VIRGINIA BEACH BAR ASSOCIATION

PERSONAL INJURY PRACTICE FROM THE PLAINTIFF'S AND DEFENSE'S PERSPECTIVE

DISCLAIMER: The speakers who present at this CLE have graciously agreed to prepare and present material at this CLE session. The views expressed by them are entirely their own, and are not necessarily those of the Virginia Beach Bar Association. The Virginia Beach Bar Association's decision to allow these speakers to present at a CLE session does not constitute an endorsement or recommendation of them by the Virginia Beach Bar Association.

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

Certify Your Attendance Online at www.vsb.org

.

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.
A $100 fee will be assessed for failure to comply with either deadline.

Member Name: _____ **VSB Member Number:** _____

Address: _____ **Daytime Phone:** _____

_____ **Email:** _____

_____

City **State** **Zip**

Course ID Number: **VIGG011**

Sponsor: **Virginia Beach Bar Association**

Course/Program Title: **Personal Injury Practice from the Plaintiff's and Defense's Perspective**

Live Interactive * **CLE Credits (Ethics Credits):** **2.0** **(1.0)**

Date Completed:_____ **Location:** _____

By my signature below I certify

___ I attended a total of _____ (hrs/mins) of **approved CLE**, of which (_____) (hrs/mins) were in **approved Ethics**. Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)

___ The sessions I am claiming had written instructional materials to cover the subject.

___ I participated in this program in a setting physically suitable to the course.

___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.

___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

_____ _____

Date Signature

This form may be mailed to:

Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
(804) 775-0577
www.vsb.org

[Office Use Only: Live]

VIRGINIA BEACH BAR ASSOCIATION

PERSONAL INJURY PRACTICE FROM THE PLAINTIFF'S AND DEFENSE'S PERSPECTIVE

SEPTEMBER 26, 2019 3:00 PM TO 5:00 PM
VIRGINIA MUSEUM OF CONTEMPORARY ART
2200 PARKS AVENUE, VIRGINIA BEACH, VA 23451

3:00 to 4:00:

Settlements, Demands, Negotiations - Presented by John Cooper, Esquire of Cooper Hurley Injury Lawyers and Rick Sanford, Esquire of Protogyrou Law

4:00 to 5:00:

Common Ethical Issues that Arise in Personal Injury Actions - Presented by John Baker, Esquire of Cooper Hurley Injury Lawyers

Reception sponsored by Cooper Hurley Injury Lawyers to follow on site. Complimentary food and beverages will be provided.

INJURY SETTLEMENT, DEMANDS, NEGOTIATIONS AND MEDIATION

By John M. Cooper
Cooper Hurley Injury Lawyers
125 St Pauls Blvd
Ste 510
Norfolk, Virginia 23510
757-455-0077

This paper is written from the viewpoint of Plaintiff's counsel in a Virginia personal injury matter. The purpose is to provide guidance and ideas for efficient and successful resolution of cases for claimants. An insurance defense attorney will provide insights during this presentation about the insurance company/defense perspective.

A. Initial Investigation and Preserving Evidence

Every persuasive settlement demand package and successful negotiation begin with a thorough investigation during the early days of the case. Every effort must be made at the beginning of a case to preserve evidence, which may not be available if you wait until after suit is filed.

1. Securing Witnesses, Video, and Other Evidence

During every sign-up the new client is asked to immediately provide all videos and photographs. If the new client is unable to provide the information in that moment, you or your staff must follow-up with the client to secure this important information. Your new client has just been through a terrible accident and can misplace this critical evidence. Cell phones with important videos or photographs can be lost along with your evidence.

Witness interviews during the early parts of the case are critical. It is important to reach these witnesses while their memory is fresh and to get current contact information. Even if the witness is a co-worker or close friend, these early interviews are critical. People change jobs and fall out of touch. Securing this information early improves your chances of locating witnesses months later when it is time to present a demand or move forward into suit. It is also important to interview the investigating officer early in the process. Officers work hundreds of accidents and will quickly forget your particular case. Police pictures, videos, and notes will be discarded after a period of time, so get these files before they are unavailable.

Physical evidence should be maintained by you in storage or an evidence locker. Do not perform destructive testing before all interested parties are placed on notice and an agreement is reached.

2. Freedom of Information Act Requests

Freedom of Information Act (FOIA) requests should be made immediately. There are certain exceptions in which a police department, municipality, or other government agency will

withhold requested information. The most common reason that information is withheld is that the requested information is relevant to an ongoing criminal investigation. You cannot assume that the FOIA office and prosecutors are on the same page, so your FOIA request must also contain language demanding that all withheld items be preserved. Your additional preservation request will keep the items from being destroyed through periodic purges, making the items available to you through a follow-up FOIA request or in response to a subpoena *duces tecum*.

For motor vehicle accident cases, your FOIA/preservation request to law enforcement should include a request for all dash-cam and lapel camera footage. This can be especially valuable evidence in punitive damages cases. Again, your request must be made promptly because police departments do not keep the footage very long.

3. Photographing Injuries

It is not enough to have a client send you a picture of a scar many months post-accident while you are drafting a settlement demand package. It is best to take photographs immediately and maintain a catalog of photographs documenting the healing process. A series of photographs is much more impactful than a single picture of the healed wound/scar. In some cases, such as amputation cases, consider hiring a professional photographer.

4. Social Media

You must advise clients that insurance companies and defense lawyers will research all publically available information, especially the client's social media. You must caution the client about the consequences of discussing the accident or injuries. Your client must be mindful of appearances. Your client must also be instructed that it is unethical and improper to remove or destroy any evidence already posted, and that already posted information must be preserved. The client should be encouraged to use the highest privacy settings possible if they do not discontinue social media during the pendency of the case.

