VIRGINIA BEACH BAR ASSOCIATION

RECENT ETHICS UPDATE AND TOP TEN WAYS TO AVOID A BAR COMPLAINT DURING COVID

OCTOBER 21, 2020
3:00 PM TO 5:00 PM
ZOOM WEBINAR

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 BEACH BAR ASSOCIATION

RECENT ETHICS UPDATE AND
TOP TEN WAYS TO AVOID A BAR COMPLAINT DURING COVID
OCTOBER 21, 2020
3:00 PM TO 5:00 PM
VIA ZOOM

3:00 to 4:00:

Recent Ethics Update - Presented by Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar

4:00 to 5:00:

Top Ten Ways to Avoid a Bar Complaint During COVID – Presented by Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar

Prescott L. Prince currently serves as an Assistant Bar Counsel with the Virginia State Bar. In that capacity, which he has held since May of 2012, he prosecutes attorney ethical misconduct.

Prior to his current position, CAPT Prince served on active duty with the United States Navy JAG Corps, having been recalled from reserve status in June of 2007. While on active duty, he served as Deputy Chief Defense Counsel for the Office of Military Commissions, where he was engaged in the representation of individuals alleged to have committed war crimes against the United States of America and who were detained at Guantanamo Bay, Cuba. His responsibilities also included supervising all naval personnel assigned to the Office of the Chief Defense Counsel. Prior to that assignment, CAPT Prince served as a Rule of Law Officer attached to Task Force 134 (Detainee Operations) in Iraq.

Prior to his recall to active naval service, Mr. Prince was the managing partner of the Associated Law Firm of Clarke and Prince, maintaining a general law practice with emphasis in the areas of criminal law and family law. As a criminal defense attorney, he frequently represented individuals charged with the most serious of crimes and was lead counsel in the defense of a number of high profile cases in the Richmond area. His family law practice included representation of clients involved in complex divorce and equitable distribution matters as well as custody and support issues.

Mr. Prince commenced service as an active duty Navy Judge Advocate immediately upon graduation from Washington and Lee Law School and admission to the Virginia State Bar. His assignments during his initial period of active duty included serving as a Military Defense Counsel and as Discipline Officer and Asst. Legal Officer on board USS JOHN F. KENNEDY (CV-67). He continued his service as a Reserve Judge Advocate until his recall. His reserve assignments included serving as Commanding Officer of the reserve unit that provided legal support for the Naval District of Washington and Commanding Officer of the reserve unit that provided legal support to the Commander of the U.S. Navy Atlantic Fleet. CAPT Prince retired from the Naval Reserve in May of 2012

Mr. Prince was graduated from Washington and Lee Law School in 1983 and was admitted to the Virginia State Bar the same year. He was awarded his Bachelor of Arts Degree from Davidson College in 1976 and he earned a Master of Arts Degree in Psychology (emphasis in clinical) from Radford University in 1980.

Mr. Prince currently serves as Immediate Past Chair of the Virginia State Bar Military Law Section and is a past Chair of the Virginia State Bar General Practice Section. Mr. Prince frequently presents programs on ethics and trial practice to various professional groups in Virginia.

HOT TOPICS IN LEGAL ETHICS (2020)

Presented by

Prescott L. Prince
Assistant Bar Counsel
Virginia State Bar

1. Amendments to Rule 1.15 - Trust account recordkeeping. (Eff. March 15, 2020).

The changes to the Rule were initially proposed by the Discipline Department based on feedback from investigators that lawyers are frequently confused about the arcane terminology in the current rule, some of which is out of step with the way certain terms are used in the accounting field. The Discipline Department surveyed language used in other states and drafted this proposal to simplify and clarify the trust account recordkeeping requirements, using terminology that is more easily understood and spelling out in the body of the rule exactly what information must be included in the required records.

The changes to paragraph (c) remove the term "cash" and clarify that a check register can be used as the required journal, if it includes the necessary information. The change also removes the term "subsidiary ledger" to clarify that the rule only requires a separate record or ledger page tracking funds received and disbursed for each client.

The same terminology is carried over to paragraph (d)(3), on reconciliations, and paragraphs (d)(3)(ii) and (d)(3)(iii) are revised to include an explanation of exactly what steps must be taken to complete the required reconciliations. The amendments also require all reconciliations to be completed monthly, since that is consistent with the usual bank statement reporting period, and will allow lawyers to identify and correct errors more quickly and easily. Under the old rule, some reconciliations are monthly, and some are quarterly; the amended rule standardizes the requirement so all reconciliations must be done monthly. The amendments retain the requirement that a lawyer must approve all reconciliations and add a requirement in Comment [5] that any discrepancies discovered in the reconciliation process must be explained, and that explanation must also be approved by the lawyer.

Below provides a markup of the changes that were approved by the Court:

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

(1) ~~Cash r~~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~~. These journals shall include, at a minimum: identification of the client

or matter; date and amount of the transaction; name of the payor or payee; manner in which the funds were received, disbursed, or transferred; and current balance. A checkbook or transaction register may be used in lieu of separate receipts and disbursements journals as long as the above information is included.

(2) A ~~subsidiary~~ client ledger ~~containing~~ with a separate ~~entry~~ record for each client, other person, or entity from whom money has been received in trust. Each entry shall include, at a minimum: identification of the client or matter; date and amount of the transaction; name of the payor or payee; source of funds received or purpose of the disbursement; and current balance.

~~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.~~

(d) Required Trust Accounting Procedures

* * * * *

(3) The following ~~R~~reconciliations must be made monthly and approved by a lawyer in the law firm:~~.~~

(i) ~~At least quarterly a~~ reconciliation ~~shall be made that reflects the trust account~~ of the client ledger balance for each client, other person, or ~~other~~ entity on whose behalf money is held in trust;~~.~~

(ii) A ~~monthly~~ reconciliation ~~shall be made~~ of the ~~cash~~ trust account balance, adjusting the ending bank statement balance by adding any deposits not shown on the statement and subtracting any checks or disbursements not shown on the statement. This adjusted balance must equal the balance in the checkbook or transaction register; and ~~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 of the trust account balance ((d)(3)(ii)) and the client ledger balance ((d)(3)(i)). The trust account balance must equal the client ledger balance. ~~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.~~

Comment

* * * * * *

[5] The reconciliations required by paragraph (d)(3) must include an explanation of any discrepancy discovered and how it was corrected. This explanation must be approved by the lawyer who approves the reconciliations.

2. Proposed Rule 1.8(k)—Ban on Sexual Relations with Clients. (Comment Period Ended March 20, 2020).

The Ethics Committee is proposing an amendment to Rule 1.8 by adding paragraph (k) prohibiting a lawyer from having sexual relations with a current client unless the relationship predated the lawyer-client relationship. This proposed amendment brings the rule in line with the ABA Model Rules and the rules of at least 43 other jurisdictions that address this issue through a rule and/or comment rather than merely an advisory ethics opinion. The proposed amendments also add three new comments, [17]-[19], explaining the purposes and scope of the prohibition, as well as the fact that it is not imputed to other lawyers in a firm. Current paragraph (k), governing the imputation of conflicts arising under Rule 1.8, is renumbered to become paragraph (l).

The issue of sexual relations with a client is currently addressed in Legal Ethics Opinion 1853, which follows much of the same reasoning as the proposed comments to Rule 1.8 and concludes that sexual relations with a client will be prohibited in many cases. The proposed amendments establish a bright-line rule to that effect, based on the same concerns about conflict of interest, imbalance of power in the relationship, the problematic issue of informed consent and overreaching.

The proposed rule states: ***"[a] lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."***

The proposed comments to Rule 1.8:

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Like a conflict arising under paragraph (i) of this Rule, this conflict is personal to the lawyer and is not imputed to other lawyers in the firm with which the lawyer is associated.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (k) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

3. Amendment to Rule 4.4 adding paragraph (b)—Duties when attorney receives inadvertently misdelivered privileged information. (Eff. December 1, 2019).

The Ethics Committee proposed adding a new paragraph (b) to Rule 4.4 (Respect for Rights of Third Persons), including adding two new Comments [2] and [3]. The amendments codify the guidance currently found in LEOs 1702 and 1871 regarding a lawyer who receives privileged information that was inadvertently sent. Specifically, paragraph (b) requires that a lawyer who receives information relating to the representation of the lawyer's client and who knows that the information is privileged and was inadvertently sent must immediately terminate review or use of the information, promptly notify the sender, and abide by the sender's instructions, if applicable, to return or destroy the information.

Comment [2] further explains the scope of the rule by defining when a document is inadvertently sent and when the lawyer knows or reasonably should know that that is the case. Comment [2] also clarifies that the rule does not apply to information that was wrongfully obtained rather than inadvertently obtained, and that it only applies to metadata if the metadata is privileged and inadvertently disclosed.

Finally, Comment [3] explains that the rule, and LEO 1702, are justified by the extreme importance of preserving lawyer-client confidences, and that the duties established by the proposed rule override the lawyer's duty of communication under Rule 1.4. Comment [3] concludes by distinguishing situations involving pre-trial discovery and other situations where rules of court or other law permit the receiving lawyer to contest a sender's claim of privilege following an inadvertent disclosure; the proposed rule does not prohibit such actions and the recipient is permitted to sequester the inadvertently sent document pending use of such a process. See also LEO 1871.

