The Virginia Beach Bar Association

presents

AN INTRODUCTION TO THE VIRGINIA BEACH GDC MENTAL HEALTH DOCKET

by the Honorable Gene A. Woolard
Chief Judge of the General District Court

And

ETHICS AND THE MENTALLY ILL

THE LINE BETWEEN SOCIAL AND PROFESSIONAL RESPONSIBILITY

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Guests

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Annette Miller, Esq. – Senior Trial Attorney
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Christianna Dougherty-Cunningham, Esq. – Associate City Attorney
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Corporal Alecia Driscoll – VBSO
Bridgette Manyak – Supervisor, Adult Correctional Services
Judith Fowler – Clinician, Adult Correctional Services
Adriene Jackson - Clinician, Adult Correctional Services
Ashley Evertson – NaphCare Mental Health Discharge Planner
Nicole Ellis – VA Veterans Justice Outreach Social Worker
Allison Kronenburg– Pretrial Supervisor

MENTAL HEALTH DOCKET REFERRAL FORM

TO: General District Court Judicial Assistant

RE: _____ **CASE NUMBER:** _____

CHARGE(S):

_____

_____

_____

The above-referenced individual should be referred to the Mental Health Docket for the following reasons:

_____

_____

_____

The matter is presently scheduled for trial on _____ at _____ am/pm in

Circle One: Criminal Court #1; Criminal Court #2; Traffic Court A; Traffic Court B; Traffic Court C; Civil Court; Other: _____

Law Enforcement Officers Involved: _____

Commonwealth's Attorney Involved: _____

Defense Attorney Involved: _____

INDIVIDUAL OR AGENCY MAKING REFERRAL: Circle One: Judge; Attorney; Police Officer; State Police; Sheriff; CSB; Pre-Trial; CCP; Other: _____

_____

Signature

DATE: _____

ETHICS AND THE MENTALLY ILL:

THE LINE BETWEEN SOCIAL AND PROFESSIONAL RESPONSIBILITY

A LEGAL OBLIGATION OR LACK THEREOF OFTEN CONFLICTS WITH SOCIAL RESPONSIBILITIES. AS A CRIMINAL DEFENSE ATTORNEY, DO YOU HAVE THE RIGHT TO POSSESS A SOCIAL CONSCIENCE IN THE ABSENCE OF ANY DIRECT, REPORTABLE THREAT?

ETHICS: QUESTION

1. You get a new file. You recognize the name. You've had him as a client before. You know he is schizophrenic and psychotic. You go and see him. He thinks that you are the devil. He is violent, psychotic, and off his meds. He is charged with malicious wounding. You know you need to evaluate him. You find out that your client was brought from the Norfolk jail. You discover that he plead guilty to robbery in Norfolk Circuit Court two days before you saw him. He accepted a plea of, among other terms and conditions, three years in the Virginia State Penitentiary. You find out he's been off his medications for two months. You have him evaluated. He's incompetent and likely insane at the time of the offense. Until his robbery conviction, he never had a felony conviction. You know there was no way he was competent when he plead in Norfolk. He may also have been insane at the time of the offense.

a. What do you do about the Norfolk conviction? Do you contact his attorney? Do you tell the client once he is medicated and competent? Do you tell the client's family?

b. If the attorney in Norfolk refuses to do anything, do you have any further responsibility? Assume the client is still incompetent and has no family (or refuses to tell you the names and phone numbers of his family members). Can or should you file any pleadings? A habeas?

c. Does it matter if the attorney is a member of the Norfolk Public Defender's Office or private counsel? What if the robbery conviction was here and the attorney is a member of this office?

d. Does it help to know that a robbery conviction would limit housing and program opportunities?

e. That it makes the defendant category one if he is not insane at the time of the offense?

f. What if both the Norfolk and Virginia Beach cases were nonviolent felonies?

g. What if the defendant had prior felonies?

h. What if the defendant was not evaluated prior to his Norfolk conviction, but that conviction was two months ago -right when he stopped taking his medication?

2. You were in general district court. Your client was psychotic and sent to the hospital under an emergency treatment order. She's back-- clinging to competency by her fingernails. You have a deal for a misdemeanor and time served. You're driving home down Princess Anne Road around 5:30 and see your client, in fifty degree weather, wearing a short sleeve shirt and shorts, weaving back and forth from the side of the road to the road itself. She is clapping her hands and singing to herself. You know that she meets commitment criteria. Emergency services was supposed to have civilly committed her before she left the jail.

a. Do you call the police?

b. Do you call emergency services?

c. Do you stop and pick her up?

d. Do you do nothing and hope she doesn't get killed?

e. Does it change any of your opinion to know that she is violent when challenged?

3. Your client is charged with trespassing. He is manic depressive, off his medication -but not psychotic. You receive the file October 1, 2003. His next court date is November 15, 2003. You do not believe that he is competent. The wait for Eastern State Hospital is nine months. Your client is incarcerated. On a class one misdemeanor, the most he can be sentenced to is twelve months. The most he can serve is six months of actual jail time.

a. Do you get him evaluated knowing that, if you do, he will need a restoration order and be placed on the Eastern State waiting list - or do you try to get him past the judge without the court noticing that he needs an evaluation.

b. What if your client thinks he is Robin Hood and that his mission in life is to steal from the rich and give to the poor?

c. What if he is violent, paranoid, and believes that he must rid the world of all of King John's men because they are trying to kill him?

d. What if his family wants him home?

e. What if he is homeless?

f. Does it matter in your consideration if it is summer or winter?

4. Your client wants to take a deal in order to get out of custody. His family wants him to stay in custody until they have a placement ready in a group home. He has a history of being noncompliant with medication once released from jail.

a. Do you try to get a deal for time served?

b. Do you argue against supervised probation knowing that he will probably violate?

c. Do you make a deal including placement in a home although your client will remain in custody longer?

d. Does it change your decision if it is a robbery conviction with 20 years of good behavior or petit larceny third offense charge with 2 years of suspended time?

5. Your client's family wants to discuss your client's case. Your client orders you not to have anything to do with his family. What do you do?

a. if your client is incompetent?

b. if your client is competent?

c. Is his competency status relevant?

6. Your client was charged with murder. Your psychologist determined that the defendant was insane at the time of the offense. Your client does not want to plead not guilty by reason of insanity (ngri). You feel there is no other option inasmuch as there is a witness, a confession, and physical evidence proving his guilt. He doesn't want to plead ngri because he isn't sick and knows it means a prolonged stay at the hospital.

a. Can you plead him ngri regardless of his wishes?

b. Does it change your mind if the charge is grand Larceny?

c. if your client is likely to reoffend, does it affect your choice? (i.e. -does not take his medication?)