Social media investigations work both ways. Search public accounts of your defendants for possible admissions or inconsistent statements.

B. Insurance Companies

1. Reserves

Shortly after a claim is opened, the insurance company will always request indexing information and a description of your client's injuries. The insurance company is attempting to set a reserve. The reserve is money that is earmarked and set aside to resolve the claim in the future. Some states have complicated insurance regulations in place regarding reserves, and it is not a simple process for an insurance company to increase the reserve amount. If the reserve is not set high enough you and the adjuster may be stuck attempting to resolve the case within the original reserve amount, which may unnecessarily force cases into trial.

Therefore it is critical that you cooperate with the insurance company and sell your case the best you can on the frontend to make sure that adequate reserves are set-aside to eventually resolve the case. Your cooperation also improves the likelihood that your medium and large files will be assigned to a supervisor with more discretion improving your chances for a prompt resolution. A refusal to provide sufficient information to set a reserve on the frontend also slows down the case. If you leave the insurance carrier in the dark, it cannot set a reserve until after it receives a settlement demand package, which can delay an initial offer.

2. Understand How Claims are Assigned and Reviewed

To effectively negotiation an injury claim you must understand how a particular insurance company handles its claim. For example, some carriers provide lower level adjusters little authority and discretion on smaller claims, but will reassign the case to a new litigation adjuster once the case is filed. On larger claims, understand the case will likely be reviewed by several supervisors and committees. This is why sending incomplete demand packages is unadvisable. The assigned adjuster will either not review the demand until all materials are received or negotiate within her original authority rather than having the case reviewed again by upper management. Understanding how the claim is reviewed and handled by the insurance company will help you maneuver the claim into a position to be resolved.

Attached as Appendix Item A are two flow charts showing how a typical injury claim is reviewed and moves through an insurance company.

C. Settlement Demand Packages

The settlement demand package is the claimant's injury lawyer's most common way of communicating to the insurance company about the value of the case. The Plaintiff's counsel and staff should follow certain standard operating procedures that provide a systematic format while allowing some room for creativity in an appropriate case. Every lawyer and law firm has slight variations on the theme but the standard content items that should be considered include the following:

1. Liability Description

In the simplest of rear-end automobile accidents perhaps attachment of the police report is enough to convey the gist of the liability issue. Additional data points to consider would also include the traffic court disposition, which is typically available online, if there was a guilty plea by the defendant or a finding of guilt. The guilty plea itself would be admissible in the civil action including prepayment of the traffic ticket. The judge's finding of guilt shows the insurance company that a fact finder thought there was sufficient evidence to hold the defendant responsible in the traffic court.

To the extent there are more complicated issues, even in an automobile accident case, there should be some fuller discussion of the liability issues. Do not assume that the adjuster is paying as much attention to the issues as you are. You need to spell it out. Sometimes the adjuster is out of state and may not know our Virginia-specific rules of the road or liability

issues. For example, in a premises liability case, an explanation of the law on notice to the owner of the danger and even an attachment of jury instructions or a key case may be helpful to ensure that the decision maker on the other side knows why you think they have to pay.

If there are problematic liability issues like contributory negligence, in my opinion they should be faced head on. If there is an argument that the potential contributory negligence could not be fairly viewed as a proximate cause of the injury, then show the adjuster how the finding instructions actually work in terms of burden of proof and causation.

Additionally, the easier you make the adjuster's decision about liability the better off you will be. If you have independent witnesses who confirm your client's version of the facts then include their contact information and the summary of what they will say. Even better is to get signed witness statements which lock the witness into their testimony. This is especially true in cases that are likely to be contested like a red light/green light case. I like a detailed demand package which basically is my road map to discovery and trial if that is necessary. Other lawyers take a different approach and do not want to show too many of their cards. My approach works for me as I am trying to reach an efficient resolution of every case. To me, hiding the ball only causes delay, confusion and mistakes by one side or the other. I also want the reserves to be set high from the start.

2. Medical Bills and Records

The meat of most demand packages is the description of the injuries and providing the backup documentation. In general, insurance companies will not take your word for anything and they only believe what is proved in black and white through the medical records or otherwise. I believe that the detailed approach is better, namely, to give the adjuster everything served up in a clear way so that they can plug it into their system and come back with the highest possible value.

Every medical bill should be matched up with a medical record. Ideally, an experienced staff member putting together the package will know all of the bills and records that should be there. For example, knowing how the emergency room billing works is important. The billing for the physicians who staff the hospital's ER, the radiologist group and the facility itself are often three separate bills. The ambulance may or may not have a bill. For example, Virginia Beach which has the volunteer rescue squad does not have ambulance bills, but all the other area cities typically will. Collecting all of the medical bills and records as quickly as possible is a continuing challenge and has become somewhat more difficult over time with obstacles including the new HIPAA laws. Many local providers (particularly the Sentara hospital system) require that you use their particular form and not just one that complies with the HIPAA law. Having the right forms on hand and getting them signed early on by the client will save time.

The medical bills and records should be clearly organized in some systematic way, such as chronological order, and be complete. In today's world of electronic medical records that becomes a little trickier because the paper copies and the electronic version don't always match up screen to page. However, I think it's critical to be clear about what's attached including on each line item an indication of how many pages are attached and the dates of service reflected

therein. On bills it's important to have all of the insurance and diagnostic codes so that the insurance company gives full credit for all care. It may even be advisable to have a separate section which details every diagnostic code on a separate sheet so there's no misunderstanding.

In terms of narrative descriptions of the medical care and injury there are different styles and approaches. I think a straightforward chronological approach makes the most sense, rather than by body part or treater. I try to be detailed in the descriptions of the progress of the treatment and the symptoms without bogging down in unnecessary detail. I take a view that the description should follow how I would present the evidence at trial. I try not to emphasize unhelpful facts. For example, if an X-ray is done and it's negative, to me it makes sense to just mention that an X-ray was done on the body part but not to dwell on the absence of findings.