When the rule change was presented to Council in February 2019 a concern was raised that the proposed Rule 4.4(b) would prohibit the receiving lawyer from reporting fraud on the tribunal

under Rule 3.3(d), and the proposed rule change was sent back to the Committee for further study. The Committee considered this issue at its April meeting, and concluded that no further changes to the rule were needed. First, the Committee believes that Rule 4.4(b) does not limit a lawyer's duties under Rule 3.3(d) to report fraud on a tribunal by a third party, once that fraud is clearly established. Second, in any situation where fraud on a tribunal is a concern, the matter would be before a tribunal for purposes of proposed Comment [3], which allows the receiving lawyer to raise the matter to the court for resolution. Finally, the Committee was concerned about the possibility that creating an exception to the rule would create a slippery slope – if lawyers are permitted to review and use information that they believe establishes a fraud on a tribunal, then a lawyer who receives inadvertently disclosed information would be much more likely to review the information hoping to find justification to use the information to her client's advantage.

The Committee considered the ABA approach reflected in ABA MR 4.4(b) which only requires the receiving lawyer to notify the sending lawyer of the inadvertent delivery. In addition, ABA MR 4.4(b) is broader than the Virginia proposal in that it applies to *any* documents that were inadvertently sent or misdelivered. Our paragraph (b) applies only to *privileged* documents that were inadvertently delivered. The Committee rejected the ABA approach, favoring a rule amendment that will essentially codify the conclusions reached in LEO 1702. The conclusions reached in LEO 1702 were based on ABA Formal Op. 92-368 (1992), which the ABA Ethics Committee later withdrew in ABA Formal Op. 06-440 (2006) after ABA MR 4.4(b) was amended in 2002.

To this day, there remains considerable controversy over whether ABA MR 4.4(b) goes far enough in spelling out the duties of a lawyer that has received documents by inadvertent misdelivery. Some states, like Virginia, require more of the receiving lawyer than merely notifying the sending lawyer, i.e., stop reading, notify and return or destroy the misdelivered documents.

Rule 4.4(b) becomes effective December 1, 2019:

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information.

Comments

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or

electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently and is privileged, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures and to abide by any instructions to return or destroy the document or information that was inadvertently sent. Regardless of whether it is obvious that the document or electronically stored information was inadvertently sent, the receiving lawyer knows or reasonably should know that the document or information was inadvertently sent if the sender promptly notifies the receiving lawyer of the mistake. If the receiving lawyer lacks actual or constructive knowledge that the document or electronically stored information was inadvertently sent, then paragraph (b) does not apply. Similarly, the lawyer may know that the document or electronically stored information was inadvertently sent but not that it is privileged; in that case, the receiving lawyer has no duty under this rule.

This Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, ''document or electronically stored information'' includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer and that it contains privileged information.

[3] Preservation of lawyer-client confidences is such a vital aspect of the legal system that it is appropriate to require that lawyers not take advantage of a mistake or inadvertent disclosure by opposing counsel to gain an undue advantage. See LEO 1702. This means that the lawyer is prohibited from informing the lawyer's client of relevant, though inadvertently disclosed, information, and that the lawyer is prevented from using information that is of great significance to the client's case. In such cases, paragraph (b) overrides the lawyer's communication duty under Rule 1.4. As stated in Comment 1, diligent representation of the client's interests does not authorize or warrant intrusions into privileged communications.

Where applicable discovery rules, agreements, or other law permit the recipient to contest the sender's claim of privilege, use of such a process does not constitute "use" as prohibited by this rule, and the recipient may sequester the document or information pending resolution of that process. When there is no such applicable law, such as in a matter that does not involve litigation, the recipient lawyer must abide by the sender's instructions to return or destroy the document. See also LEO 1871.

4. Supreme Court Rejects Proposed "Needle in a Haystack" Comment. (October 24, 2019).

Rule 3.8(d) requires a prosecutor "make timely disclosure" of the "existence of evidence" that the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. But the rule does not specify what form that disclosure must take, nor whether disclosure requires more than mere production of the evidence. The Ethics Committee believed "disclosure…of the existence of evidence" means more than just making the evidence available to be found by the defense, and particularly that a "needle in a haystack" scenario is not compatible with the prosecutor's obligations under this Rule. After all, commentary to the Rule speaks to the prosecutor serving as a "minister of justice" whose duty is not merely to convict but to see that "justice is done," and that the accused is accorded procedural justice. Comment [1] to Rule 3.8.

The Committee also felt that, even when there was no intentional concealment of exculpatory evidence, a prosecutor has not "disclosed" the existence of exculpatory evidence when he or she includes one piece of exculpatory evidence within hundreds or thousands of pages of non-exculpatory evidence. The proposed comment made explicit that the prosecutor's duty to disclose the "existence of [exculpatory] evidence" requires the prosecutor to do more than merely produce or make available the exculpatory evidence.

After a long history of failed attempts to address a prosecutor's ethical obligations when turning over exculpatory evidence buried amidst a large production of documents or data, the Supreme Court rejected the VSB's petition to add a proposed Comment [5] to Rule 3.8 (Additional Responsibilities of a Prosecutor). The VSB's proposals faced vigorous and sometimes vituperative opposition from state and federal prosecutors and the lobbying arm for state prosecutors, the Virginia Association of Commonwealth's Attorneys (VACA). The last and final attempt to address the "needle in a haystack" problem was a proposed comment adopted by Council on a vote of 47-13 at its meeting on February 23, 2019:

> Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.

The proposed comment was in line with the conclusion the Ethics Committee reached in a draft LEO 1888 which was later withdrawn, as well as an earlier proposed comment which was also withdrawn. The Committee's efforts to address a prosecutor's duty to disclose the existence of exculpatory evidence, particularly in a "needle in a haystack" situation where a piece of known exculpatory evidence is included in a large volume of other materials, began with proposed LEO 1888. That opinion was based on a hypothetical scenario involving 200 hours of recorded jail calls, including one statement that the prosecutor knew to be exculpatory, and the proposed opinion concluded that the prosecutor was required to specifically identify that exculpatory

statement to the defense lawyer. After the proposed opinion was released for public comment, the Committee withdrew the opinion, based in part on concerns about the ability to address this issue through a hypothetical scenario, and in part on the decision that the interpretation of the phrase "disclose the existence of" was better suited to a comment to the Rule rather than a legal ethics opinion.

The Committee then drafted a proposed Comment [5] to Rule 3.8 and released it for public comment. After receiving comments on that proposal, the Committee agreed to withdraw that proposed comment and establish a working group to ensure that the views of all stakeholders, including the Virginia Association of Commonwealth's Attorneys ("VACA"), were included in the Committee's process. The working group subsequently produced the following comment, which was adopted by the Committee and submitted to Council, where it was amended before being adopted. The proposal, which was approved by the working group and by the Committee and submitted to Council at its February 2019 meeting, read:

> [5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely disclose the evidence. What constitutes sufficient disclosure is dependent on the circumstances. In many cases, providing a copy of or access to the evidence or information is sufficient. In some circumstances, additional steps may be necessary to fulfill the disclosure obligation.

Although two prominent members of VACA participated in the drafting of this comment, VACA as an organization would not support it and sent representatives to the Council meeting to attack and oppose it. However, Council obviously concluded that the working group's proposed comment did not go far enough in establishing the prosecutor's obligations and rejected it, proposing instead the comment set out earlier in this topic, which it approved on February 23, 2019 by a vote of 47-13, requiring the prosecutor to identify and produce exculpatory evidence.

In opposition to the proposed comment and withdrawn LEO 1888, prosecutors tried to make the case that the ethical duties of a prosecutor under Rule 3.8(d) should be coextensive with the prosecutor's legal duty under the so-called *Brady* Rule which has evolved over the years through numerous case decisions in state and federal courts. They argued this position during a presentation at an Ethics Committee meeting at which they were invited and at the Council meeting in February 2019. While the duties of a prosecutor under *Brady* and Rule 3.8(d) may overlap in some respects, the prosecutor's ethical duty under Rule 3.8(d) is a separate disclosure obligation. ABA Formal Op. 09-454 (2009).

First, there is nothing in the record, history or commentary to Va. Rule 3.8(d) that suggests that the drafters of that rule intended merely to codify *Brady*. See Va. Legal Ethics Op. 1862 ("Rule 3.8(d) does not refer to or incorporate, in the language of the Rule or its comments, the *Brady* standard for disclosure."). If the drafters of Va. Rule 3.8(d) intended for the rule to remain

merely an incorporation of the law under *Brady*, they could have said so in the commentary to the rule. See, for example, D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.").

Second, there is clear evidence in the development of Rule 3.8(d) that the drafters intended Rule 3.8(d) to be more demanding than constitutional case law in some respects, while less demanding in others. For example, in 1983 the Virginia State Bar and the Supreme Court of Virginia made substantial revisions to the Virginia Code of Professional Responsibility and published the *Virginia State Bar Professional Handbook* in 1984. The predecessor to Rule 3.8(d), DR 8-102(A) stated at that time; "The prosecutor in a criminal case or a government lawyer shall . . . (4) Disclose to a defendant all information required by law." As explained below, this language was interpreted to mean that the prosecutor's ethical duty simply meant the prosecutor's legal obligation to disclose exculpatory evidence under *Brady*, and nothing more.

The removal of the language "all information required by law" and its replacement with the language in the current rule is telling evidence that the drafters intended more than the incorporation of *Brady* in Rule 3.8(d). Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation. This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome determinative "materiality" requirement before disclosure is "required by law." 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009). As the ABA's Standing Committee on Ethics and Professional Responsibility has stated:

> Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*, which held that criminal defendants have a due process right to receive favorable information from the prosecution. This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule. Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.

ABA Formal Op. 09-454 at 1. The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation:

> A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf.

The accompanying Commentary observes:

> This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law. *Id*. at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment *at the earliest feasible opportunity*. (emphasis added).