7. You see your client in your office. He is a Paranoid schizophrenic. It is obvious that he is not taking his medication. He is incompetent. He is supposed to take his medication in order to remain out on bond in hopes that restoration can occur out patient. He is also on a waiting list for the hospital. Court is two months away. He talks about the voices across the street that come at night to beat him up. He wants a gun to take care of the voices. Suicide or homicide. It doesn't much matter. You know he means it. The prosecutor does not know how bad off your client is. He lives alone. What do you do?

a. Tell the prosecutor?

b. Call emergency services?

c. Call the Court?

d. Talk to your client about taking his medication?

e. Do nothing?

f. Eliminate potential violence. Does it change your decision?

g. If you do a, b, or c, does a conflict exist as to continued representation?

8. You represent Jane, a heroin addict, with a dual diagnosis history of both drug abuse and mental health issues. Her father refuses to bond her; her boyfriend breaks up with her. You have her evaluated. She is both competent and sane at the time of the offense. You see her several times. She has become harder to work for and with upon successive visits. She refuses to see you in the jail the day prior to court. On the day of court, you go over the plea questionnaire with her in lockup. Although she is extremely difficult to deal with, she responds appropriately to your questions (both as to the guilty plea form and as to her charges, defenses, and roles of court personnel; she is oriented to both time and place).

Her deal is for three years in the Virginia State Penitentiary with all active time suspended and NO supervised probation. She is caught in a house where an attempt capital murder shootout occurs between her roommate and a police officer. She is lucky to only be getting a possession charge. The drugs are found on her during an officer safety pat down for weapons after the shootout.

Her attorney asks her repeatedly in lockup if she wants to proceed. They can do another evaluation, continue it; etc. The client wants to go forward.

She looks unkempt on the day of court. She acts up in the courtroom. Once again she appears to be difficult but responds appropriately to all questions. The Court accepts the plea and sentences the client pursuant to the plea agreement.

She gets out of jail. Her father is waiting for her. She acts up in the car. He gets a police officer to arrest her for disturbing the peace. She is put back in custody. It is 11:45 a.m. on the same day as court. The next morning the jail social workers support a civil temporary detention order (unable to care for self/danger to self and others). Her attorney appears at the arraignment and gets the court to provide a personal recognizance bond upon her civil commitment.

Her attorney talks to the prosecutor. She will not initiate a revocation hearing if your client is convicted of the disturbing the peace charge.

a. Should Jane's attorney have gone forward with the plea once Jane became difficult in court? If she recognized that Jane might be sinking deeper into her mental illness?

b. The plea allowed Jane to get out of jail that day. What if the plea called for another six months to serve?

c. Jane had someone willing to pick her up and take her home. Does it matter if she had nowhere to go and nobody who cared?

d. By the next day the jail's social worker is supporting a civil commitment. Do you take the case back in front of the sentencing judge and ask to withdraw the plea?

e. Apparently she was not competent the next morning. If the plea is withdrawn she goes back to jail on both the felony and misdemeanor. Does it influence your decision that the prosecutor is willing to not violate your client if convicted of the misdemeanor? What if she didn't agree?

f. Your client wanted to proceed. Not proceeding meant a longer jail stay -whether for revaluation or waiting for hospitalization. Do you substitute your judgment for hers?

g. Your client is extremely paranoid. She exhibits violent tendencies. She is not threatening any one particular individual but is wrapped up in her paranoid delusions to the extent that she presents a real danger to her family, coworkers, etc. Her father sees her acting difficult in court. He later blames you for the incident outside of the jail. What if she killed someone? What is the line between attorney and social worker? Attorney and social conscience. Is there a duty to warn where there is no specific threat? Is there a duty to warn for a bad feeling from observed behavior? What if she went out a killed several people? Is it your responsibility? The jail's? The court's? Her family's?

ETHICS: ANSWERS

1. COMPETENCY. DILIGENCE. RULES 1.1, 1.3; IT IS YOUR RESPONSIBILITY TO NOTIFY THE ATTORNEY IN ORDER THAT HE CAN SEEK CORRECTIVE ACTION; IF HE REFUSES TO DO SO THAN YOU NEED TO DETERMINE WHETHER OR NOT CORRECTIVE ACTION WOULD BENEFIT THE CLIENT OR DETRIMENTALLY AFFECT HIS CURRENT STATUS.

2. UNDER THIS SCENARIO AND RULE 1.2A, AS LONG AS THE CLIENT IS COMPETENT, HIS WISHES AND DESIRES ARE PARAMOUNT.

3. THERE IS AN INHERENT CONFLICT BETWEEN RULE 1.2 (A) THAT A LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION AND (B) RULE 1.14 CLIENT UNDER A DISABILITY: 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 CLIENT-LAWYER RELATIONSHIP WITH THE CLIENT.

A. THE CLIENT WANTS TO GET OUT OF CUSTODY. IT IS NO FRAUD ON THE COURT TO TRY & SQUEEZE THE CLIENT PAST THE COURT & GET HIM OUT OF JAIL. THE ATTORNEY'S DECISION MATCHES THE CLIENT'S DESIRES IN THIS INSTANCE.

B. NO CHANGE FROM A ABOVE

C. RULE 1.6, CONFIDENTIALITY OF INFORMATION COMES INTO PLAY IN THIS INSTANCE. THE CLIENT IS VIOLENT & A DANGER TO HIMSELF OR OTHERS. HE IS A POTENTIAL THREAT. AS LONG AS HE STAYS IN CUSTODY, VIOLATING HIS CONFIDENTIALITY AS TO FUTURE THREATS IS NOT AN ISSUE. IN THIS INSTANCE, ALTHOUGH THE CLIENT WANTS OUT OF JAIL, HE NEEDS TO BE EVALUATED. THE LAWYER NEEDS TO BALANCE THE CLIENT'S DESIRES VERSUS THE EXTENT AND NATURE OF THE DISABILITY.

D. DOESN'T CHANGE EITHER A OR C ABOVE.

E. DOESN'T CHANGE EITHER A OR C ABOVE.

F. DOESN'T CHANGE C; MAY CHANGE A. MENTAL CLIENTS OFTEN TRY TO GET ARRESTED IN THE WINTER MONTHS TO GET A ROOF OVER THEIR HEAD AND "THREE HOTS & A COT."