Diagnostic imaging and other visual information should be offered if helpful. Good car crash pictures may show impact and demonstrate the mechanism and likelihood of serious injury. Positive MRI's or x-rays showing clear fractures, post-surgical hardware, or frank disk herniations make a real impact. If scars are present, provide clear photographs of the same.

3. Humanizing the Client

I think it's critical to try to flesh out what the client thinks is important in terms of the injury and its impact on their quality of life. These unique facts separate this client from the pile of other casualty claims on the adjuster's desk. The first place to begin to get this information is in the new client interview. You want to know if your client has been inconvenienced or suffered in a way that is particular to them, whether it is an effect on their work life, family life or hobbies and interests. You want the client to tell you if they are a champion bowler and their shoulder injury has kept them from being involved in league play. You want to make sure that you know how a parent's caregiving for their small children at home has been affected by their back pain.

One way to get this information is to ask the client to draw up a couple of paragraphs about their injury and problems caused by the wreck. That way you get it in their own words to be able to more fully understand it. Sometimes you can use the client's descriptions verbatim and other times it may need to be recrafted into useable material for the demand package.

The client and their good attributes are often key at driving value. Determine what makes this person especially deserving, sympathetic, or virtuous. Spending enough time with the client and their close circle, for instance at a home visit, can prove invaluable.

4. Consideration of Prognosis and Permanency.

If at the time that you are going to present the demand package the client is not 100 percent back to how they were before the wreck, then you need to address their relevant medical future. One data point is to look at their last treatment records and see what the doctor said about prognosis and permanency if anything. Was the client asymptomatic on their last visit? If the client says that they are still having trouble from the wreck, but the records don't

clearly reflect that, you may need to encourage them to go back to see their doctor to update the physician on the current and lingering complaints.

In some cases, depending upon the insurance available and other factors, it is advisable to speak with the key doctor, orthopedist, or neurosurgeon to get them to put in writing issues related to permanency. Is an AMA permanent and partial impairment rating warranted? Sometimes the doctor will be willing to just write one up and sometimes they'll want to send the person for a functional capacity evaluation to document their range of motion and lifting restrictions. If there's going to be an effect on their ability to work, or do daily activities, it's good to have that in writing through a physical capacity form or work restriction evaluation. Is future treatment expected, and if so, what?

Depending on the insurance limits value, and the extent of future care likely needed, you might consider hiring a life care planner or cost projector to put the figures together.

I strongly suggest sitting down face to face with the doctor in these cases with permanent injuries, whenever possible. Telephone conferences would be the second best option. To me the last thing you want to do is send a letter blindly to a doctor asking these questions because you don't want them to make negative comment, perhaps without full information, and put that in writing. When I go sit down with a doctor I want to be armed with all of the medical records and information so they are fully aware of any special issues. I find that this appointment is also best done after they have recently seen the client so that they can speak about current conditions. Only when a letter from the physician addressing permanency and future medicals is in the file will the insurance company treat these issues seriously.

5. Lost Wages and Loss of Earning Capacity

Lost wages should be documented as soon as the client is able to return to work and has stopped missing time for doctor appointments. It's important to make sure that the person filling out the lost wage form understands that the worker is entitled to recapture even sick days and lost personal days that had to be used up as a result of the injury. I usually give the client a choice of having me send the lost wage form directly to their employer or personnel department or having them bring it in themselves. Once the form is completed, it's a good idea for the client to make sure they've looked at it and that it matches up with their understanding of their missed time from work.

Self-employed people present a greater challenge on the lost wage documentation. Usually, tax returns are the best way to show a drop off in income if they have been in the same field for a number of years. However, it sometimes requires greater creativity, even going to particular primary customers for independent contractors to document the loss of work for some given period of time.

I've sometimes seen insurance companies who will not respond well to a lost wage claim unless the medical records are clear that the doctor was keeping the person out of work. Sometimes the doctor will not send you the return to work slips in reply to a general HIPAA

request unless you specifically ask for them. Other times, they are contained right on the face of the medical record.

Future loss of earning capacity, if proved, can greatly drive up the economic losses. Normally, you are looking for a serious permanent injury that will make the wage earner unable to do their old work. Railroad workers must lift over fifty pounds to do that work, so a permanent lifting restriction to light duty (twenty pounds max) knocks them out of this high paying field. Even if they can still work, their remaining earning capacity may be far less per year than before. The experts needed usually are an orthopedic doctor, a vocational specialist and an economist. The doctor will need to write up the physical capacity guidelines. The vocational expert explains the effect on work options and earnings. The economist reduces to present value and reiterates the big numbers.

6. Demand Figure

Most of the time it does make sense to have a particular figure in the demand package. You need to know the insurance limits, if possible, as they can affect value. Sometimes if I think that the value of the case may exceed the liability insurance limits, I will just have a demand for the tendering of policy limits reserving my right to confirm that there are no other alternate and additional sources of recovery. Today's rules allow you to get the insurance limits on the liability policy upon presentation of $12,500.00 of medical bills, so it's easier to know what you're dealing with in terms of the coverage. To the extent there are special underinsured motorist issues, it's a good idea to address those head-on in the discussion of value with the liability carrier. I use the language that I would "recommend" to my client a settlement of a certain dollar figure, and of course, always put that the entire settlement demand package is presented without prejudice to the client's rights at the time of the trial of the matter. Normally, I have a discussion of a range of value with the client before presenting the demand package and try to get express permission before giving any particular numbers to other side.

