of the death penalty is a lawful process, governed by constitutional parameters. A client's election preference for that penalty does not convert the imposition of that sentence to an unlawful act. As one commentator explained it, a client's preference for the death penalty is not "state-assisted suicide" as the state's imposition of the penalty is not a homicide.[18] In LEO 1737 [LE Op. 1737], the committee concluded that an attorney should respect a client's wishes to refrain from presenting mitigating evidence at the sentencing hearing, so long as the client was capable of a rational decision, even where that decision was "tantamount to a death wish." As the committee does not consider this client's objective "unlawful," the committee rejects the suggestion raised by the third question. However, as stated above, Rule 1.14 [Prof. Conduct Rule 1.14] may nonetheless support this attorney disregarding this particular directive of his client should the attorney conclude, as discussed above, that his client cannot make "adequately considered decisions" regarding the representation such that protective action is needed.

This opinion is advisory only, based on the facts you presented and not binding on any court or tribunal.

Committee Opinion
August 17, 2005

FOOTNOTES:

[1] A distinction can be made between the questions of what decisions should all attorneys leave to their clients to comply with Rule 1.2's [Prof. Conduct Rule 1.2] concept of scope and what decisions must any defense attorney leave to a criminal defendant to preserve that client's constitutional protections. This opinion addresses the first question, but of course any decisions of the latter variety would necessarily come within the category established by the first question. For discussion of those decisions derived from constitutional protections, such as the right to a jury trial, *see Jones v. Barnes*, 463 U.S. 745 (1983).

[2] As with Rule 1.2 [Prof. Conduct Rule 1.2], the committee reads neither category presented in Standard 4-5.2 as establishing an exhaustive list; both paragraphs (a) and (b) use the word "include" before listing examples. Decisions not listed in that standard's examples could, depending on the character of the decision, belong to either category.

[3] *See Jones v. Barnes*, 463 U.S. 745 (1963)

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See, e.g., U.S. v. Boyd*, 86 F.3d 719 (7th Cir. 1996).

[8] *See, e.g. Meeks v. Berg*, 749 F.2d 322 (6th Cir. 1984); *State v. Hedges*, 8 P.3d 1259 (Kan. 2000); *State v. Debler*, 856 S.W.2d 641 (Mo. 1993); *People v. Frierson*, 705 P.2d 396 (Cal. 1985).

[9] *People v. Segoviano*, 725 N.E.2d 1275 (Ill. 2000).

[10] *See LEO 1737 [LE Op. 1737] and cases cited therein.*

[11] *See, e.g., People v. McKenzie*, 668 P.2d 769 (Cal. 1983); *State v. Davis*, 506 A.2d 86 (Conn.1986).

[12] *Id. and see, e.g., United States v. Claiborne*, 509 F.2d 473 (D.C. Cir. 1974).

[13] *Id. and see, e.g., State v. Burnette*, 583 N.W.2d 174 (Wis. Ct. App. 1998).

[14] *Id.; and see Sexton v. French*, 163 F.3d 874 (4th Cir. 1998); *State v. Gibbs*, 758 A.2d 327 (Conn. 2000); *State v. Mecham*, 9 P.3d 777 (Utah 2000); *State v. Oswald*, 606 N.W.2d 207 (Wis. Ct. App. 1999).

[15] *See, e.g., United States v. Washington*, 198 F.3d 721 (8th Cir. 1999).

[16] *See Poole v. United States*, 832 F.2d 561 (11th Cir. 1987).

[17] *New York v. Hill*, 528 U.S. 110 (2000).

[18] Bonnie, "The Dignity of the Condemned", 74 Va. L. Rev. 1363, 1375 (1988).