4. UNDER THIS SCENARIO AND RULE 1.2A, AS LONG AS THE CLIENT IS COMPETENT, HIS WISHES AND DESIRES ARE PARAMOUNT. HIS FAMILY'S DESIRES DO NOT ENTER INTO YOUR DECISION. THE ANSWER TO A. IS THEREFORE YES. UNDER B., IF YOU FEEL THAT YOUR CLIENT CAN SURVIVE WITHOUT HELP, THE ANSWER IS YES. IF NOT, THEN RULE 1.14 COMES INTO PLAY. C. AGAIN DEPENDS ON THE DEFENDANT'S MENTAL STATUS. A CLIENT CAN BE DELUSIONAL BUT COMPETENT.

5. THE ANSWER IS THAT YOU CAN LISTEN TO WHAT THE FAMILY SAYS BUT MAKE NO COMMENTS ABOUT YOUR CLIENT EXCEPT WHAT IS PUBLIC RECORD. HIS COMPETENCY STATUS DOES NOT MATTER. UNDER RULE 1.6., THE CLI ENT'S CONFIDENTIALITY MUST BE MAINTAINED. THE ABOVE REQUEST DOES NOT FALL UNDER ANY EXCEPTIONS LISTED IN THE RULE. AS A PRACTICAL MATTER, GET THE JAIL TO HAVE YOUR CLIENT SIGN MULTIPLE RELEASES OF INFORMATION FOR BOTH THEM & YOU.

6. I ACTUALLY CALLED THE VIRGINIA STATE BAR'S ETHIC'S DEPARTMENT CONCERNING THIS SCENARIO INASMUCH AS I HAD A CLIENT WHO WAS INSANE, CHARGED WITH MALICIOUS WOUNDING, AND DID NOT WANT TO PLEAD NGRI. THE BAR NOTED THAT RULE 1.2 & 1.14 CAN COEXIST TO AN EXTENT IN THIS SITUATION. IT IS THE DEFENSE COUNSEL'S RIGHT TO DETERMINE WHAT WITNESSES TO CALL & WHAT DEFENSES TO USE. NGRI IS A DEFENSE. A DEFENSE ATTORNEY HAS THE RIGHT TO USE THIS DEFENSE WHEN HE OR SHE DESIRES. BE VERY, VERY CAREFUL. ONCE FOUND NGRI, ON A VIOLENT OFFENSE, THE CLIENT GOES TO THE HOSPITAL FOR AN EXTREMELY LONG TIME. YOU CAN ASK FOR THE APPOINTMENT OF A GUARDIAN AD LITEM UNDER 1.14 (B) BUT THE VIRGINIA SUPREME COURT WILL NOT PAY FOR THE GAL'S SERVICES BECAUSE SUCH AN APPOINTMENT IS NOT UNDER THEIR LIST OF ALLOWANCES.

7. YOU CAN NOT DO NOTHING. UNDER 1.6 (C) (1) YOU HAVE TO DO WHAT IS NECESSARY TO PREVENT YOUR CLIENT FROM COMMITTING A CRIME. DO THE LEAST INVASIVE STEP YOU CAN TO PROTECT YOUR CLIENT & SOCIETY FROM THE RISK OF FUTURE HARM. IF POTENTIAL VIOLENCE IS ELIMINATED, THEN CONFIDENTIALITY IS PARAMOUNT & YOU DO NOTHING. IF YOU HAVE TO COMPLETE A, B OR C THEN MAINTAINING REPRESENTATION DEPENDS ON THE EXTENT OF THE BREACH. IF THE ATTORNEY-CLIENT RELATIONSHIP IS DESTROYED BASED ON THE CLIENT'S PERCEPTIONS, THE LAWYER SHOULD WITHDRAW.

8. UNDER THIS SCENARIO AND RULE 1.2A, AS LONG AS THE CLIENT IS COMPETENT, HIS WISHES AND DESIRES ARE PARAMOUNT.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

Cross Reference Table

See also: *Virginia Code of Professional Responsibility to Virginia Rules of Professional Conduct (http://www.vsb.org/pro-guidelines/index.php/rules/vacpr-to-varpc)*

Virginia Rules of Conduct	Issue or Topic	Virginia Code of Responsibility
1.1	Competence	DR 6-101 (A)(2)
1.2(a)	Scope of Representation	***EC 7-7; EC 7-8
1.2(b)	" " " "	DR 7-101 (B)(1)
1.2(c)	" " " "	DR 7-102 (A)(7); DR 7-102(A)(6); DR7-105 (A); EC 7-5
1.2(d)	" " " "	***
1.2(e)	" " " "	DR 7-108 (A)(1)
1.3(a)	Diligence	DR 6-101 (B)
1.3(b)	" " " "	DR 7-101 (A)(2)
1.3(c)	" " " "	DR 7-101 (A)(3)
1.4(a)	Communication	DR 6-101 (C)
1.4(b)	" " " "	***EC 7-8; EC 9-2
1.4(c)	" " " "	DR 6-101 (D)
1.5(a)	Fees	DR 2-105 (A); EC 2-20
1.5(b)	Contingent Fees	DR 2-105 (C); EC 2-22
1.5(c)	Fee Splitting	DR 2-105 (D)
1.5(d)	Contingent Fees	DR 2-105 (C)
1.5(e)	Fees Sharing	DR 2-105 (D)
1.5(f)	" " " "	***
1.6(a)	Confidentiality	DR 4-101 (A), (B)
1.6(b)(1)	Disclosure Required By Law or Court Order	DR 4-101 (C)(2)
1.6(b)(2)	Disclosure to Protect Lawyer's Legal Rights	DR 4-101 (C)(4)
1.6(b)(3)	Disclosure of Client Fraud on Third Party	DR 4-101 (C)(3)
1.6(b)(4)	Disclosure of Client Information for Attorney's Death or Disability	***
1.6(b)(5)	Disclosure of Client Information for LOMAP	***
1.6(b)(6)	Disclosure of Client Information to Outside Auditor	***EC 4-3
1.6(c)(1)	Disclosure of Client's Intent to Commit Crime	DR 4-101 (D)
1.6(c)(2)	Disclosure of Client Fraud on Tribunal	DR 4-101 (D)
1.6(c)(3)	Reporting Misconduct of Another Attorney	***
1.7(a), (b)	Conflict of Interest	DR 5-105 (A), (C)
1.8(a)	Business Transaction With Client	DR 5-104 (A)
1.8(b)	Improper Use of Client Confidences or Secrets	DR 4-101 (B)(3)
1.8(c)	Client Gifts to Lawyer	DR 5-104 (A)