Look over the standard jury instruction for damages applicable to the case to be sure nothing is missed in the demand. For example, punitives or other special issues should be addressed as needed.

D. Injury Settlement Negotiations

1. Timing of Settlement Demands

You don't want to present a claim for demand until the client's medical treatment is completed and the client is in a position to have the discussion. Normally you need to wait until your client is at maximum medical improvement before you really know what the value of the case is. Like any rule, there are exceptions. For example, where there is a big injury and continuing treatment but minimum insurance coverage, there may be no need to wait.

In some specialized litigation, like medical malpractice, it may be that no demand is even given pre-lawsuit. Certainly in cases like medical malpractice, premises liability or products

liability it may be that you can't really judge the value of the case and the strength of the liability arguments until some discovery has been conducted to get information only available from the defense.

Sometimes in automobile accident litigation on a medium-size case, no fruitful negotiations can take place until the defense has had some discovery. It may be that the insurance company wants to probe the pre-existing condition question by getting past medical records. Often a car crash case must at least progress to the plaintiff's deposition for the defendant to feel that they have a good enough handle on the case to fairly evaluate it. If I have a good plaintiff who will present well as both credible and likeable, then I'm often willing to wait until after the plaintiff's deposition to engage in serious negotiations.

In big cases where I'm expecting the client to be paid in the hundreds of thousands or even millions of dollars, I will typically file suit without too much pre-litigation negotiation. My main goal in those files is to get a trial date as soon as possible. My impression is that real money won't be paid until a trial date looms. If the case doesn't get resolved for a fair figure by agreement, then I know the client will have their day in court as soon as possible.

I have heard certain lawyers say that in some kinds of cases they don't engage in pre-suit negotiation. I tend to disagree with this approach. I generally want to at least have tried to settle the case before suit in most circumstances. Maybe this is misplaced optimism. There are certain insurance companies that have become so difficult to deal with on the small and medium sized cases that law firms just automatically file suit when they see that insurance company pop up as the liability carrier. It certainly is frustrating to deal with the ridiculously low offers that are sometimes being proposed by insurers in routine cases in the current environment. The general district court where you can sue up to $25,000.00 now provides an option for low ball offers in smaller cases. If the case is in the range where general district court litigation is appropriate then the ability to move the case along briskly is a possibility where the insurer is being intransigent.

2. Negotiating Techniques

The following are some negotiating tactics which might be considered in the right case:

a. Using odd figures. The insurers or their computers spit out these absurd figures to propose that end in peculiar numbers, like $57,623.76. Sauce for the goose is sauce for the gander. It is not a bad idea to come up with a highly specific and non-rounded number on occasion to keep the other side guessing and to add a sense of scientific precision to the negotiation.

b. The old “Mutt and Jeff”. This name is a reference to some old radio or TV show well before my time, but the idea is that you say to the other side “Look, I'd love to settle it for a certain figure but my client, law partner, or wife won't let me.” Also called “good cop/bad cop” and if properly deployed can be a useful technique.

c. Official track, unofficial track. I find that sometimes when there is an impasse in the numbers that it's a good idea to say to the adjuster, “My official number is x in response to your last proposal, but in the interest of getting this case moved forward I will tell you that if you

can get me the following number, $_____, I will get the case settled for that; but if not accepted that unofficial number never really happened." This technique works best when it's an adjuster who you have some positive history with and therefore you have a sense that they know what the real value of the case is. Obviously the risk here is that even though the "unofficial" number doesn't officially count if not accepted, that you have undercut your position to the extent that the case doesn't resolve at that figure.

d. Asking "What am I missing?" Seeking clarification of the basis for the other side's position can help figure out how to resolve a file. Sometimes the best thing to do with an especially low-ball figure is to inquire why the adverse insurance company is at such a low figure. "What am I missing?" If nothing else, they may make clearer for you if they haven't already some of their basis their evaluation. Perhaps, it creates an opportunity for you to fill in some gaps and give them some argument or piece of information which may help move them closer to your figure. At least you may learn more about their trial strategy. The trick is to get frank communication from the other side.

e. Know the insurer and the adjuster's authority. You want to make sure that you have some sense of how this insurance company and adjuster are going to negotiate and use that to your advantage. If you are not familiar with that insurance company you can ask other attorneys (like on the Virginia Trial Lawyers Association listserve for plaintiff's counsel). You can also just ask the adjuster themselves how things work for them and at their company. They are often willing to tell you. There are key authority issues that may effect the negotiation, like if the file goes into suit will the same adjuster keep the case or does it go to someone else. You want to know what level of authority the adjuster has. Unfortunately now in the current environment the line adjusters often have very little authority and their only goal is to basically try to get you to accept some low-ball figure. If that is the case it may be that you have to just file suit to get into the hands of the next level of authority and adjuster. Know if the claims representative needs to make lots of moves before they can cut to the chase. If necessary, do the dance of going back and forth a bunch of times to allow them to document their file the way they need to. The point is that the correct resolution may only come if you understand the game the insurer plays.

f. You get <u>more flies with honey</u> than with vinegar. Treat the adjusters as equals and as professionals. This has always been hard for me as I get overly passionate sometimes about my work and take it too personally. Realize that the claims representatives have people they have to answer to including their bosses and their bosses' bosses. Recognize that they have to check certain boxes in order to get a case resolved and help them to check the boxes necessary to get to "yes." If you give them the information that they need and respect the idea that they want to be treated pleasantly and courteously, then you have a better chance of getting a better number for your client.

3. Special Settlement Issues

a. Pre-existing Conditions

The case with no pre-existing conditions issues is rare. Some pointers on files where the client has pre-existing conditions include:

1.) Get the pre-existing records as soon as possible. You need to know what's there. The client description of the medical facts may be inaccurate. If asked for the prior records by the insurer, cough them up. In discovery, they are going to get them anyway.