The Prosecutor's Knowledge of Exculpatory Evidence

While it is true that *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny established a prosecutor's legal duty to turn over exculpatory evidence to the defense, Rule 3.8(d) is not coextensive with a prosecutor's legal obligations in several respects. Rule 3.8(d) applies only to evidence that the prosecutor *knows* exists and is exculpatory, whereas the prosecutor's legal obligations include information known to law enforcement but not to the prosecutor personally, and even require the prosecutor to learn of "any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). *Cf. Workman v. Commonwealth*, 272 Va. 633, 646 (2006) (". . . the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Rule 3.8(d) and proposed Comment [5] do not put any burden on the prosecutor to look for exculpatory evidence, but only to disclose and identify it once it becomes known to the prosecutor. Stated differently, the scienter required to prove a prosecutor violated Rule 3.8(d) is *actual knowledge*, whereas the scienter for a *Brady* violation requires only *constructive knowledge*.

The reason for the differing scienter requirements is obvious. The purpose of the *Brady* Rule is to ensure that an accused's right to due process is not violated when either the prosecutor *or the police* withhold exculpatory evidence. The purpose of Rule 3.8(d) is to enforce a prosecutor's personal ethical duty to the defense and avoid conduct prejudicial to the administration of justice. The policies and objectives supporting the two rules are quite different and therefore justify differing standards and application.

Brady Law Requires "Materiality"—Rule 3.8(d) does not

Another significant difference is that the legal requirement of *Brady* disclosure only applies to evidence that is "material" to the defendant's guilt or punishment, whereas Rule 3.8(d) does not include any materiality standard and requires disclosure of *any* evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." Exculpatory evidence that is "material" is evidence that would likely change the outcome of the case, i.e., justify an acquittal, if the evidence were disclosed in time for the defense to use it. For example, the Fifth Circuit found no *Brady* violation in a case where the prosecutor failed to disclose that an eyewitness had misidentified the defendant, but three law enforcement witnesses testified and were credible in identifying the defendant. *United States v. Green*, 46 F.3d 461, 466 (5th Cir. 1995). In contrast, Rule 3.8(d) requires the prosecutor to disclose "evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment" *without regard to the anticipated impact of the evidence on a trial's outcome.* ABA Formal Op. 09-454 at 4. (emphasis supplied).

If the ethical and legal duties of the prosecutor were based solely on *Brady* law, the Virginia State Bar would have to prove that the outcome of the defendant's case would likely have been different had the prosecutor disclosed the evidence in time for the defense to use it in the proceeding. In effect, the prosecutor would have a disclosure duty under Rule 3.8(d) only if it could be shown that the defendant was entitled to an acquittal that was sabotaged by the prosecutor's non-disclosure. While this standard may make sense in post-conviction habeas proceedings, it is wholly inappropriate for determining the prosecutor's pre-trial obligations and compliance with Rule 3.8(d).

The *Brady* standard is inherently backward-looking as it is generally applied and interpreted in motions made at the trial level and in post-conviction proceedings, whereas the Rules of Professional Conduct, and especially the comments to the rules, are primarily addressed to lawyers analyzing their own prospective conduct. Accordingly, Rule 3.8(d) requires broader disclosure, at an earlier stage in the proceeding, than the *Brady* standard requires, balanced with the actual knowledge standard of Rule 3.8(d) which does not require the prosecutor to search for or take responsibility for information that is not actually known to the prosecutor. *See also* Va. Legal Ethics Op. 1862 (2012) (explaining how the ethics rule was rewritten after *Read v. Virginia State Bar*, 233 Va. 560 (1987), and that the prosecutor's *ethica*l duty under Rule 3.8(d) is not coextensive with the prosecutor's *legal* duty under *Brady*).

Importantly, the "materiality" standard applied by trial courts and appellate courts to determine whether the prosecutor's suppression of exculpatory evidence amounts to a violation of due process is not an appropriate standard for a prosecutor to apply in determining whether to turn over exculpatory evidence *before* trial:

> Retrospective analysis, while it necessarily comports with appellate review, is wholly inapplicable in pretrial prospective determinations. *See Lewis v. United*

> *States,* 408 A.2d 303, 306–07 (D.C.1979). Specifically, in *Lewis,* this court recognized that *Brady* and its progeny were retrospective evaluations that were difficult to apply in a pretrial context. "While it is therefore true that the constitutional question commonly comes up retrospectively, the due process underpinning of *Brady-Agurs* is a command for disclosure [b]efore an accused has to defend himself." *Lewis,* 408 A.2d at 306–07. It is impossible for a trial court at the pretrial stage to require "the defendant ... to satisfy the test of materiality normally associated with a retrospective *Brady-Agurs* inquiry, namely, materiality to outcome." *See id.* at 307. "On the premise that there can be a pretrial ruling under *Brady,* this abandonment of the material-to-outcome test is necessary because there can be no objective, ad hoc way to evaluate before trial whether [evidence or information] will be material to the outcome. No one has that gift of prophecy." *Id.* Therefore, "[t]o argue that the court can apply a material-to-outcome test before trial is to argue a contradiction." *Id.* (citing *Agurs,* 427 U.S. at 107–08, 96 S.Ct. 2392).

In re Kline, 113 A.3d 202, 308 (D. C. Ct. App. 2015).

The Timing of Disclosure Under Brady vs. Rule 3.8(d)

The case of *Read v. Virginia State Bar* illustrates why the ethics rule must not be coextensive with the prosecutor's duty under *Brady*. In that decision, the Supreme Court of Virginia reversed the Disciplinary Board's revocation of a prosecutor's law license despite the Board's finding that the prosecutor willfully suppressed exculpatory evidence before and during trial; and, had no intention of revealing it but for the fact that the witnesses who had recanted their statements appeared at the defendant's trial and were about to inform defense counsel that they could not identify the defendant as the arsonist. Only then did the prosecutor alert the defense that these witnesses had recanted their prior incriminating statements. The ethics rule in effect at that time was coextensive with *Brady* and required the prosecutor to disclose exculpatory evidence "as required by law," which the Court interpreted as *Brady*. Because the defense learned that these witnesses had changed their stories and was able to use that information at trial, there was no violation of *Brady*, and therefore no violation of the existing ethics rule. This shocking decision drew sharp criticism from legal commentators and led to a movement to change the rule.

A key distinction between *Brady* and disclosure under Rule 3.8(d) is *timing*, i.e., when is the prosecutor required to disclose? Under *Brady* law, whether a "timely" disclosure of exculpatory evidence was made turns on whether the defense had an opportunity to use the evidence at trial once it was disclosed or whether the defendant has been prejudiced by the delay of the prosecutor in making disclosure. As shown in the *Read* decision, if the disclosure is made during trial and the defense gets it in time to effectively utilize it at trial, then the conviction will not be reversed. *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (*citing United States v*

.*McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985) ("If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it . . .should have been.")). Under the ethics rule—Rule 3.8(d)—disclosure must be made "as soon as practicable" once the prosecutor knows of its existence, including before or during plea negotiations. *See* LEO 1862 and ABA Formal Op. 09-454. On the other hand, some courts hold that *Brady* does not apply in the context of guilty pleas. *See Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000) (stating *Brady* does not apply when a defendant pleads guilty and waives his right to trial); *Matthew v. Johnson*, 201 F.3d 353, 361–62 (5th Cir. 2000) (noting that a prosecutor is not required to disclose exculpatory information when an accused waives his right to trial). *See also United States v. Ruiz*, 536 U.S. 622 (2002) (no duty to disclose impeachment evidence in plea negotiations because defendant's plea waived right to trial). *But see United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (concluding that the withholding of *Brady* evidence can invalidate a guilty plea).

Disclosure vs. Production

Yet another difference between the *Brady* Rule and Rule 3.8(d) is that "disclosure" under *Brady* law, according to some courts, does not actually mean disclosure by the prosecutor but instead whether the defense, through the exercise of due diligence, could have found or had access to exculpatory evidence. *See Thompson v. Cain*, 161 F.3d 802, 807 (5th Cir. 1998) ("[T]he prosecution is under no duty to furnish defendant with information that is readily accessible to the defense."); *United States v. Maloof*, 205 F.3d 819, 827 (5th Cir. 2000) (refusing to reverse a conviction when the prosecution failed to turn over evidence because the defense had received the evidence from another source). Thus, if the defense has equal access to the information and the failure to discover the evidence was from a failure to use reasonable diligence, there is no *Brady* violation. *United States v. Infante*, 404 F.3d 376, 386–87 (2005).

Some courts applying *Brady* suggest that an "open file" policy may satisfy the prosecutor's disclosure duty. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)."); *see also Vega v. State*, 898 S.W.2d 359, 362 (Tex. App.

Of course not. Just as that is not an acceptable excuse for non-compliance with *Brady* it is not acceptable as an excuse for the prosecutor's violation of Rule 3.8(d). Yet, the truth is that prosecutors must make that call routinely in many cases in order to avoid a *Brady* violation. Moreover, determining whether to disclose under Rule 3.8(d) is much simpler and easier than determining whether to disclose under *Brady*, because the prosecutor does not have to assess the "materiality" of the evidence, only whether the evidence tends to negate guilt, reduce the degree of the offense or mitigate the severity of the punishment. In most instances this is not difficult.

The Hon. Patti Watson in her comment letter on behalf of VACA revealed that during training seminars VACA urges prosecutors:

> You should consider your duty to gather and disclose exculpatory and impeachment evidence your paramount *ethical obligation.* In most cases, if you are confronted with a "close call" as to whether evidence constitutes *Brady* or *Giglio* evidence, "**you should err on the side of caution and disclose the evidence to opposing counsel."** (emphasis added). *The Right Thing – Every Time: Ethical Guidelines for Virginia's Prosecutors*, VACA Committee on Justice and Professionalism, 2017. (emphasis added).