Virginia Rules of Conduct	Issue or Topic	Virginia Code of Responsibility
1.8(d)	Literary Rights in Subject Matter of Representation	*** EC 5-4
1.8(e)	Financial Assistance to Client	DR 5-103 (B)
1.8(f)	Nonclient Paying Lawyer's Fee	DR 5-106 (A)
1.8(g)	Aggregate Settlements	DR 5-107
1.8(h)	Limitation of Malpractice Liability	DR 6-102 (A)
1.8(i)	Interfamily Comflicts	***
1.8(j)	Proprietary Interest in Client Matter	***
1.8(k)	Imputation of Conflicts	***
1.9(a)	Conflict of Interest: Former Client	DR 5-105 (D)
1.9(b)	" " " "	***
1.9(c)	" " " "	***
1.10(a)-(e)	Imputed Disqualification	***DR 5-105 (E)
1.11(a)	Public Officials: Conflicts	DR 8-101 (A)
1.11(b)	" " " "	DR 9-101 (B)
1.11(c)	" " " "	***
1.11(d)	" " " "	***
1.11(e)	" " " "	***
1.11(f)	" " " "	***
1.12(a)	Former Judge, Arbitrator or Mediator	DR 9-101 (A): EC 5-20
1.12(b)	" " " "	***
1.12(c)	" " " "	***
1.12(d)	" " " "	***
1.13	Organization as a Client	***EC 5-18; EC 5-24
1.14	Client With Impairment	***EC 7-11; EC 7-12
1.15(a)	Safekeeping Property	DR 9-102 (A)
1.15(b)	" " " "	***
1.15(c)	" " " "	DR 9-102 (B)
1.15(d)	" " " "	***
1.15(e)(1)	Recordkeeping Requirements for Trust Accounts	DR 9-103
1.15(e)(2)	Recordkeeping Requirements for Lawyers Serving as Fiduciaries	***
1.15(f)	Accounting Procedures	DR 9-103 (B)
1.16(a)	Terminating or Declining Representation	DR 2-108 (A)
1.16(b)	" " " "	DR 2-108 (B)
1.16(c)	" " " "	DR 2-108 (C)
1.16(d)	" " " "	DR 2-108 (D)
1.16(e)	Delivery of Former Client's File	***
1.17	Sale of a Law Practice	*** EC 4-6
2.1	Lawyer as Advisor	*** EC 7-8
2.3	Lawyer as Evaluator	*** EC 5-20
2.10	Third Party Neutral	***
2.11	Mediator	***
3.1	Meritorious Claims	***

Virginia Rules of Conduct	Issue or Topic	Virginia Code of Responsibility
3.3(a)(1)	Candor Toward Tribunal	DR 7-102 (A)(5)
3.3(a)(2)	" " " "	DR 7-102 (A)(3)
3.3(a)(3)	Controlling Legal Authority	*** EC 7-20
3.3(a)(4)	False Evidence	*** EC 7-102 (A)(4)
3.3(b)	" " " "	***
3.3(c)	Ex Parte Proceedings	***
3.3(d)	Reporting Third Party Fraud on Tribunal	DR 7-102 (B)
3.4(a)	Fairness To Opposing Party & Counsel; Obstructing Access to Evidence	DR 7-108 (A)
3.4(b)	Secreting Witnesses	DR 7-108 (B)
3.4(c)	Compensating Witnesses	DR 7-108 (B)
3.4(d)	Disregarding Court Rules or Orders	DR 7-105 (A)
3.4(e)	Discovery Abuse	***
3.4(f)	Improper Trial Conduct	DR 7-105 (C)(1)-(4)
3.4(g)	Disruptive Rule Violations	DR 7-105 (C)(5)
3.4(h)	Discouraging Witnesses	***
3.4(i)	Threatening Criminal or Disciplinary Action	DR 7-104
3.4(j)	Harassing or Injuring Others	DR 7-102 (A)(1)
3.5(a), (b), (c)	Communication With Jurors	DR 7-107 (A)-(F), ***
3.5(d)	Influencing Judges	DR 7-109 (A)
3.5(e)	Ex Parte Communication With Judge	DR 7-109 (B)
3.5(f)	Disruptive Conduct Toward Tribunal	***
3.6(a), (b)	Tribal Publicity	DR 7-106
3.7(a)	Lawyer as Witness	DR 5-101 (B); DR 5-102 (A)
3.7(b)	" " " "	DR 5-102 (B)
3.7(c)	" " " "	***
3.8(a)	Additional Responsibilities of a Prosecutor	DR 8-102 (A)(1)
3.8(b)	" " " "	DR 8-102 (A)(1)
3.8(c)	" " " "	DR 8-102 (A)(2)
3.8(d)	" " " "	DR 8-102 (A)(3)
3.8(e)	" " " "	DR 7-106 (B)
4.1(a)	Truthfulness in statements to Others	DR 7-102 (A)(5)
4.1(b)	" " " "	DR 7-102 (A)(3); DR 7-102 (A)(7)
4.2	Ex Parte Communication With Represented Person	DR 7-103 (A)(1)

Rules 1.1 - 1.18 - Client-Lawyer Relationship

Rule 1.1

Competence

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

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Virginia Code Comparison

Rule 1.1 is substantially similar to DR 6-101(A). DR 6-101(A)(1) provided that a lawyer "shall undertake representation only in matters in which . . . [t]he lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters." DR 6-101(A)(2) also permitted representation in matters if a lawyer "associated with another lawyer who is competent in those matters."

Committee Commentary

The Committee adopted the *ABA Model Rule* verbatim, but added the third paragraph of the Comment to make it clear that legal representation, in which a lawyer is expected to be competent, involves not only litigation but also negotiation techniques and strategies.

In addition, the Committee added the second sentence under Maintaining Competence Comment section to note Virginia's Mandatory Continuing Legal Education requirements.

The amendments effective March 1, 2016, added the language "in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology."

Rule 1.2

Scope of Representation

(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.**

(c) **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is**

criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation

[1] 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.

[2-3] *ABA Model Rule* Comments not adopted.

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

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to

represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

[8] *ABA Model Rule* Comment not adopted.

Criminal, Fraudulent and Prohibited Transactions

[9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. *See Rule* 1.16.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. *See* also Rule 3.4(d).

Virginia Code Comparison

Paragraph (a) has no direct counterpart in the Disciplinary Rules of the *Virginia Code*. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client...." EC 7-8 stated that "n the final analysis, however, the ... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client.... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is

contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provided that a lawyer "shall not intentionally ... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law.... A lawyer does not violate this Disciplinary Rule, however, by ... avoiding offensive tactics...."

With regard to paragraph (b), DR 7-101(B)(1) provided that a lawyer may, "with the express or implied authority of his client, exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or position of his client."