2.) Know the medicine about degenerative and congenital conditions. You need to be able to convey to the adjuster (and the jury) what is a new injury versus an activation or aggravation of an existing one. If you need help or clarification, consider asking for an appointment with the treater or get a plaintiff's side IME doctor.

b. Punitives

In cases with alcohol, get the facts to see if you have a strong punitives case. If you have a BAC over 0.15, then you have the start of a statutory case for nearly automatic punitive damages. You still need to read the law about what else you need to show and hire a toxicologist depending on the facts. The increased value depends on the severity of the injury and facts about the defendant's culpability. The premium is more on a broken bone case than with mild connective tissue cases. The law was changed in Virginia last year by statute to allow admission of post-wreck conduct of the defendant, like if he failed his VASAP program or got a second DUI after the wreck.

4. Adding Value

The Plaintiff is your Exhibit 1. You need to put forth their best attributes. Work history, parenting, and perseverance in face of adversity make a big difference. The idea that your person will look like the jurors and be liked by them matters. What good will the money do? A deserving Plaintiff is key.

a. Before and After Witnesses

1.) The story of the wreck, injury and aftermath told by a neighbor, preacher, co-worker, or friend is so much more compelling than the Plaintiff whining about the accident. You need to identify these folks and interview them early in a case to measure their jury appeal. If you have great before and after witnesses, flaunt them.
2.) It is helpful to develop a set of questions to use with before/after witnesses, including the basis of the relationship, the extent of knowledge before and after the injury, the baseline health of Plaintiff before the wreck, the effects of the injury on the Plaintiff, and stories of real life examples of the injury's effects. How did the witness first hear of the wreck/injury?

b. Venue Matters in Tidewater

The Portsmouth premium is about 20% in the right case. Norfolk, Hampton, and Newport News are next best. Make sure you consider your options for filing and keeping the case in the most advantageous court. Adjusters and defense attorneys know this effects value.

c. Insurance Coverage is King

The difference between the value of a case with a corporate defendant and a commercial policy compared to an individual is significant. Not only is the jury more ready to hit a company than an individual, the factors of decision making are not the same. The case with two defendants, even just *respondeat superior*, is huge. You will get more from the case with the same injury if the defendants include a target defendant. You may also find additional sources of coverage with a business which may have additional layers of excess or umbrella insurance. These layers may create leverage for you to maximize the recovery.

E. Settlement After Suit

Settlement after suit can happen at any time from the moment of filing through the jury beginning deliberations. Issues about how and when to get a case settled after suit largely depend upon the nature of the case. Sometimes it just requires a few calls after suit is filed for the other side to come around and give you the bump or two that you need to get the case resolved. This is often the case when you file suit in a smaller, general district court case and get in the hands of a new adjuster or an attorney who recognizes that it makes sense for them to pay more quickly.

In medium size cases with a value between $30,000.00 and $100,000.00. A lot of times negotiations can be successful after initial circuit court discovery and perhaps the plaintiff's deposition. In this type of case it may be that the court's pre-settlement conference system may be useful to get a case resolved. The settlement conference system in most Virginia circuit courts allows for a settlement conference to be convened upon request of the parties or by court order. The benefits of the court settlement conference is that it creates a lower cost way than private mediation to get to a chance at resolution before a neutral. Some of the available judges are more effective than others in getting cases resolved. Typically these settlement conferences last around two hours and have a fairly high degree of success. One major drawback from the plaintiff's side is that the settlement conference judge has relatively little power to force the adjusters to be present and to come with any reasonable authority. Another issue is whether the settlement conference judge is more adept at pressuring the plaintiff to accept less than they are at encouraging the defendant to pay more.

More and more in significant personal injury litigation, mediation has become the new trial. Private mediation through various groups has become so effective that they're resolving 85 to 90 percent of the cases that come to them. In some ways mediation has become the expected end point of cases. If mediation can settle a case for a fair number that everyone agrees to without the necessity of a trial, then that's a good thing.

My approach to mediation is to come showing the other side that we are ready, willing, and able to go to trial. By having fully prepared the case for trial, it increases the chance of getting full value from the process. One major issue is timing. You need to have the mediation late enough in the process that the discovery has progressed sufficiently for everything essential to be known by that time. However, you want it to be sufficiently far out from trial that you can have some cost savings on experts and leave yourself enough time if the case doesn't settle at mediation to get your trial shoes on and shift your focus to presentation to a jury. You should send to the other side the critical information they need to make a good decision weeks in advance. I advise asking the defense attorney about when the insurance company will roundtable the case to make their decision about what value to put on the file for mediation. You want to make sure that you've given your mediation presentation materials to the other side at least a week or two before their pre-mediation meeting so that they have time to digest it. The idea is that the insurance company is going to come with authority to the mediation and so you want to have that be as high a figure as it possibly can be.

Picking the right mediator is critical. Some are more evaluative than others. I tend to prefer an evaluative mediator who is actually going to, at the appropriate time, tell people what they think if needed to get the case resolved. The other style of a more facilitative mediator is to just be a message carrier going back and forth between the parties. In terms of picking a mediator my main concern is that the defense side likes and trusts the mediator. I expect that I will have relatively good client control and can do what's necessary on my side to get the case resolved. I want the defense adjuster to listen to the mediator at the appropriate time to make sure they're being reasonable and stretching a bit. So most of the time I actually prefer to have the defense counsel pick the mediator.