But aside from all that and most importantly, a prosecutor does not violate Rule 3.8(d) unless the prosecutor *actually knows* that the evidence in his or her file is in fact exculpatory. Thus, any reasonable doubts or reservations the prosecutor may have about the exculpatory evidence precludes any violation of Rule 3.8(d).

Conclusion

Based on the opposition letters received by VSB and the Supreme Court of Virginia, VACA and other prosecutors have taken the VSB's efforts to address this issue as some sort of implied statement by the Committee that in general prosecutors act in bad faith, instead of accepting the facts as presented to a single prosecutor in a particular situation. This is an unfortunate misunderstanding.

Most prosecutors adhere to the letter and spirit of Comment [1] to Rule 3.8 that a prosecutor is not just an advocate but also a minister of justice, whose role is not merely to convict but to see that the defendant is accorded procedural justice. There are some, however, that will "hide the ball" or cut ethical corners to achieve their objectives. It is for these prosecutors that the ethics rules were written and must be enforced. Because of the awesome power prosecutors hold, a prosecutor is obliged to be forthcoming and honest, to ensure that the truth will always be revealed, and that justice is served. But as one commentator has noted, "the fear of losing cases can powerfully subvert the better natures of both prosecutors and defense lawyers engaged in an adversary system." Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2237 (2010).

Prosecutors should stop trying to conflate their legal obligations under *Brady* with their ethical duties under Rule 3.8(d). Through training and leadership, Commonwealth Attorneys should foster a culture of more and earlier disclosure of both exculpatory and inculpatory evidence. Doing so will result in quicker resolution of cases, fewer motions over discovery and non-disclosure, fewer errors and will save time and money. In making pre-trial disclosure decisions under Rule 3.8(d), a prosecutor should not be weighing the strength of exculpatory evidence vis-à-vis the other inculpatory evidence in his or her file. That is for a court to decide in determining what relief, if any, the defendant is entitled to when a prosecutor withholds such evidence.

5. Supreme Court Adopts LEO 1890—Compendium Opinion on Rule 4.2 and Contacts with Represented Persons. (Eff. January 9, 2020). *Vacated by Supreme Court of Virginia by Order entered April 7, 2020.*

Legal Ethics Opinion ("LEO") 1890 is a compendium opinion about the "no contact" rule—Rule 4.2 of the Virginia Rules of Professional Conduct. Rule 4.2 states quite clearly and plainly: "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The Virginia State Bar (VSB) Standing Committee on Legal Ethics ("Ethics Committee") issued LEO 1890 for public comment on February 6, 2019. Although the opinion is lengthy, it discusses 14 different issues that have arisen over the years in the application of Rule 4.2, formerly DR 7-103(A)(1) of the Virginia Code of Professional Responsibility, which was replaced effective January 1, 2000 by the Virginia Rules of Professional Conduct:

1. The rule applies even if the represented person initiates or consents to an *ex parte* communication.

2. The rule applies only if the communication is about the subject of the representation in the same matter.

3. The rule applies only if the lawyer actually knows that the person is represented by counsel.

4. The rule applies even if the communicating lawyer is self-represented.

5. Represented persons may communicate directly with each other regarding the subject of the representation, but the lawyer may not use the client to circumvent Rule 4.2.

6. A lawyer may not use an investigator or third party to communicate directly with a represented person.

7. Government lawyers involved in criminal and certain civil investigations may be "authorized by law" to have *ex parte* investigative contacts with represented persons.

8. *Ex parte* communications are permitted with employees of a represented organization unless the employee is in the "control group" or is the "alter ego" of the represented organization.

9. The rule does not apply to communications with former employees of a represented organization.

10. The fact that an organization has in house or general counsel does not prohibit another lawyer from communicating directly with constituents of the organization, and the fact that an organization has outside counsel in a particular matter does not prohibit another lawyer from communicating directly with in-house counsel for the organization.

11. Plaintiff's counsel generally may communicate directly with an insurance company's employee/adjuster after the insurance company has assigned the case to defense counsel.

12. A lawyer may communicate directly with a represented person if that person is seeking a "second opinion" or replacement counsel.

13. The rule permits communications that are "authorized by law."

14. A lawyer's inability to communicate with an uncooperative opposing counsel or reasonable belief that opposing counsel has withheld or failed to communicate settlement offers is not a basis for direct communication with a represented adversary.

During the comment period and at the meeting of the VSB Council in October 2019, some lawyers wanted the Ethics Committee to rewrite section 8 of LEO 1890 insisting that Virginia should adopt the ABA position on this topic, as expressed by ABA Model Comment [7] in lieu of the "control group" or "alter ego" test used in the current rule to determine which employees of a represented organization are "off limits" for an *ex parte* interview or communication. Although the Virginia Rule 4.2 and ABA Model Rule 4.2 are identical, ABA Comment [7] significantly expands the scope of employees who may not be contacted *ex parte* under MR 4.2 to include an employee "who supervises, directs or regularly consults with the organization's lawyer concerning the matter *or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability*." (emphasis added).

Council approved proposed LEO 1890 without modification. Notwithstanding the debate at the Council meeting in October 19, 2019, the Ethics Committee voted to go forward by asking the Supreme Court to adopt LEO 1890, without amendment to Comment [7] to Rule 4.2, keeping intact the "control group" or "alter ego" test. The Court adopted LEO 1890 effective January 9, 2020; **however, the Court vacated its January 9 order on April 7, 2020, which means the LEO is not approved by the Court.**

6. Supreme Court Adopts LEO 1891—Communications with Represented Government Employees and the "authorized by law" exception under Rule 4.2. (Eff. January 9, 2020).

LEO 1891 tackles yet another difficult issue arising out of the application of the "no contact" rule—Rule 4.2. That is, if a lawyer represents a client that has a legal dispute with a represented governmental entity, when is that lawyer's communication with a government employee, officer or official considered "authorized by law" for purposes of Rule 4.2?

LEO 1891 addresses whether there are instances where communication with represented government officials is "authorized by law" for purposes of Rule 4.2, considering the constitutional and statutory rights of citizens to access the government and to petition for the redress of grievances. The opinion concludes that yes, communication with a represented government official is authorized by law and does not require the government lawyer's consent if the communication is made for the purposes of addressing a policy issue and the government official being addressed has the ability or authority to take or recommend government action, or otherwise effectuate government policy on the issue. A lawyer making such a communication is not required to give the government lawyer notice of the intended communication. This is true even though the subject matter of the communication relates to a pending claim, lawsuit or legal controversy between the communicating lawyer's client and the represented governmental entity or official.

The analysis of this opinion applies only to government officials who are within the "control group" of the government entity for purposes of Rule 4.2, Comment [7]; other government employees outside of the control group are not represented by the lawyer for the government body, so communication with those employees is not prohibited by Rule 4.2 in any event. LEO 1891 relies in part on ABA Formal Op. 97-408 which states that Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. However, the Ethics Committee in LEO 1891 parted company with the ABA opinion by not requiring advance notice to the counsel for the governmental entity or official. The rejection of the "advance notice" requirement drew criticism from some local government attorneys. In rejecting the requirement of advance notice to the government's lawyer the Ethics Committee explained that the requirement of advance notice of the communication is not grounded in the text or comments of Rule 4.2 and therefore the Committee does not interpret the rule to require advance notice to the government lawyer of otherwise-permissible communications to government officials. Stated differently, if the communication with the represented person is "authorized by law" then Rule 4.2 doesn't apply in the first place.

Although one might read the "authorized by law" exception to Rule 4.2 as seemingly boundless, a lawyer communicating with a represented government official must be communicating solely about some policy issue, even if the resolution of that policy issue directly affects or includes the settlement of the lawyer's client's matter. On the other hand, a lawyer may not communicate with a represented government official for the purposes of gathering evidence unless the lawyer has the consent of the government lawyer or the communication is otherwise authorized by law, such as formal discovery procedures that might allow direct contact with a represented person. The fact that a communication begins with an appropriate and authorized purpose does not authorize further communication that is not permitted by Rule 4.2. A lawyer who engages in a communication about policy issues must terminate or redirect the communication if the communication crosses the line into improper evidence gathering.

7. Supreme Court Adopts Amendments to Corporate Counsel Rule 1A:5. (Eff. January 1, 2020).

On November 1, 2019, the Supreme Court of Virginia amended Rule 1A:5 regarding Virginia certified corporate counsel and corporate counsel registrants. The amendments were effective January 1, 2020. These rule changes do not apply to Corporate Counsel Registrants under Part Two and require no action by lawyers currently certificated under Part One. The new amendments require lawyers not admitted in Virginia who wish to serve as Part I Corporate Counsel for a Virginia employer to apply to the Virginia Board of Bar Examiners (VBBE) on forms to be provided by the VBBE. Applicants must undergo a character and fitness evaluation and cover the costs of the investigation and the fee for the application. An applicant must be admitted by examination and licensed to practice law in the court of last resort in another state or territory of the United States and in good standing in all other jurisdictions in which the applicant has been admitted.

The reason for the change is that by statute any applicant for a license or certificate to practice law in the Commonwealth of Virginia must first undergo a character and fitness evaluation administered by the Virginia Board of Bar Examiners. Code of Virginia § 54.1- 3925.1. *See also* Rules 1A:1 (admission on motion) and Rule 1A:6 (Registered Military Legal Assistance Attorneys). A foreign lawyer issued a certificate to serve as Corporate Counsel under Part I of Rule 1A:5 immediately becomes an active member of the Virginia State Bar.