With regard to paragraph (c), DR 7-102(A)(7) provided that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-105(A) provided that a lawyer shall not "advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal ... but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 stated that a lawyer "should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

Paragraph (d) had no counterpart in the *Virginia Code*.

With regard to paragraph (e), DR 2-108(A)(1) provided that a lawyer shall withdraw from representation if "continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules." DR 9-101(C) provided that "[a] lawyer shall not state or imply that he is able to influence improperly ... any tribunal, legislative body or public official."

Committee Commentary

The Committee adopted this Rule as a more succinct and useful statement regarding the scope of the relationship between a lawyer and the client. However, the Committee moved the language of paragraph (b) of the ABA Model Rule to the Comment section styled "Independence from Client's Views or Activities" since it appears more appropriate as a Comment than a Rule. Subsequent paragraphs were redesignated accordingly.

The Committee added the fourth sentence in Comment [1] requiring lawyers to advise clients of dispute resolution processes that might be "appropriate."

In Comment [7], the Committee used the verb "shall" to match the mandatory standard of the *Virginia Code* and these Rules.

The amendments effective January 1, 2004, added present paragraph (d) and redesignated former paragraph (d) as present paragraph (e).

Rule 1.3

Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

[5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity.

Virginia Code Comparison

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for

a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."

Paragraphs (b) and (c) adopt the language of DR 7-101(A)(2) and DR 7-101(A)(3) of the *Virginia Code*.

Committee Commentary

The Committee added DR 7-101(A)(2) and DR 7-101(A)(3) from the *Virginia Code* as paragraphs (b) and (c) of this Rule in order to make it a more complete statement about fulfilling one's obligations to a client. Additionally, the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy.

The amendments effective February 28, 2006, added Comment [5].

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.

Comment

[1] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.

[2- 4] *ABA Model Rule* Comments not adopted.

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance unless prior discussions with

the client have left it clear that the proposal will be unacceptable. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

Virginia Code Comparison

Rule 1.4(a) is substantially similar to DR 6-101(C) of the *Virginia Code* which stated: "A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered."

Paragraph (b) has no direct counterpart in the *Virginia Code*. EC 7-8 stated that a lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

Paragraph (c) is identical to DR 6-101(D) of the *Virginia Code*.

Committee Commentary

The *Virginia Code* had already substituted the essential notion of paragraph (a) as DR 6-101(C), thus specifically addressing a responsibility omitted from the *ABA Model Code*. The Committee believed that

paragraph (b) specifically addressed a responsibility only implied in the *Virginia Code* and that adding DR 6-101(D) as paragraph (c) made the Rule a more complete statement regarding a lawyer's obligation to communicate with a client. Additionally, the Committee added a new second paragraph to the Comment to remind lawyers of their continuing duty to help clients choose the most appropriate settlement process.

Rule 1.5

Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in a domestic relations matter, except in rare instances; or

(2) for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) **the client is advised of and consents to the participation of all the lawyers involved;**

(2) **the terms of the division of the fee are disclosed to the client and the client consents thereto;**

(3) **the total fee is reasonable; and**

(4) **the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.**

(f) **Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.**

Comment

Basis or Rate of Fee

[1] *ABA Model Rule* Comment not adopted.

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the amount, basis, or rate of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple letter, memorandum, receipt or a copy of the lawyer's customary fee schedule may be sufficient if the basis or rate of the fee is set forth.

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

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should

not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When considering whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. In any event, a fee should not be imposed upon a client, but should be the result of an informed decision concerning reasonable alternatives.

Contingent Fees in Domestic Relations Cases

[6] An arrangement for a contingent fee in a domestic relations matter has been previously considered appropriate only in those rare instances where:

(a) the contingent fee is for the collection of, and is to be paid out of (i) accumulated arrearages in child or spousal support; (ii) an asset not previously viewed or contemplated as a marital asset by the parties or the court; (iii) a monetary award pursuant to equitable distribution or under a property settlement agreement;

(b) the parties are divorced and reconciliation is not a realistic prospect;

(c) the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent;

(d) the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis; and

(e) the fee arrangement is fair and reasonable under the circumstances.

Division of Fee

[7] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

[8] *ABA Model Rule* Comment not adopted.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Virginia Code Comparison

With regard to paragraph (a), DR 2-105(A) required that a "lawyer's fees . . . be reasonable and adequately

explained to the client." The factors involved in assessing the reasonableness of a fee listed in Rule 1.5(a) are substantially similar to those listed in EC 2-20.

Paragraph (b) emphasizes the lawyer's duty to adequately explain fees (which appears in DR 2-105(A)) but stresses the lawyer's duty to disclose fee information to the client rather than merely responding to a client's request for information (as in DR 2-105(B)).

Paragraph (c) is substantially the same as DR 2-105(C). EC 2-22 provided that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee...."

With regard to paragraph (d), DR 2-105(C) prohibited a contingent fee in a criminal case. EC 2-22 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-105(D) permitted division of fees only if: "(1) The client consents to employment of additional counsel; (2) Both attorneys expressly assume responsibility to the client; and (3) The terms of the division of the fee are disclosed to the client and the client consents thereto."

There was no counterpart to paragraph (f) in the *Virginia Code.*

Committee Commentary

The Committee believes that DR 2-105 placed greater emphasis than the *ABA Model Rule* on the Full Disclosure of Fees and Fee Arrangements to Clients and therefore added language from DR 2-105(A) to paragraph (a) and from DR 2-105(D)(3) to paragraph (e). The Comment to paragraph (d)(1) reflects the Committee's conclusion that the public policy concerns which preclude contingent fee arrangements in certain domestic relations cases do not apply when property division, support matters or attorney's fee awards have been previously determined. Paragraph (e) eliminates the requirement in the *Virginia Code* that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the *Virginia Code* was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

The amendments effective January 1, 2004, added paragraph (f).

Rule 1.6

Confidentiality of Information

(a) **A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be**

detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

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

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

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

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

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

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[5] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[5a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another

attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

[5b] Compliance with Rule 1.6(a) might include fulfilling duties under Rule 1.14, regarding a client with an impairment.

[5c] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

[6] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6a] Lawyers involved in insurance defense work that includes submission of detailed information regarding the client's case to an auditing firm must be extremely careful to gain consent from the client after full and adequate disclosure. Client consent to provision of information to the insurance carrier does not equate with consent to provide the information to an outside auditor. The lawyer must obtain specific consent to disclose the information to that auditor. Pursuant to the lawyer's duty of loyalty to the client, the lawyer should not recommend that the client provide such consent if the disclosure to the auditor would in some way prejudice the client. *Legal Ethics Opinion #1723, approved by the Supreme Court of Virginia, September 29, 1999.*

Disclosure Adverse to Client

[6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[7] Several situations must be distinguished.