Preparing the client for mediation is critical. You need to make sure that they understand that it's going to be an all-day process and they need to bring materials with them so that they can be comfortable and patient. You need to explain to them that the only number that really matters is the end-of-the-day number which, if everything goes properly, should be the most money that the insurance company is willing to pay on the case. Then at that time they can make a decision whether they want to accept that number or move forward to trial. You need to make sure that you discuss numbers and a range of value with the client in advance of the mediation so that they give you appropriate authority to negotiate. You also want to make sure that the Plaintiff understands the issues about gross and net recovery so that they can be prepared for how the negotiations will proceed. It's important that the client realize that the process of mediation is less adversarial than trial will be. The client needs to neither love nor hate the other attorney and insurance adjuster. Those folks are just doing a job. It's important for the client to keep a poker face and not be too reactive to whatever is being said by the other side during their presentation. The client who makes a good presentation should be asked to say a few words at the mediation so that the adjuster, who probably has not met them before that time, is in a position to know how they look and sound. The Plaintiff who seems authentic and not angry answering a couple of pre-chosen questions from you can make a lot of difference in the value ultimately offered at the end of mediation.

The presentation by the plaintiff's counsel needs to be detailed but not too aggressively presented. If you go overboard in your plaintiff's side presentation at mediation you may

alienate the other side and cause them to shut down in their willingness to negotiate in good faith. Also, the client may get wound up in a way that they become less able to reach a good decision for themselves even though you've warned them to understand that their side of the story is not the only side. If you go too long, you risk boring everyone and undermining the process by cutting into the time necessary to do the back-and-forth negotiations. You can keep a couple of items in your back pocket like rebuttal to defense arguments to pull out as you are teasing out information and numbers later in the process.

Be prepared for the end game of mediation. It's not a bad idea to even have a form ready for the initial settlement agreement to be signed at the end of the process if successful. Be prepared to consider issues like confidentiality which should always be reciprocal to avoid taxation. At the beginning of the process find out what everyone's schedule is, like flights home, so that you can have the best chance of concluding the case while everyone is still focused on resolution, not travel plans.

In setting up the mediation you want to make sure that you've negotiated the terms of the process with the other side to have it be successful. Make sure that you know who is coming. In a perfect world you'd want to have a person with sufficient authority to get the case resolved there in person with you. If there are multiple levels of insurance coverage you need to make sure that all the necessary players are assembled. I've heard some people like to try to get some settlement negotiations accomplished and some reasonable offer on the table before they go into mediation. I have not been as successful in getting that accomplished as I might like. Often for me, the mediation is the first negotiation. However, it never hurts to try to be as clear and communicative before the mediation as to expectations from both sides.

Liens, paybacks, and costs need to be considered and marshaled prior to mediation. If there are major paybacks beyond medical bills, those need to be negotiated and clarified well in advance of the mediation in order to have a good conversation with your client about what any given number means in their pocket. To the extent that there are complicated issues like workers' compensation liens they need to be worked out as a settlement technically can't be reached without permission of the workers' compensation carrier. Medicare set-asides or any issues about future payments like structured settlement possibilities should also be explored in advance so that at the appropriate time they can be worked out during the process with as much pre-mediation work accomplished as possible. All of these potential liens and paybacks can be used as ammunition to obtain more money from the insurer and being on top of the issues will show the other side and the mediator that you are prepared to get a resolution at mediation.

F. Conclusion

Injury cases are mostly settled and not tried. Although trial may be great for the Plaintiff with an iron-clad big case, that is the exception, not the rule. Knowing how to extract maximum value for the client by efficient and effective demand packages, negotiation and settlement is fundamental to successful injury practice.

VB BAR ASSOCIATION CLE- ETHICS OUTLINE (09/04/19)

John Baker- Cooper Hurley Injury Lawyers

A. AVOIDING CONFLICTS OF INTEREST

LEO 357- Facts: Driver and passenger are involved in a car accident caused by tortfeasor, who is the driver of a second vehicle. Driver and passenger hire attorney to represent them both for personal injuries. Passenger claims that driver was not negligent in any way. Driver's claim settles. Tortfeasor's attorney threatens to file third-party action against the driver.

Question Presented: May an attorney represent both a driver and passenger in a vehicle if alleged tortfeasor threatens to file third party action against the driver.

Opinion: The committee held that the attorney may continue to represent the passenger, assuming the passenger maintains the position that the driver was not negligent in any way.

LEO 1762- Facts: Mother was driving a vehicle. Child was sitting on the lap of a passenger in the vehicle. All three were injured in an accident. Attorney represented the mother in a claim against the tortfeasor and settled the case prior to trial. Mother now wants attorney to represent child in claim where mother serves as next friend.

Question Presented: May an attorney represent a child in an injury claim where he previously represented the child's mother in a claim arising out of the same accident?

Opinion: The committee noted that the mother has three roles in this case that need to be evaluated: 1) third party payor of child's legal expenses, 2) next friend in the child's case, and 3) former client of the attorney. The committee held that with regard to the mother's first role, the attorney must follow Rule 5.4(c) and not let the mother dictate the terms or direction of the representation. With regard to the mother's second role, the attorney's duties are to the child as his client. The mother is not a client merely because of her role as next friend. With regard to the mother's third role, the attorney must be careful that there is no arguable claim, however weak, against the mother. This would be a conflict

that the child could not waive due to the child being a minor. The committee did not address whether anyone could consent to the waiver on the child's behalf.

LEO 1561- Facts: Wife is passenger in husband's vehicle. They are involved in an accident with a second vehicle. Husband is killed. Wife has no memory of the accident. Wife asks attorney to represent her in action against husband's estate. There is a witness to the accident, but attorney is unable to locate the witness even after hiring an investigator. Wife settles claim with husband's insurance carrier prior to trial. Wife later finds a witness who can testify that the driver of the second vehicle was the sole, proximate cause of the accident. Wife asks attorney to represent her, as adminstratrix of husband's estate, in a claim against the second driver. Second driver's law firm seeks to disqualify attorney.
Question Presented: May attorney represent the administrator of decedent's estate after having represented administrator in her individual capacity?
Opinion: The committee held that there was nothing improper about the attorney representing Wife. If there were conflicts that arose due to the prior lawsuit, Wife is in a position to waive them, both individually and as administratrix of the estate.