A Corporate Counsel Registrant under Part II of Rule 1A:5 will continue to register with the Virginia State Bar. No substantive changes were made to Part II of the Rule.

8. Amendments to LEO 1850 Outsourcing Legal Services. (Comment Period Ended March 20, 2020).

This is a proposed rewrite of an earlier legal ethics opinion issued by the Ethics Committee on December 10, 2010 about outsourcing legal or non-legal support services. In this proposed opinion, the Committee concludes a lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed advance consent to outsourcing the work. The proposed revisions simplify and streamline the scenarios and analysis in the opinion and clarify what a lawyer must disclose to a client when outsourcing services.

Outsourcing takes many forms: reproduction of materials, document retention, database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example. Law firms have always and will always engage other lawyers and nonlawyers in the provision of various legal and non-legal support services. Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the lawyer the opportunity to seek the services of outside lawyers and staff in complex matters. Legal outsourcing also gives sole practitioners and small law firms more flexibility in not having to hire staff or employees when they experience temporary work overflows for which a contract lawyer or nonlawyer may be appropriate.

The Committee's analysis in this opinion emphasizes the requirement that a lawyer's selection of lawyers or nonlawyer outside the office to perform outsourced work must be made competently and that the work performed must be adequately supervised and reviewed by the outsourcing lawyer or firm. If outsourcing work will reveal confidential information to persons outside the firm, the affected clients must give consent to the disclosure of confidential information and the use of persons outside the firm to perform the outsourced work. Billing the client for the work performed by persons not associated with the firm must be billed at actual cost to the firm as a disbursement and may not be "marked up" without disclosure of actual cost and client consent. On the other hand, if the lawyer or firm hires a contract lawyer or nonlawyer to work on site or under the direct supervision of the lawyer such that they are considered "associated" with the firm, the lawyer or firm may bill the client for the usual or customary charge the firm would bill for any other associate or employee even if that amount is more than what the firm pays the staffing agency or vendor. The amount paid to the staffing agency or vendor is an overhead expense that the firm is not required to disclose to a client.

9. Proposed LEO 1878—Duty of Successor Lawyer to Explain to Client her Responsibility for Discharged Lawyer's Attorney's Lien or *Quantum Meruit* Claim in a Contingency Fee Case. (Comment period ended March 20, 2020).

This proposed opinion generally addresses the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a *quantum meruit* basis against the proceeds of a recovery.

In this proposed opinion, the Committee concludes that successor counsel in a contingent fee matter must charge a reasonable fee and must adequately explain her fee to the client. If the client, predecessor counsel, and successor counsel cannot agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel should address in her written contingent fee agreement the client's potential obligation to pay fees to discharged counsel, as well as that successor counsel's fees might need to be adjusted in view of predecessor counsel's *quantum meruit* lien, so as to ensure that successor counsel's fee is reasonable using the factors identified in Rule 1.5(a). Successor counsel may represent the client in negotiations and litigation involving the predecessor counsel's claim of lien, provided that there is no conflict under Rule 1.7(a)(2) or the client gives informed consent to a potential conflict under Rule 1.7(b).

10. Supreme Court Adopts Amendments to LEO 1872—Virtual Law Offices. (Eff. October 2, 2019).

The changes to this opinion update references to Rule of Professional Conduct 1.6(d), concerning a lawyer's duty to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to confidential information protected under the Rule, and Rule 7.1, prohibiting misleading advertising about the law firm's offices. The revisions also remove references to former Regulation 7 Governing Applications for Admission to the Virginia Bar Pursuant to Rule 1A:1 of the Supreme Court of Virginia since that regulation has been modified and no longer requires that lawyers admitted to practice by motion maintain a physical office space.

The revisions also modify the discussion of when a lawyer may advertise a non-exclusive office space as a location of the firm. The revisions remove the "factors to be considered" in making that determination, which included frequency of use, whether nonlawyers use the space, and whether signage indicates that the space is used as a law office. Thus, the analysis in the opinion is narrowed to the question of whether the advertised location is an office where the lawyer provides legal services, and whether the advertised location is being used to mislead prospective clients that the lawyer's practice or firm is more geographically diverse or larger

than is actually the case. These revisions by the Court will conform LEO 1872 with revisions made to LEO 1750 last year (approved by this Court on April 20, 2018), which refers to and cites LEO 1872.

AVOIDING BAR COMPLAINTS

DURING "THE TIME OF COVID"

Presented by

Prescott L. Prince
Assistant Bar Counsel
Virginia State Bar

Below are my "Top Ten" ways of avoiding Bar Complaints. In preparing this discussion, I assumed that, generally, attorneys want to do the right thing. But we all make mistakes. A simple mistake does not normally rise to the level of ethical misconduct. How one deals with a mistake (or a problem that is not of the attorney's own creation), however, frequently does determine whether or not a client (or some other interested party) will file a Complaint with the Virginia State Bar.

Listed below are some of the best ways to avoid bar complaints. The discussions address Rules that are frequently violated and (hopefully) give some life to the Rules by highlighting ways in which compliance with the Rules may not only decrease the likelihood of winning a Bar Complaint, but decrease the likelihood of the having a Bar Complaint filed against you to begin with.

I. Read the Rules

The Virginia Rules of Professional Conduct are rules of reason, but they are not always intuitive. Some of the Rules are common sense (e.g. Rule 1.1; Competence). Other Rules are somewhat technical and provide specific instructions that must be complied with (e.g. Rule 1.15 Safekeeping of property.)

Ultimately, familiarity with Rules of Professional Conduct is a simple issue of competence. An error because one fails to know the Rules will likely be considered a violation of Rule 1.1 (Competence). Accordingly, take the time to read the Rules as well as the official comments to the Rules.

The Rules of Professional Conduct can be found at Part 6, Section II of the Rules of the Supreme Court of Virginia. They are located in the printed Code of Virginia in the Rules of the Supreme Court volume. They are also available online at the VSB Website as are Legal Ethics Opinions.

<u>Rules implicated:</u> 1.1 (Competence)

II. Keep The Client Informed

Good, bad or otherwise, make sure your client knows what is going on. This is especially important-- and challenging-- during "The Time of Covid." Your clients may be more stressed. *You* may be more stressed. These circumstances create a greater need for connectivity with our clients.

There are more communication options today than ever before. In addition to face to face and/or telephone communication, one can text or e-mail information. Six months ago, I never would have seriously recommended attorneys use Zoom or Web-Ex or any such computer-based face-to-face communication option. Today, I engage in two or three such meetings a week. There is no excuse for not communicating. BUT, be careful to not be the victim or the perpetrator of information overload.

If you choose to use computer-based face-to-face communication, confirm with the client that he or she is alone and that no one is around who can overhear the communication.

Early in your representation of the client, establish your guidelines for communication. Rule 1.4 (a) provides that a lawyer shall promptly comply with reasonable requests for information, but prompt does not mean instantaneous. If your client is the kind of individual (or group entity) who sends multiple e-mails daily, you do not need to respond to every e-mail. You also do not need to be on your smart phone or computer at 9:00 p.m or on a Saturday afternoon responding to e-mails simply because the client sent you an "urgent" e-mail that is not really urgent at all.

Notwithstanding the fact that some clients will try to "over communicate", telephone calls and e-mails (even abusive ones) should be returned in a timely manner, but wait until you have the time to respond properly. Even if you think you don't have the time, make the time, and respond properly. A single e-mail, acknowledging receipt, may be sufficient for the client who sends multiple e-mails. Calls from the client who gets on the phone/computer (or appears at your office) and talks incessantly, need to be returned, but the client needs to understand that he or she will be billed for your time and time spent explaining the same thing over and over might not be the best use of the client's money.

When responding to e-mails or texts think (and then think again) before you hit send. Electronic messages last forever and one sent without proper thought or editing may re-appear as an attachment to a bar complaint. Text messages are frequently sent out when one does not have time to properly compose a message or to process information received. One should therefore probably avoid sending text messages more complicated than, "Received your message. Will call later"

Communication with the client is an ethical responsibility, but every opportunity to communicate is also an opportunity to build the relationship.

Rules implicated: 1.4 (Communication)

III. Avoid Procrastinating

Procrastination is one of the greatest causes of bar complaints. When you take in a new case, whether you have recruited the client or the case is assigned to you by a supervising partner or if it is court appointed, engage in it as soon as possible. Determine what needs to be done and do it. Bar Counsel frequently see complaints where an attorney engaged in a case late and discovered that the matter was more difficult than expected. The predictable result is missed deadlines, going into court underprepared and, ultimately, the disgruntled client.

If delays occur (especially if they are Covid related) communicate the information to the client as soon as possible. But do not use Covid as an the convenient excuse for every imaginable delay.

Most attorneys have one or more cases in their filing cabinets that are, for whatever reason, troublesome. Regardless of the reason for the trouble (unreasonable client, unreasonable opposing counsel, difficult subject matter or all of the above) these cases frequently get set aside and ignored. (Often as not, the attorney does not perceive that he or she is "ignoring" the case; rather, one sees it as waiting until he or she has the time to devote proper attention to the case.) Do not let this happen to you.

These cases are time bombs. These cases must be worked aggressively. Sometimes difficult issues "resolve themselves". Far more often, they become more difficult due to neglect. Delay can be an effective strategy, but ignoring a case is not.