[7a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. *See* Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

[7b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[7c] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph

(c)(1), the lawyer is obligated to reveal such information. Some discretion is involved as it is very difficult for a lawyer to "know" when proposed criminal conduct will actually be carried out, for the client may have a change of mind.

[8] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client, the nature of the client's intended conduct, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

[9] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[10a] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle

. that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[11] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[12] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct

[13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(3) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[14] Although paragraph (c)(3) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

[15 - 17] *ABA Model Rule* Comments not adopted.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Acting Reasonably to Preserve Confidentiality

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's

supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

[19a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. See Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;

(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;

(c) Procedures addressing security measures for access of third parties to stored information;

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic

data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

Virginia Code Comparison

Rule 1.6 retains the two-part definition of information subject to the lawyer's ethical duty of confidentiality. EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." However, the definition of "client information" as set forth in the *ABA Model Rules*, which includes all information "relating to" the representation, was rejected as too broad.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

Paragraph (b)(1) is substantially the same as DR 4-101(C)(2).

Paragraph (b)(2) is substantially similar to DR 4-101(C)(4) which authorized disclosure by a lawyer of "[c]onfidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Paragraph (b)(3) is substantially the same as DR 4-101(C)(3).

Paragraph (b)(4) had no counterpart in the *Virginia Code*.

Paragraphs (c)(1) and (c)(2) are substantially the same as DR 4-101(D).

Paragraph (c)(3) had no counterpart in the *Virginia Code*.

Committee Commentary

The Committee added language to this Rule from DR 4-101 to make the disclosure provisions more consistent with current Virginia policy. The Committee specifically concluded that the provisions of DR 4-101(D) of the *Virginia Code*, which required broader disclosure than the *ABA Model Rule* even permitted, should be added as paragraph (c). Additionally, to promote the integrity of the legal profession, the Committee adopted new language as paragraph (c)(3) setting forth the circumstances under which a lawyer must report the misconduct of another lawyer when such a report may require disclosure of privileged information.

The amendments effective January 1, 2004, added present paragraph (b)(4) and redesignated former paragraphs (b)(4) and (5) as present (b)(5) and (6); in paragraph (c)(3), at end of first sentence, deleted "but only if the client consents after consultation," added the present second sentence, and deleted the former last sentence which read, "Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney."; added Comment [5b] and [6a]; rewrote Comment [13].

The amendments effective March 1, 2016, added paragraph 1.6 (d); added "*Acting Reasonably to Preserve Confidentiality*" before adding Comments [19], [19a], [20] and [21] paragraphs "a" through "f".

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, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

Comment

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

[2] *ABA Model Rule* Comment not adopted.

[3] The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to

determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[4] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See* Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[5] *ABA Model Rule* Comment not adopted.

[6] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.

[7] *ABA Model Rule* Comment not adopted.

[8] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation — specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

Conflict Charged by an Opposing Party

[9] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Lawyer's Interests

[10] A lawyer may not allow business or personal interests to affect representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. *See* Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer's romantic or other intimate personal

relationship can also adversely affect representation of a client.

Interest of Person Paying for a Lawyer's Service

[11-12] *ABA Model Rule* Comment not adopted.

[13] A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See* Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

[14-18] *ABA Model Rule* Comment not adopted.

Consultation and Consent

[19] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

[20] Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

[21–22] *ABA Model Rule* Comment not adopted.

Conflicts in Litigation

[23] Paragraph (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph(a)(2). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal

cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

[23a] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[24] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

[25] *ABA Model Rule* Comment not adopted.

Other Conflict Situations

[26] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[27] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[28] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. The lawyer should make clear his relationship to the parties involved.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw

from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(b).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *ABA Model Rule* Comment not adopted.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another

lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Virginia Code Comparison

This Rule is similar to DR 5-101(A) and DR 5-105(C). DR 5-101(A) provided that "[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances." DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Rule 1.7(b) clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the lawyer must believe that he can provide competent and diligent representation, that the representation must be lawful, and the representation must not involve asserting a claim on behalf of one client against another client in the same litigation or other proceeding before a tribunal. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it [be] obvious that [the lawyer] can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires may affect adversely the advice to be given or services to be rendered the prospective client."

Committee Commentary

Although there are few substantive differences between this Rule and corresponding provisions in the Virginia Code, the Committee concluded that the ABA Model Rule provides a more succinct statement of a general conflicts rule.

The amendments effective June 30, 2005, substituted entirely new paragraphs (a) and (b) for the former paragraphs (a) and (b); rewrote Comments [1], [4], [6], [8], [19], [23], [24] and [26]; added Comments [29] – [33].

Rule 1.8

Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

(k) While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

Comment

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. Similarly, paragraph (b) does not limit an attorney's use of information obtained independently outside the attorney-client relationship.

[2 - 5] *ABA Model Rule* Comments not adopted.

[6] A lawyer may accept ordinary gifts from a client. For example, an ordinary gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[7 - 8] *ABA Model Rule* Comments not adopted.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

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

Person Paying for a Lawyer's Services

[11] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality, Rule 1.7 concerning conflict of interest, and Rule 5.4(c) concerning the professional independence of a lawyer. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[12] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

[13-15] *ABA Model Rule* Comments not adopted.

Acquisition of Interest in Litigation

[16] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances or payment of the costs of litigation set forth in paragraph (e).

Virginia Code Comparison

With regard to paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure . . . ." EC 5-3 stated that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

Paragraph (b) is substantially similar to DR 4-101(B)(3) which provided that a lawyer should not use "a confidence or secret of his client for the advantage of himself, or a third person, unless the client consents after full disclosure."

Paragraph (c) is substantially similar to DR 5-104(B) which stated that a lawyer "shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee." EC 5-5 stated that a lawyer "should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Except in those instances in which the client is related to the donee, a lawyer may not

prepare an instrument by which the client gives a gift to the lawyer or to a member of his family."

Paragraph (d) has no direct counterpart in the *Virginia Code*. EC 5-4 stated that in order to avoid "potentially differing interests" a lawyer should "scrupulously avoid [literary arrangements with a client] prior to the termination of all aspects of the matter giving rise to the employment, even though [the lawyer's] employment has previously ended."

Paragraph (e)(1) incorporates the provisions of DR 5-103(B), including the requirement that the client remain "ultimately liable" for such advanced expenses.

Paragraph (e)(2) has no direct counterpart in the *Virginia Code*, although DR 5-103(B) allowed a lawyer to advance or guarantee expenses of litigation as long as the client remained ultimately liable.