LEO 1310: Facts: Employer was sued by plaintiff for injuries arising out of accident between employee and John Doe driver. Employee, who was driving employer's vehicle, was not a party to the lawsuit. Attorney's defense on behalf of employer was that employee was not negligent. Employee was called as key liability witness at trial. Judge found that employee was negligent, however, and entered judgment against the employer. Employee later filed a personal injury claim against John Doe, and employer's UM carrier asked attorney to defend the case. Attorney's defense in second matter would be res judicata and/or collateral estoppel.
Question Presented: May the attorney represent the insurance carrier in the personal injury claim filed by the employee driver under the employer's UM provision when the attorney earlier represented the employer/insured?
Opinion: The committee assumed, but did not decide, that no attorney-client relationship was forged between the employee and the attorney during the attorney's defense of the

employer. If this is the case, attorney is ethically permitted to represent UM carrier in the second action because 1) attorney would have no confidential information from employee and 2) interests of former client employer and current client UM carrier are not potentially adverse.

B. ATTORNEY FEES

LEO 1812- Question Presented: "Can a lawyer include in a fee agreement a provision allowing for alternative fee arrangements should client terminate representation mid-case without cause?"

Provision at issue:

> Either Client or Attorney has the absolute right to terminate this agreement. In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered. In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.

Opinion: "[A]lternative fee arrangements are permissible in contingent fee contracts so long as the alternative fee arrangements otherwise comply with the Rules of Professional Conduct."

In this case, the committee held that the second sentence is improper because it is unclear and does not fully inform the client of the basis of the fee, i.e. "whether the language is attempting to establish an alternative contractual hourly fee arrangement or is attempting to establish an agreed upon hourly rate to be used in employing a quantum meruit calculation."

The committee held that the third sentence is also "improper as it is misleading and fails to fully and properly inform the client of the lawyer's entitlement to compensation in the event the client terminates the representation prior to a recovery from the defendant."

LEO 1641- Facts: Attorney wished to insert one of following three provisions in his retainer agreement for his efforts to collect medical payments benefits, and he wanted to know which would be ethically acceptable: 1) a 10% administrative fee; 2) a flat fee based on the estimated actual cost of the paralegal providing assistance; and/or 3) an hourly fee based on the paralegal's standard hourly rate.
Question Presented: May attorneys charge clients for collecting medical payments benefits?
Opinion: The committee held that the 10% administrative fee was tantamount to a contingency fee and is not permissible for something ministerial such as collecting med pay benefits. The other two fee provisions "would not be per se improper provided that these payment provisions include appropriate language indicating that all paralegal activity will be under the supervision of an attorney in the law firm."

LEO 1696- Facts: Attorney's fee agreement stated "that the attorney will receive 30% of any amounts obtained for the client, including medical payments coverage which might exist under the tortfeasor's insurance." The tortfeasor's insurance carrier in this case "ignored and later questioned the attorney's requests for medical expense payments."
Question Presented: May attorneys charge a contingency fee for the collection of medical payments benefits from the tortfeasor's insurance carrier?
Opinion: The committee held that under these circumstances, the fee arrangement "would not be improper" because the work was "a more complex task" and not merely ministerial.

LEO 1218- Facts: Attorney A took a number of cases from Attorney B whose license was suspended for 60 days. Attorney A settled two personal injury matters after taking over the cases. Attorney A had an agreement with Attorney B whereby they would split the fees. Attorney A's plan was to disburse amounts to Attorney B which represented his fee for "services rendered by him prior to the suspension."
Question Presented: May attorneys split fees with an attorney whose license has been suspended?

Opinion: The committee held "that it is not improper for the suspended or disbarred lawyer to receive *quantum meriut* compensation for services rendered prior to suspension or disbarment." One exception to this would be if the payment "would permit the lawyer to profit from his own wrongdoing."

LEO 1739- Facts: Law Firm A solicits attorney referrals and promises referral fees to referring attorneys or firms. Client is advised of the arrangement in writing in advance and must consent. It is also disclosed to the client that the referring attorney or firm will not participate in the matter and will assume no responsibility.
Question Presented: What degree of responsibility must an attorney have in a client matter to accept a referral fee?
Opinion: The committee held that the revised Rule 1.5(e), which eliminated the paragraph requiring each attorney in a fee-splitting arrangement to assume full responsibility of a client, now permits an attorney to receive a referral fee without assuming any responsibility.

LEO 1831- Facts: Attorney is appointed to serve as a guardian *ad litem* for a minor plaintiff in a personal injury case. The matter is settled, and the insurance carrier petitions the court to approve the settlement. The insurance carrier intends to pay the guardian *ad litem's* fee for services rendered.
Question Presented: Can the guardian *ad litem* ethically accept payment for services rendered from the insurance carrier?
Opinion: The committee opined that the guardian *ad litem* "may ethically accept payment of her fee by a third party." The guardian *ad litem* shall not permit the insurance carrier to "direct or regulate [her] professional judgment in rendering such services." The guardian *ad litem* also owes the duty of confidentiality to the minor. Court approval of the settlement, which must include the amount of and payor of the fee, also serves as an added protection.

C. OBLIGATIONS TO CLIENTS

LEO 0570- Facts: Attorney believes that client is or has become mentally disabled.
Question Presented: What actions may an attorney who believes her client is mentally disabled take?
Opinion: The attorney is not obligated "to petition the court for a committee or other personal representative. The attorney is entitled to do so, however, if she deems it to be in the best interest of her client."