Rules implicated: 1.1 (Competence); 1.3 Diligence

IV. Aggressively avoid conflicts.

Be aware of possible conflicts of interests with past clients as well as current clients. Frequently the conflicts ore the possibility of conflict does not immediately become apparent. When the issue is discovered, however, act promptly to obtain a waiver from all concerned if possible. If a waiver is not possible (e.g. unwaivable conflict or one or more individuals concerned declines to waive the conflict) withdraw (or request permission to withdraw) as soon as possible.

Treat "possible" conflicts as actual conflicts. If the conflict or potential conflict involves a current client, and the conflict *can* be waived a written waiver may be needed. Extreme caution is urged, however, because cases frequently take unexpected turns and the attorney may discover that the potential conflict becomes real and it is not possible to competently represent both clients. This could result in the need to withdraw from *both* cases. Aside from likely financial ramifications, the attorney will now have *two* disgruntled clients.

Sometimes unforeseeable (or at least unforeseen) conflicts are discovered after the case is well underway (for example, a potential witness for the opposing party is a former client of the

attorney.) Do not ignore these surprises. Act promptly to notify all concerned and take appropriate action. Appropriate action includes investigating to determine whether and the extent to which a conflict might exist. Obtain waivers if possible/necessary and/or withdraw if the conflict is cannot be properly waived.

The conflict does not have to be with another client; the representation may come into conflict with the personal interest of the attorney. This is especially likely when the attorney finds himself representing neighbors, friends and family members. Difficult thought it may be to say "No" to the seemingly reasonable requests for assistance from family and friends, the possibilities of conflict are endless. The better course is to avoid these entanglements. (A surprising number of complaints come from individuals who claim to have been close friends with a family member of the attorney.)

Rules implicated: 1.7 Conflict of Interest: General Rule; 1.8 Conflict of Interest: Prohibited Transactions; and 1.9 Conflict of Interest: Former Client

V. Take Care Of Your Trust Account

Trust account violations *will get you in trouble.* Money in your trust account does not belong to you. It is in your care because of the special trust placed in attorneys by the law. Do not abuse this trust. (And there really is no Covid-19 excuse for failing to maintain your trust account.)

Money that goes into the trust account includes advance fees that are paid by the client, but not yet earned. (Special note: Flat fees, paid in advance, are not yet earned by the attorney. Such fees must be deposited in trust until earned by the attorney.) Money received by the attorney from a third party for disbursement to the client or other third parties also remain in the trust account until time for disbursement to the client, other third parties and/or the lawyer himself (e.g. funds received from a personal injury settlement or real estate closing). The trust account must not include funds that belong to the attorney but remain in trust as a "slush fund" to avoid reporting to the IRS or to avoid possible overdrafts.

An attorney may retain in the trust account sufficient funds to pay for reasonable bank charges. This is not an excuse for maintaining a slush fund, but act proactively, learn how and when fees are going to be charged and take appropriate steps to ensure that any fees charged do not result in a conversion of client funds.

If you are in a solo practice or a joint practice where you have your own trust account, budget time to perform the required accounting for the trust account. Keep that appointment as sacrosanct as an appearance in court. Get help if necessary (e.g. CPA) but the attorney ultimately remains accountable for the trust account. Do not let anyone other than yourself have signatory authority over checks.

If you are in a partnership or small group practice with a joint trust account, get personally involved with how the trust account is maintained. Do not assume that someone else is taking care of funds that are untrusted to you.

If you overdraft your trust account, the overdraft will be reported to the Virginia State Bar. The Virginia State Bar will investigate. The investigation will not necessarily result in the attorney being sanctioned (mistakes do occur-- and sometimes it is the bank that committed the error), but you would be expected to explain how the overdraft occurred. "I didn't have time to balance my account," will not be considered a proper answer.

Attached as an addendum to this presentation is a "cheat sheet" that addresses the high points of what one must do and what one may not do with one's trust account along with references.

Rules implicated: 1.15 Safekeeping Property

VI. Know What Is Expected Of You

Often as not, your client is new to the legal process. He or she may never have been to court and he or she may have never previously been in a law office. His or her expectations of the legal process are likely to have been shaped by TV and or the advice that a friend (who is not a lawyer) has provided.

Ensure that you understand what the client is expecting you to accomplish and ensure that the client understands what your limitations may be. Not every attorney is as capable as Matlock, Harmon Rabb or Sarah McKenzie and those of us who do have such capabilities probably cannot accomplish it all in one hour.

The "Covid Experience" may have heightened client anxiety and hence client expectations. This does not necessary change the attorney's actual obligations, but the attorney may have to spend more time aligning client expectations with reality.

"Scope of Representation" issues frequently arise when there is a disconnect regarding what is expected of the attorney to begin with or, as the case progresses and additional issues develop, what is needed in order to move forward with the case. Most attorneys recognize that, the best way to initially establish the Scope of Representation is through some form of written contract or confirmatory letter. Many such letters are ineffective, however because they do not clearly state what the attorney is supposed to do. (For example, a criminal retainer agreement might state that the retainer is "for representation on charges in the General District Court of a certain county, but fail to state what the charges are. What happens if additional charges are added?)

The agreement should be concise enough so that it clearly states what is expected of the attorney. Use plain language. Avoid agreements or confirmatory letters that are written so lawyerly that the client needs another attorney to understand what you are supposed to do.

If you perceive that scope of representation has changed or is changing, engage the client to ensure that there continues to be a meeting of the minds as to what is expected. To the extent possible or reasonable, send some form of confirmatory writing regarding the changed scope of representation.

Rules implicated: 1.2: Scope of Representation; 1.5 Fee Agreements

VII. Have a Clear Written Fee Agreement

Most experienced attorneys have a fee agreement that he or she has developed over the course of his or her practice period of time and use all the time. Take time to review it periodically. Ensure that it tells the naïve client what is expected of you and what is expected of them, both in fees and other "client obligations." Far too often, when I review a fee agreement as the result of a bar complaint, I see large gaps in these areas. These gaps may not be ethics violations in and of themselves, but such gaps may lead to attorney-client relationship issues that result in bar complaints.

Reviewing and updating your fee agreement is especially important in the "Time of Covid." Accessibility restrictions due to Covid, may have caused additional costs. Decide who is to be responsible for bearing those costs and address the issue in advance, possibly in the fee agreement.

Do not be shy about discussing money with your client. They want to know how much this is going to cost them and they want to know how they are going to be charged. There is an old saying that "A workman is entitled to the cost of his wages." You are entitled to be paid and you are doing a disservice to yourself and, ultimately to your other clients if you do not require the client to pay for your good efforts.

Take the time to explain to the client how he or she is to be charged. Put it in writing. If he or she is to be billed on an hourly basis, ensure that they understand that this may include time taken to read and respond to telephone calls and e-mails. The client must understand that whereas communication between the attorney and client is necessary, you want to ensure that their money is being spent wisely. Time (and money) that is spent in communication is time (and money) that is not spent engaging the opposition.

The attorney's part of the bargain is to work efficiently. If you charge an hour's time, ensure that you have provided an hour's worth of effort. Provide the client with periodic account statements and be prepared to discuss the bill and the billing process. (If there are questions about the bill, it is generally not a good idea to charge the client for time spent discussing his or her bill.)

If you have provided an estimate for the cost of a case and it appears that the case is costing more than was estimated, explain to the client why the cost disparity exists. (Often as not, this is because the scope of representation has changed, as was discussed above.)

The addendum (aka cheat sheet) discussed in Section V above also contains specific requirements regarding Fee Agreements provided in Rule 1.5.

I note that simple fee disputes are beyond the purview of the disciplinary process. Issues resulting from defective fee agreements are within the disciplinary process, however, and are a frequent source of bar complaints. One must also note that dissatisfaction with the amount of

work provided for the fee charged is likely to cause a dissatisfied client to complain about matters that would otherwise have been overlooked by the client.

Rules implicated: 1.5 (Fee Agreements)

VIII. Fire Yourself When Necessary

Sometimes it is clear that the attorney and the client are not a good fit. When that happens, do not be afraid to fire yourself.

Obviously, this outcome should be avoided. An attorney does not make money by walking away from cases. Nevertheless, the client is entitled to an attorney who believes in his or her case and can maintain the representation with the appropriate zeal. When the attorney perceives that the attorney client relationship is deteriorating, he or she should attempt to engage with the client to determine the cause of the damage and repair it. If the relationship continues to deteriorate, withdrawal should be considered. Withdrawal should also be considered if the client cannot or will not pay.

Once the decision is made to withdraw, the attorney should act promptly to terminate the relationship. Delay will not help the matter and it may make withdrawal more difficult and/or impossible. If the matter is not yet in court, the attorney should explain his or her reasons to the client and make the termination of representation as amicable as possible. If court proceedings are underway, the attorney must make a Motion to Withdraw and the attorney must remain engaged until the motion is granted. (It will not be granted if the attorney waits until a few days or weeks before a scheduled hearing or trial.)

Upon termination of representation, the attorney must take all reasonable steps to protect the interests of the client. This includes, but is not necessarily limited to providing the client with the full file and cooperating with successor counsel. The attorney must return to the client any unearned funds in the Trust Account, (and the attorney should ensure that they are, in fact, in the Trust Account.) The attorney must also consider refunding additional money, even if it has been properly earned through services provided. This would be especially prudent, if the termination is at the behest of the attorney.

Rules implicated: 1.2 (Scope of Representation); Rule 1.16 (Termination of Representation)

IX. Be Response to Client Complaints.

The comes a time in almost every lawyer's career when a client comes to you and informs you that he or she is dissatisfied with your performance. These events are not fun. But whether or not you are the subject of a bar complaint may very well depend on how you respond to the client's complaint to you.

Treat the client with respect and address the issue intellectually and not emotionally. Your client may be emotional. Try not to respond with equal emotion.