Paragraph (f) is substantially similar to DR 5-106(A)(1) and DR 5-106(B). DR 5-106(A)(1) stated: "Except with the consent of his client after full and adequate disclosure under the circumstances, a lawyer shall not . . . [a]ccept compensation for his legal services from one other than his client." DR 5-106(B) stated that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

Paragraph (g) is substantially similar to DR 5-107, but also covers aggregated plea agreements in criminal cases.

The first portion of Paragraph (h) is essentially the same as DR 6-102(A), but the second portion of Paragraph (h) has no counterpart in the *Virginia Code*. The new provision allows in-house lawyers to arrange for the same indemnity available to other officers and employees, as long as their employers are independently represented in making the arrangement.

Paragraph (i) has no counterpart in the *Virginia Code*.

Paragraph (j) is substantially the same as DR 5-103(A).

Paragraph (k) had no counterpart in the *Virginia Code*.

Committee Commentary

The Committee added "for the advantage of himself or a third person" from DR 4-101(B)(3) to paragraph (b) as a further limitation on a lawyer's use of information relating to representation of a client.

The Committee added a further time limitation to paragraph (d)'s restriction. Borrowing language from EC 5-4, the restriction on agreements giving a lawyer literary or media rights extends through the conclusion of "all aspects of a matter giving rise to the representation."

In Rule 1.8(e)(1), the Committee retained the requirement in DR 5-103(B) that a client must "remain

ultimately liable for [litigation] expenses." However, the Committee adopted the limited exception for indigent clients that appears in Rule 1.8(e)(2).

After lengthy debate, the Committee adopted 1.8(h), which retains the general prohibition on lawyers prospectively limiting their malpractice liability to clients (which appeared in *Virginia Code* DR 6-102). However, the Committee added a limited exception that allows in-house lawyers to arrange for the type of indemnity that other officers and employees of entities may obtain. The Committee voted to insist that the client be independently represented in agreeing to any such arrangement.

In 1.8(i), the Committee adopted the *ABA Model Rule* approach, which permits lawyers who are members of the same nuclear family to represent clients adverse to each other, as long as both clients consent after full disclosure. *The Virginia Code* was interpreted to create a non-waivable per se conflict of interest in these circumstances. *See* LEO 190 (April 1, 1985).

The amendments effective January 1, 2004, in paragraph (c), added new first and second sentences; in current third sentence, deleted "as parent, child, sibling, or spouse" between the present words "lawyer" and "any substantial," and substituted "unless the lawyer or other recipient of the gift" for "except where the client," substituted "client" for "donee" and added the third sentence; added paragraph (k); in Comment [1], added the last sentence.

Rule 1.9

Conflict of Interest: Former Client

(a) **A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.**

(b) **A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:**

(1) **whose interests are materially adverse to that person; and**

(2) **about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;**

unless both the present and former client consent after consultation.

(c) **A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:**

(1) **use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or**

(2) **reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.**

Comment

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved and other lawyers may be subject to imputed disqualification under Rule 1.10. If a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs 1.9 (b) and (c) concerning confidentiality have been met.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4a] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm,

there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[4b] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the *Virginia Code*. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. *See* Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm; and Rule 1.11(d) for restrictions regarding a lawyer moving from private employment to public employment.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[6a] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6 and 1.9.

Adverse Positions

[8] Information acquired by the lawyer in the course of representing a client may not subsequently be used

or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client.

[9] Disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. A waiver is effective only if there is full disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[10] With regard to an opposing party's raising a question of conflict of interest, *see* Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, *see* Rule 1.10.

Virginia Code Comparison

Paragraph (a) is substantially the same as DR 5-105(D), although the Rule requires waiver by both a lawyer's current and former client, rather than just the former client.

There was no direct counterpart to paragraph (b) in the *Virginia Code*. Representation by a lawyer adverse to a client of a law firm with which a lawyer was previously associated was sometimes dealt with under the rubric of Canon 9 of the *Virginia Code* which provided: "A lawyer should avoid even the appearance of impropriety."

There was no counterpart to paragraph (c) in the *Virginia Code*. The exception in the last clause of paragraph (c)(1) permits a lawyer to use information relating to a former client that is in the "public domain," a use that also was not prohibited by the *Virginia Code* which protected only "confidences and secrets." Since the scope of paragraphs (a) and (b) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

Committee Commentary

The Committee believed that, in an era when lawyers frequently move between firms, this Rule provided more specific guidance than the implicit provisions of the Disciplinary Rules. However, the Committee added language to paragraph (a) requiring consent of both present and former clients. Additionally, the Committee adopted broader language in paragraph (c) precluding the use of any information "relating to or gained in the course of" the representation of a former client, rather than precluding the use only of information "relating to" the former representation.

The amendments effective January 4, 2010, in Comment [5], added the reference to Rule 1.11(d) in the last sentence.

Rule 1.10

Imputed Disqualification: General Rule

(a) **While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).**

(b) **When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:**

(1) **the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and**

(2) **any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.**

(c) **A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.**

(d) **The imputed prohibition of improper transactions is governed by Rule 1.8(k).**

(e) **The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.**

Comment

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm as defined in the Terminology section can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other.

[1a] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[1b] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit

of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[1c] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(b) and (c); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(d)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

[1d] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[2a] A lawyer or firm should maintain and use an appropriate system for detecting conflicts of interest. The failure to maintain a system for identifying conflicts or to use that system when making a decision to undertake employment in a particular matter may be deemed a violation of Rule 1.10(a) if proper use of a system would have identified the conflict.

[3 - 4] *ABA Model Rule* Comments not adopted.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

Virginia Code Comparison

There was no direct counterpart to this Rule in the *Virginia Code*. DR 5-105(E) provided that "[i]f a lawyer

is required to decline employment or to withdraw from employment under DR 5-105, no partner of his or his firm may accept or continue such employment."

Committee Commentary

The *ABA Model Code* contained a broadly inclusive imputation rule, prohibiting representation by a partner, associate, or any affiliated lawyer when a lawyer would be required to decline employment under any Disciplinary Rule. *See ABA Model Code* DR 5-105(D). The Virginia Code limited imputation to disqualification under DR 5-105. *See Virginia Code* DR 5-105(E). The Committee concluded that the provisions of the *ABA Model Rule* struck the appropriate balance between the confidentiality needs of clients and the professional needs of lawyers.

The amendments effective January 1, 2004, in paragraph (a), added the references to Rules 1.6 and 2.10(e), deleted the references to Rules 1.8(c) and 2.2; added paragraphs (d) and (e).