> Rule 1.14 provides further guidance on this issue. An attorney may under certain circumstances reveal certain information about the client, but only to the extent necessary to protect the client's interests.

LEO 1289- Facts: Attorney negotiates a settlement in a personal injury matter on behalf of a client. The settlement was reached in part "based upon a bill which was later determined to have been not actually incurred by the client but by an individual with the same name as the client and provided in error by the treating hospital."
Question Presented: What must an attorney do if he reaches a settlement with the insurance carrier based in part upon a bill that the attorney later finds out did not exist?
Opinion: The committee held this is a mutual mistake of fact that "does not constitute any form of fraud perpetrated on the insurance company." They attorney's duty is therefore to his client, and the client would have to consent to the release of this secret after full disclosure by the attorney of its repercussions. The attorney would have to be honest, however, if the issue was raised later by the insurance company. The attorney should also advise the client that the insurance company may have a future claim for unjust enrichment.

LEO 0598- Facts: Insurance company staff counsel represents a defendant in a personal injury action. Through the representation, the attorney learns information from defendant that would jeopardize coverage if the insurance carrier found out about it.
Question Presented: Can an insurance company attorney reveal information obtained from the client to the insurance company if it would jeopardize coverage?
Opinion: The committee held the attorney's duty is to the client and not to the insurance company. "Accordingly, except with the consent of the client, the insurance carrier's

employee attorney is barred from disclosing or using confidences and secrets . . . for example, any defense to policy coverage gained through the attorney/client relationship with the attorney's insurance carrier's insured."

LEO 1787- Facts: Attorney sends documents to an expert witness containing attorney's mental impressions and thoughts about the case. Attorney is worried that when case gets into litigation, opposing counsel may request documents from the expert via a subpoena *duces tecum*. Attorney is concerned that he may learn of the subpoena too late, and that the documents might be disclosed before he can file a Motion to Quash or Motion for Protective Order.

Questions Presented: 1) Can the attorney request that the expert notify him of any request for documents protected by attorney work-product and delay production of the documents "to allow the attorney the time to either have the subpoena quashed or a protective order entered?"

2) "May an attorney ever enter into an agreement with a third party to keep privileged information confidential if the purpose of that agreement is to prevent the third party from disclosing that information to an opposing party?"

Opinion: The committee opined that attorneys often need to share confidential information with experts, and that the attorney does have a duty to take steps to prevent the disclosure of such information. Such agreements with experts are appropriate to ensure that confidential information is not compromised by the expert. The committee also noted, however, that the attorney may not direct the expert to violate a rule of court and disregard the subpoena.

D. UPHOLDING CLIENT CONFIDENTIALITY

LEO- 0629- "It is improper for an attorney who was consulted in a professional capacity during a social engagement, to reveal the contents of that consultation, absent the consent of the client."

LEO 1079- Facts: Client signed an agreement to reimburse his health insurance company if he recovered from a third party who caused his injury. Attorney settled case and client does not want the attorney to disclose settlement to the insurance company.
Question Presented: May the attorney disclose the settlement to the insurance company "without violating any client confidences or secrets?"
Opinion: The committee opined that the client perpetrated a fraud upon the insurance company by not disclosing the settlement. The attorney was therefore permitted to reveal this information to the insurance company.

LEO 0952- Facts: Attorney makes a demand authorized by the client to settle a personal injury matter. The insurance company makes offer that is within the range of value authorized by the client. The client dies before the offer can be accepted. The administrator of the estate authorizes the attorney to accept the offer.
Question Presented: Whether it is improper for the attorney not to disclose the client's death to the insurance company.
Opinion: The committee opined that the attorney need not "disclose the death of his client to the insurance company absent a direct inquiry from the insurance company regarding his client's health." The attorney should, however, to avoid the appearance of impropriety, disclose the death at the time the offer is accepted.
Committee Notes: "If the client's death would arguably affect the settlement, failing to disclose the death might violate Rule 3.3(a)(2) and Rule 4.1(b), which prohibit a lawyer from knowingly failing to disclose a fact if disclosure is necessary 'to avoid assisting a criminal or fraudulent act by a client.'"

LEO 1477- Facts: Client signed Interrogatory Answers under oath that are later found to be incorrect. Client wants attorney to try and settle the case before sending amended responses.
Questions Presented: Whether, "1) the attorney may attempt a settlement without first amending the incorrect interrogatory answers, and 2) whether the attorney is permitted to enter settlement negotiations as long as he does not verbally reaffirm the incorrect interrogatory answers, but rather remains silent."

Opinion: The committee opined that the attorney could not attempt to negotiate a settlement without first amending the incorrect answers, and remaining silent on the issue was improper as well. To do either would violate multiple duties, and any settlement would be fraudulently induced.

LEO 1270- Facts: Attorney finds out after settling a personal injury case for a client that the client is "being held in jail under an assumed name on a[n] [unrelated] criminal matter." Attorney advises client to inform the authorities of his real name and hire a criminal attorney.
Question Presented: What are the ethical obligations of reporting or not reporting the "double identity?"
Opinion: The committee opined that the attorney, given the circumstances, "may have an ethical duty not to reveal [the] former client's true identity."

E. RULES OF PROFESSIONAL CONDUCT

Rule 1.4

(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.

Rule 1.5

(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.

Rule 1.14

(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.

Rule 3.3(a)-(b)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

* * *

Rule 3.4(d)

A lawyer shall not:

* * *

d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

* * *

Rule 4.1

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Rule 5.4

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profitsharing arrangement; and

(4) a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client

* * *

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

* * *

Rule 8.4

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;

(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.