Take time to listen to your client's concerns and respond openly and honestly. Your client is entitled to your best efforts as well as an explanation of why tactics may not have been successful.

If you made an error that compromises your client's rights or opportunity for a positive outcome in a case (e.g. missing a deadline), the client needs to be informed. If there are corrective or mitigating actions that can or should be taken, take such actions, but the clients must still be informed as soon as possible. If withdrawal is necessary, in the course of the withdrawal, take all actions reasonable to minimize negative impact to the client.

Rules implicated: Rule 1.4 (Communication); 1.7 Conflict of Interest: General Rule; 1.16 (Termination of Representation)

X. When in doubt, reach out.

The practice of law is an extraordinarily difficult profession. No one can do it alone. Even solo practitioners need some form of "backup." Moreover, it is not unusual for even experienced attorneys to take on cases and discover that they are over their head. Do not be afraid to ask for assistance, whether it is from a partner, associate, or law school classmate. Do not be afraid to inform the client that you need assistance and that the client may have to pay for that assistance. Even it the client cannot afford a paid consult, my experience is that attorneys are often willing to help a colleague.

If it is necessary to engage another attorney in the case, the client must be informed and consent.

If the issue pertains to legal ethics, engage the VSB Hotline at 804-775-0564 or by e-mail through the VSB.org website.

Rules implicated: Rule 1.1 (Competence);

Avoiding Bar Complaints in "The Time of Covid"

and

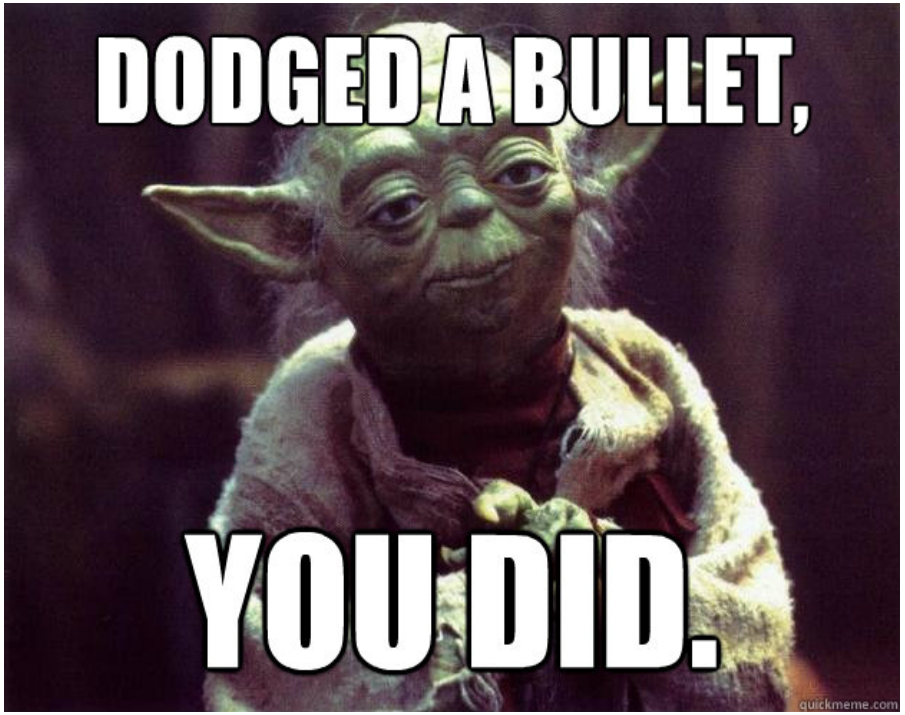
Hot Topics in Legal Ethics (2020)

Prescott L. Prince
Assistant Bar Counsel
Virginia State Bar
October 2020

Rules Implicated

- Rule.1.1 Competence
- Rule 1.2 Scope of Representation
- Rule 1.3 Diligence
- Rule 1.4 Communication
- Rule 1.5 Fee Agreements
- Rule 1.7: Conflicts of Interest: General Rule
- Rule 1.9: Conflict of Interest: Former Client
- Rule 1.10: Imputed Disqualification
- Rule 1.15: Trust Accounts
- Rule 1.16: Declining or Terminating Representation

Avoiding Bar Complaints



I. Read The Rules

- Take time to actual read the Virginia Rules of Professional Conduct.
- Find them under the Rules of Supreme Court, and they are located on the Virginia State Bar website.
- After you have read them, put them into action.
- See Rule 1.1 (Competence)

II. Keep the Client Informed

- Good, bad or otherwise, make sure your client knows what is going on
- Bad news does not get better with time.
- Rule 1.4 (a) provides that a lawyer shall promptly comply with reasonable requests for information, but prompt does not mean instant. (Take your time and make sure communication is proper and accurate.)
- Think before hitting “send”.
- See Rule 1.4 (Communication)

III. Avoid Procrastination

- Engage quickly.
- Deliver promised work on time. If delays are necessary, communicate the reason for delay to the client and make the case a priority.
- Review your caseload periodically. Old cases not only cost you money, they are time bombs.
- See Rule 1.3 (Diligence)

IV. Aggressively Avoid Conflicts

- You may have conflicts with past clients as well as current clients. (Rules 1.6 and 1.8).
- If you perceive the possibility of a conflict, obtain a waiver.
- Make “gray” the new “red”. If you are in the “gray area”, you should assume that you have already crossed into a “red area” and act accordingly.

V. Take Care Of Your Trust Account

- Rule 1.15 is the rule that provides specific provides specific rules regarding trust accounts.
- If you are in charge of the trust account, budget specific time to perform required accounting
- Even if you engage outside accounting assistance, the attorney is still ultimately accountable.
- If you are in a partnership or small group practice with a joint trust account, get personally involved with how the trust account is maintained.

VI. Know What is Expected of You

- Make sure you and the client are on the same page as to what you are expected to do and how you are going to get there.
- Make sure the client is aware of your limitations.
- Rule 1.2 (a) & (b) provides requirements regarding “Scope of Representation” and the limitation of the Scope of Representation.

VII. Have a Clear Written Fee Agreement

- Make sure the client knows how is being charged and what he or she is going to get for his money.
- Rule 1.5 and LEO 1606 provide guidance for Fee Agreements.

VIII. Fire Yourself When Necessary

- If it becomes clear to you that you cannot meet your client's expectations (realistic or otherwise), bring the case to an orderly point where you can withdraw.
- Take all reasonable steps to protect the client's interests, including where appropriate, providing a refund of advance payment of fee that may not been earned.
- See Rule 1.16 (Termination of Representation).

IX. Be Responsive To Client Complaints

- Treat the client with respect.
- Take time to listen to listen to his concerns and respond openly and honestly.
- “Work the problem” pragmatically instead of emotionally
- If the client wants a refund, seriously consider the request even if you have properly earned your fee.
- *Even if you have done nothing unethical or improper, it is **sometimes** a worthwhile to provide a disgruntled client with some financial consideration.*

X. When In Doubt, Reach Out

- VSB Ethics Hotline available to provide ethics advise
- Telephone 804-775-0564 or by e-mail through the VSB.org website

Judges and Lawyers Assistance Program

- JLAP previously known as Lawyers Helping Lawyers ("LHL");
- 804-644-3212
- 24-hour a day number:

  (877) 545-4682

Hot Topics in Ethics

"You must unlearn what you have learned."

1. Amendments to Rule 1.15 (3/15/20) Trust Account Recordkeeping

- The changes to paragraph (c) remove the term “cash” and clarify that a check register can be used as the required journal, if it includes the necessary information.
- The change also removes the term “subsidiary ledger” to clarify that the rule only requires a separate record or ledger page tracking funds received and disbursed for each client.
- On reconciliations, paragraphs (d)(3)(ii) and (d)(3)(iii) are revised to include an explanation of exactly what steps must be taken to complete the required reconciliations. The amendments also require all reconciliations to be completed monthly, since that is consistent with the usual bank statement reporting period and will allow lawyers to identify and correct errors more quickly and easily.

Amendments to Rule 1.15 (3/15/20) Trust Account Recordkeeping

- Under the old rule, some reconciliations were monthly, and some are quarterly; the amended rule standardizes the requirement so all reconciliations must be done monthly.
- The amendments retain the requirement that a lawyer must approve all reconciliations and add a requirement in Comment [5] that any discrepancies discovered in the reconciliation process must be explained, and that explanation must also be approved by the lawyer.
- Reconciliations: (1) trust account balance and client ledger balance for each client or third party; (2) trust account balance against bank statement; (3) trust account balance and aggregate client ledger balance

2. Proposed Rule 1.8(k) Ban on Sexual Relations with Clients

- The Ethics Committee is proposing an amendment to Rule 1.8 by adding paragraph (k) prohibiting a lawyer from having sexual relations with a current client unless the relationship predated the lawyer-client relationship.
- This proposed amendment brings the rule in line with the ABA Model Rules and the rules of at least 43 other jurisdictions that address this issue through a rule and/or comment rather than merely an advisory ethics opinion.
- The conflict under the proposed rule would be a personal conflict not imputed to the other lawyers in the firm

Proposed Rule 1.8(k)
Ban on Sexual Relations with Clients

- The issue of sexual relations with a client is currently addressed in Legal Ethics Opinion 1853, which follows much of the same reasoning as the proposed comments to Rule 1.8 and concludes that sexual relations with a client will be prohibited in many cases. The proposed amendments establish a bright-line rule to that effect, based on the same concerns about conflict of interest, imbalance of power in the relationship, the problematic issue of informed consent and overreaching.
- The proposed rule states: “[a] lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”

3. New Rule 4.4(b)(12/1/20)

Duties when lawyer receives inadvertently misdelivered privileged information

- Codified the guidance in LEOs 1702 and 1871 regarding a lawyer who receives privileged information that was inadvertently sent.
- Requires that a lawyer who receives information relating to the representation of the lawyer's client and who knows that the information is privileged and was inadvertently sent must immediately terminate review or use of the information, promptly notify the sender, and abide by the sender's instructions, if applicable, to return or destroy the information.
- The rule does not apply to information that was wrongfully obtained rather than inadvertently obtained. See Cmt. [2].
- The rule prohibits the lawyer from informing client of the receipt of inadvertently misdelivered privileged information. Cmt. [3].

New Rule 4.4(b)(12/1/20) Duties when lawyer receives inadvertently misdelivered privileged information

- A document or electronically stored information is inadvertently sent when accidentally transmitted, such as when an email or letter is mis-addressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. Cmt. [2].
- The receiving lawyer knows or reasonably should know that the document or information was inadvertently sent if the sender promptly notifies the receiving lawyer of the mistake. Cmt. [2].
- Where applicable discovery rules, agreements, or other law permit the recipient to contest the sender's claim of privilege, use of such a process does not constitute "use" as prohibited by this rule, and the recipient may sequester the document or information pending resolution of that process. Cmt. [3].

4. Supreme Court Rejects Proposed "Needle in a Haystack" Comment (October 24, 2019)

- Rule 3.8(d) requires a prosecutor "make timely disclosure" of the "existence of evidence" that the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.
- But the rule does not specify what form that disclosure must take, nor whether disclosure requires more than mere production of the evidence.
- To the Ethics Committee and Council for the VSB, disclosure means to reveal or make known, i.e., "identify."
- To many prosecutors, "disclose" means only to produce exculpatory evidence, even if that evidence is buried like "a needle in a haystack" amidst a large production of other documents or material.

Supreme Court Rejects Proposed "Needle in a Haystack" Comment (October 24, 2019)

- After a long, tortured history of failed attempts to arrive at a fair and sensible solution to the "needle in a haystack" problem, Council voted 47-13 at its meeting on 2/23/19 to petition the SCV to adopt this proposed comment:
- Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.
- On October 24, 2019, the SCV rejected the VSB's proposal.

5. LEO 1890 (January 9, 2020)

Contacts with represented persons

VACATED by the SCV on 4/7/2020

- Rule 4.2 (Communications With Persons Represented by Counsel): “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”
- Compendium Opinion 1890 addresses 14 different questions that have arisen over the years in apply what seems to be a straightforward rule.

LEO 1890 (January 9, 2020)
Contacts with represented persons
VACATED by the SCV on 4/7/2020

- 5. Represented persons may communicate directly with each other regarding the subject of the representation, but the lawyer may not use the client to circumvent Rule 4.2.
- 6. A lawyer may not use an investigator or third party to communicate directly with a represented person.
- 7. Government lawyers involved in criminal and certain civil investigations may be "authorized by law" to have ex parte investigative contacts with represented persons.
- 8. Ex parte communications are permitted with employees of a represented organization unless the employee is in the "control group" or is the "alter ego" of the represented organization.
- 9. The rule does not apply to communications with former employees of a represented organization.

LEO 1890 (January 9, 2020)
Contacts with represented persons
VACATED by the SCV on 4/7/2020

- 10. That an organization has in house or general counsel does not prohibit another lawyer from communicating directly with constituents of the organization, and the fact that an organization has outside counsel in a particular matter does not prohibit another lawyer from communicating directly with in-house counsel for the organization.
- 11. Plaintiff's counsel generally may communicate directly with an insurance company's employee/adjuster after the insurance company has assigned the case to defense counsel.
- 12. A lawyer may communicate directly with a represented person if that person is seeking a "second opinion" or replacement counsel.
- 13. The rule permits communications that are "authorized by law."
- 14. A lawyer's inability to communicate with an uncooperative opposing counsel or reasonable belief that opposing counsel has withheld or failed to communicate settlement offers is not a basis for direct communication with a represented adversary.
- **LEO 1890 was vacated by the SCV on 4/7/2020.**

LEO 1891 (1/9/2020) Communications with Government Employees

- If a lawyer is representing a client that has a legal dispute with a represented governmental entity, when is that lawyer's communication with a government employee, officer or official considered "authorized by law" for purposes of Rule 4.2?
- Doesn't a lawyer have a 1st Amendment right to communicate with a public official about a policy or matter of public interest, even if it may be the subject of a legal controversy the lawyer is handling for a client against a governmental entity?
- Does the communicating lawyer need the consent of the government's attorney to have an *ex parte* conversation with a "control group" public employee?

LEO 1891 (1/9/2020) Communications with Government Employees

- There are instances where communication with represented government officials is "authorized by law" for purposes of Rule 4.2, considering the constitutional and statutory rights of citizens to access the government and to petition for the redress of grievances.
- Communication with a represented government official is authorized by law and does not require the government lawyer's consent if made for the purpose of addressing a policy issue and the government official being addressed has the ability or authority to take or recommend government action, or otherwise effectuate government policy on the issue.
- Communication may be proper even if the public employee is a member of the "control group" and even though the subject matter of the communication relates to a pending claim, lawsuit or legal controversy in which the government official or entity is a party.

7. Supreme Court Adopts Amendments to Corporate Counsel Rule 1A:5 (eff. 1/1/20)

- Prior to January 1, 2020 a foreign lawyer (admitted in a US state or territory but not in VA) could apply to the VSB for a Part 1 Corporate Counsel Certificate so that he or she could serve as in-house or corporate counsel for an employer in VA.
- The new amendments now require foreign lawyers to apply to the VBBE and undergo a character and fitness examination before a Part 1 Certificate may be issued.
- An applicant must be admitted by examination and licensed to practice law in the court of last resort in another state or territory of the United States and in good standing in all other jurisdictions in which the applicant has been admitted.
- The new amendments do not apply to Part 2 Corporate Counsel Registrants or Part 1 Corporate Counsel holding a certificate before January 1, 2020.

8. Revisions to LEO 1850 Outsourcing Legal Services

- Proposed rewrite of an earlier legal ethics opinion issued by the Ethics Committee on December 10, 2010 about outsourcing legal or non-legal support services.
- Outsourcing examples: reproduction of materials, document retention database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts.
- Law firms have always and will always engage other lawyers and nonlawyers in the provision of various legal and non-legal support services.
- Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the lawyer the opportunity to seek the services of outside lawyers and staff in complex matters.
- Legal outsourcing also gives sole practitioners and small law firms more flexibility in not having to hire staff or employees when they experience temporary work overflows for which a contract lawyer or non-lawyer may be appropriate.

Revisions to LEO 1850 Outsourcing Legal Services

- Lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer
- (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law,
- (2) preserves the client's confidences,
- (3) bills for the services appropriately, and
- (4) obtains the client's informed advance consent to outsourcing the work.
  - *See In re Wright*, 290 B.R. 145, 19 Law. Man. Prof. Conduct 281 (Bankr. C.D. Cal. 2003) (law firm that failed to seek debtor-client's consent before shipping out work to contract attorney in bankruptcy proceeding is barred from collecting fees for independent contractor's time).

Revisions to LEO 1850 Outsourcing Legal Services

- Selection of lawyers or non-lawyer outside the office to perform outsourced work must be made competently
- Work performed must be adequately supervised and reviewed by the outsourcing lawyer or firm.
- If confidential information will be revealed to persons outside the firm the affected clients must consent to the disclosure of confidential information and the use of persons outside the firm to perform the outsourced work.
  - Unless person performing the work is considered “associated” with the firm or working under the close supervision of hiring attorney.
- Billing the client for the work performed by persons not associated with the firm must be billed at actual cost to the firm as a disbursement and may not be “marked up” without disclosure of actual cost and client consent.
  - Unless person performing the work is considered “associated” with the firm.
  - See Illinois Ethics Op. 98-2 (1998) (lawyer who hires independent lawyer and pays her on hourly basis need not disclose arrangement to clients if work is performed under counsel's close supervision

9. Proposed LEO 1878

Duty of Successor Lawyer to address discharged lawyer's lien

- This proposed opinion generally addresses the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a quantum meruit basis against the proceeds of a recovery.
- The successor's contingent fee must be reasonable, taking into consideration work performed by the discharged lawyer prior to discharge.
- Rule 1.5(b) and Rule 1.4 require the successor lawyer to communicate with the client about the client's potential obligation to pay for work performed by the discharged lawyer in addition to successor lawyer's fee.
- Successor lawyer may represent the client in negotiation and litigation over the discharged lawyer's lien if there is no conflict under Rule 1.7(a)(2).

10. Supreme Court Adopts Amendments to LEO 1872 Virtual Law Offices (Eff. October 2, 2019)

- LEO 1872 was issued March 29, 2013 as a committee opinion. Because Virtual Law Offices (VLOs) were emerging, the opinion sought to address two issues: (1) the lawyer's duty to use reasonable care to protect client confidential information when selecting and using a "cloud" computing provider; and (2) avoiding the misleading use of addresses of physical office spaces and executive suites by listing them as a "law office" unless the lawyer actually uses the office space to practice law.
- The revisions modify the discussion of when a lawyer may advertise a non-exclusive office space as a location of the firm by removing the "factors to be considered" which included frequency of use, whether nonlawyers use the office space, and whether signage identifies the space as a "law office."
- The revisions remove the reference to VBBE Regulation 7 since it is no longer required that an applicant seeking admission on motion have proof of a physical office space to practice law.