The amendments effective July 31, 2015, in paragraph (a), deleted "knowingly" and added "the lawyer knows or reasonably should know that..." and added Comment [2a].

Rule 1.11

Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

[3] Paragraphs (b) and (d) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for

the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (b). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

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

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

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

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

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

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

Virginia Code Comparison

Paragraph (a) is identical to DR 8-101(A).

Paragraph (b) is substantially similar to DR 9-101(B), except that the latter used the terms "in which he had substantial responsibility while he was a public employee." The Rule also requires consent of both a current

client and the former agency.

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

Committee Commentary

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

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

The amendments effective January 4, 2010, added present paragraph (e) and re-designated former paragraphs (e) and (f) as present paragraphs (f) and (g); deleted Comment [10].

Amendments effective November 1, 2013, moved the definition of "confidential government information" from paragraph (g) to paragraph (e), added a provision to paragraph (d) allowing the conflict to be waived with consent from the private client and the appropriate government agency, and adopted ABA Model Rule Comment 3, which explains why paragraphs (b) and (d) apply even when a lawyer is not adverse to a former client.

Rule 1.12

Former Judge Or Arbitrator

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge, other adjudicative officer, arbitrator or a law clerk to such a person, unless all parties to the proceeding consent after consultation.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge, other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to

ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A (2), B (2) and C of the *Virginia Code of Judicial Conduct* provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their consent after consultation. Other law or codes of ethics governing these roles may impose more stringent standards of personal or imputed disqualification.

[3] Although lawyers who serve as judges and arbitrators do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing their roles. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of paragraph (c) are met.

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

[5] Notice, including a description of the screened lawyer's representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Virginia Code Comparison

Paragraph (a) is substantially similar to DR 9-101(A), which provided that a lawyer "shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There was no counterpart in the *Virginia Code* to paragraphs (b), (c) or (d).

With regard to arbitrators and mediators, EC 5-20 stated that "a lawyer [who] has undertaken to act as an impartial arbitrator or mediator ... should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) did not permit a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) was similar in effect and could be construed to permit waiver.

Committee Commentary

The Committee adopted the *ABA Model Rule* essentially verbatim for former judges and arbitrators since it clearly provides more complete guidance to judicial officials than DR 9-101(A). However, the committee chose not to extend these provisions to mediators and other third-party neutrals, as those roles are distinguishable.

The amendments effective January 1, 2004, in paragraph (c)(1), added the word "timely" between "is" and "screened"; in paragraph (c)(2), added "parties and any" between "the" and "appropriate" and substituted "them" for "it"; added Comments [2], [3], [5].

Rule 1.13

Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees,

members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] The decisions of constituents of the organization ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Substantial justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

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

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(c) can be applicable.

[7 - 8] *ABA Model Rule* Comments not adopted.

Government Agency

[9] The duty defined in this Rule applies to government organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Government lawyers, in many situations, are asked to represent diverse client interests. The government lawyer may be authorized by the organization to represent subordinate, internal clients in the interest of the organization subject to the other Rules relating to conflicts.

Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. *See* note on Scope.

Clarifying the Lawyer's Role

[10] When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (e) recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the

lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's representation of both is controlled by the confidentiality and conflicts provisions of these Rules.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Virginia Code Comparison

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent the individual in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with non lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5 106(B) provided that a lawyer "shall not permit a person who ... employs ... him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

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, in paragraph (b)(1), inserted the word "for".

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.

Rule 1.15

Safekeeping Property

(a) Depositing Funds.

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

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

(3) No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as

follows:

(i) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution or to maintain a required minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so; or

(ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be withdrawn promptly from the trust account.

(b) Specific Duties. A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i) the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and

(ii) any unexpended balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d)

Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(1) Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.

(3) Reconciliations.

(i) At least quarterly a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

(ii) A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts

journal, cash disbursements journal, the trust account checkbook balance and the trust account bank statement balance.

(iii) At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).

(iv) Reconciliations must be approved by a lawyer in the law firm.

(4) The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. For purposes of this Rule, the term "fiduciary" includes personal representative, trustee, receiver, guardian, committee, custodian, and attorney-in-fact. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if funds, in one or more trust accounts. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

[2] Separation of the funds of a client from those of the lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

[2a] In relation to (b)(5), consent can be inferred from the engagement agreement or any consequential agreement between the lawyer and the client regarding the disbursement of fees, i.e., when earned fees are routinely withdrawn from the lawyer's trust account upon an accounting to the client, when costs and expenses of litigation are routinely withdrawn, or when other fees/costs or expenses are agreed upon in advance.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or mediation. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession. However, a lawyer may be in possession of property or funds claimed both by the lawyer's client and a third person; for example, a previous lawyer of the client claiming a lien on the client's recovery or a person claiming that the property deposited with the lawyer was taken or withheld unlawfully from that person. Additionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorneys' lien, a valid assignment executed by the client, or a lien on the subject property created by a recorded deed of trust) the lawyer has a duty to secure the funds claimed by the third party. Under the above described circumstances, paragraphs (b)(4) and (b)(5) require the lawyer either to deliver the funds or property to the third party or, if a dispute to the third party's claim exists, to safeguard the contested property or funds until the dispute is resolved. If the client has a non-frivolous dispute with the third party's claim, then the lawyer cannot release those funds without the agreement of all parties involved or a court determination of who is entitled to receive them, such as an interpleader action. A lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the

transaction.

[6] Nothing in this Rule is intended to prohibit an attorney from using electronic checking for his trust account so long as all requirements in this Rule are fulfilled. It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule. Many businesses are now converting paper checks to automated clearinghouse (ACH) debits. Authorized ACH debits that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by this rule. The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the financial institution, or the lawyer's independent record of the transaction, must show the amount, date, recipient of the transfer or disbursement, and the name of the client or other person to whom the funds belong.

Prior Rule Comparison

This rule is substantially the same as the original Rule 1.15 adopted January 1, 2000 except that the language has been substantially simplified for ease of understanding and the portions regarding the Financial Institutions duties redacted as they are appropriately incorporated into the "Trust Account Notification Agreement" signed by all Virginia approved financial institutions.

Committee Commentary

The Committee chose to modify the rule for ease of understanding and enforcement with no substantive changes to a lawyer's safekeeping property and recordkeeping requirements.

Amendments effective November 1, 2013, clarified that paragraph (a)(1) requires that funds must be placed in an identifiable trust account, while other property may be placed in a safe deposit box or other place of safekeeping.

Rule 1.16

Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(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.

Comment

[1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. *See* also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed *pro se*.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. *See* Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal