





VEGAS

Annual Bar Trip and CLE Conference





The Palazzo @ The Venetian MCLEs 9/6/25 & 9/7/25 9am

Virginia MCLE Board Certification of Attendance (Form 2)

Report attendance online at www.vsb.org. Keep this form for your records.

Name:	VSB ID#:								
Address:					Phone:				
					Email:				
	City	Sta	te	Zip					
Course ID:	VIMM0	05							
Sponsor:	Virginia Beach Bar Association								
Title:	VBBA~VEGAS ANNUAL BAR TRIP AND CLE CONFERENCE								
Type:	Live								
Format:	Speaker in Room								
Credits:	4.00 CLE	2.00 (Ethics)	0.00 Well-bei r	ng					
				lit Certific					
Pate completed:	Do not le	ave blank or fo	orm will not l	be processed	Location:				
(hrs/min hour. E.g. 75 n 2. The sessions 3. I participate 4. I was given means if the pr 5. I understand or preceding C	total of	(hrs/mins proved Well-LE hours.) h I am claimin rogram in a setunity to interact pre-recorded to claim credit its.	being. (Clair g credit had tting physica ct with the p l). for any cours	m credit for a written instally suitable bresenter (in se/segment f	thich () (hrs/mins) were approved Ethics and actual time in attendance. Round to the nearest half ructional materials to cover the subject matter. for the course. real time if the program was live or by some other for which credit has already been claimed in the current to appropriate disciplinary action.				
Date			_		Signature				

MCLE requirement: Paragraph 17, Section IV, Part Six of the Rules of the Supreme Court of Virginia and MCLE Board Regulations. Completion deadline: October 31. Reporting deadline: December 15. Fees are assessed for failure to comply with MCLE deadlines.

Virginia MCLE Board

Certification of Teaching (Form 3)

Email your completed form to MyMCLE@vsb.org.

Name:	VSB ID#: Phone:									
Address:										
	Email:									
	City	Sta	te	Zip						
Course ID:	VIMM005									
Sponsor:	Virginia Beach Bar Association									
Title:	VBBA~VEGAS ANNUAL BAR TRIP AND CLE CONFERENCE									
Type:	Live									
Format:	Speaker in Room									
Credits:	4.00 CLE	2.00 (Ethics)	0.00 Well-bein	g						
			Cred	lit Certif	ïcation					
 To claim teac your teaching Up to four (4) by '4' to determ (8) hours can 	hing and at segment) i hours of p mine the m be claimed	tendance cred in line 2, and to reparation cre aximum preparation cours	its, enter the he amount o dit can be cla hration credit e.	time spent f preparation aimed per of you can re	dit. Leave line 2 blank. It teaching in line 1, time as an attendee (do not include on credit in line 3. one hour of teaching. Multiply the total minutes taught eccive for your teaching segment. A maximum of eight um of the three lines, rounded to the nearest half hour.					
Date completed	Do not le	ave blank or fo	orm will not b	e processe	Location:					
1. My teachin Ethics and	g segment	was(hi	s/mins) of C	LE which	included () (hrs/mins) of approved					
2. I also attend of approved E					CLE which included () (hrs/mins) eing.					
3. I am claimi	ng(hrs/mins) of p	reparation cr	edit.						
4. I understand	d that a ma	terially false s	tatement sha	ll be subje	ct to appropriate disciplinary action.					
Date			_		Signature					

MCLE requirement: Paragraph 17, Section IV, Part Six of the Rules of the Supreme Court of Virginia and MCLE Board Regulations. Completion deadline: October 31. Reporting deadline: December 15. Fees are assessed for failure to comply with MCLE deadlines.



Vegas 2025: The Palazzo

Saturday 9/6/25 9a-11a

"I Recorded It!" ~ USE OF AUDIO OR VIDEO RECORDINGS IN COURT, HEARSAY AND ITS EXCEPTIONS, AND ETHICAL CONSIDERATIONS (2.0 MCLE/1.0 ETHICS)

Christy L. Murphy, Esq., Bischoff Martingayle P.C. Christianna Dougherty-Cuningham, Esq., Associate City Attorney-Virginia Beach

Sunday 9/7/2025 9am-11am

"Here Come the Judges" ~ Being Ethical and Realistic in Litigation (2.0 MCLE/1 ETHICS)

Hon. Salvatore R. Iaquinto, *Virginia Beach Circuit Court*Hon. Paul D. Merullo, *Virginia Beach General District Court*Hon. Jennifer B. Shupert, *Virginia Beach Juvenile & Domestic Relations District Court*

Christy L. Murphy, Esq. Bischoff Martingayle, P.C.

BISCHOFF MARTINGAYLE

Christy is an experienced litigation specialist with a demonstrated history of working in all courts in Virginia focused on complex civil litigation. She is a partner at Bischoff Martingayle, P.C. Christy is skilled in commercial litigation, corporate law, domestic relations law, estate litigation and real estate law including landlord/tenant issues, title issues, easements, and liens. Christy has nearly two decades of experience in state and federal courts including appeals in the Virginia Court of Appeals, the Supreme Court of Virginia, and the Fourth Circuit Court of Appeals. She currently serves as Commissioner of Chancery in Virginia Beach.

Christy serves a Director on the Board of the Virginia Beach Bar Association and is the current president of the I'Anson Hoffman Inn of Court.

<u>Christianna Dougherty-Cunningham, Esq., Associate</u> <u>City Attorney</u>



Christianna Dougherty-Cunningham is an Associate City Attorney for the City of Virginia Beach has handled eminent domain, §1983 defense, code enforcement, local taxation, worker's compensation, municipal liability claims, and presently represents the City's Department of Human Services in all facets of Public

Health and Welfare. She is a member of the VB JDR Court Improvement Committee, the VB JDAI Committee, the Virginia Beach Bar Association Juvenile Court Committee, and a Past President for the James Kent American Inn of Court. She was a recipient of the VBBA Bar Service Award and presently serves as Treasurer for the VBBA Executive Board.

Ms. Cunningham has been a speaker at numerous statewide CLEs and conferences on DSS and DARS Matters and has drafted teaching materials on a wide range of topics, including but not limited to, Adult Protective Services issues, Guardian and Conservatorships, HIPAA and 42 CFR Regulations, Abuse, Neglect and Foster Care Proceedings in Virginia, and Ethics and Family Partnership Meetings. She currently serves on the stakeholders/advisory groups for Virginia 988/ Marcus Alert, the Indian Child Welfare Act in Virginia, and the VDSS CPS Local Conference Policy Group. She has also conducted numerous training sessions on all aspects of trial preparation and civil liability for law enforcement and social work staff.

"I Recorded It!" " USE OF AUDIO OR VIDEO RECORDINGS IN COURT, HEARSAY AND ITS EXCEPTIONS, AND ETHICAL CONSIDERATONS (2.0 MCLE/1.0 ETHICS)

Christy L. Murphy, Esq., Bischoff Martingayle P.C. Christianna Dougherty-Cuningham, Esq., Associate City Attorney-Virginia Beach

USE OF AUDIO OR VIDEO RECORDINGS IN COURT AND HEARSAY AND ITS EXCEPTIONS

I. Admissibility, Legality, and Ethical Considerations of Audio and Video Recordings in Family Law Cases

Before deciding whether to use or disclose the contents of an audio or video recording, you must consider 1) the legality of the recording, 2) any ethical concerns, and individual criminal liability if you know or have reason to know that a client's recording was obtained illegally, and 3) in the event the recording is legal and ethical, what is your ability to use the recording at trial and how do you get it into evidence.

A. Legality of Recordings

1. Wiretapping

i. Federal Wiretapping Laws

Federal and state legislatures have enacted statutes regulating wiretapping. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the Act) contains the federal wiretapping statute. The Act prohibits interceptions and disclosures of wire and oral communications, providing possible criminal and civil penalties to violators. Provisions in the Act clarify Congress did not intend to regulate the entire field of wiretapping when it enacted the law. As such, states may regulate the wiretapping field by passing state wiretapping statutes. The Act gives only the minimum protection against illegal interception. States may enact stricter legislation if the state wants to offer its citizens more protection. A state, however, cannot pass a law with lower standards than the federal law. States are not required to pass wiretapping statutes and may rely solely on the provisions of the Act¹.

ii. Virginia's Wiretapping Statute

Va. Code § 19.2-62 makes it unlawful, when any person who, either lacks advanced consent or is not party to the communication, intercepts, or endeavors to intercept, any wire, electronic, or oral communication. This section also makes it unlawful to use or disclose, and to attempt to use or disclose, the contents of any such unlawfully obtained oral communication.

2. A party recording the opposing party when they themselves are not present.

If a client is not present during a conversation, whether in-person or telephonic, and they do not have advanced consent from the opposing party to record the conversation, their recording is in violation of Virginia's Wiretapping Statute and they are opening themselves to criminal liability.

¹ NOTE: HE WOULDN'T LISTEN TO ME BEFORE, BUT NOW . . . : INTERSPOUSAL WIRETAPPING AND AN ANALYSIS OF STATE WIRETAPPING STATUTES

For example, if a spouse sets an audio recording device in the home, and leaves the house, they are no longer present or a party to the conversation in violation of Va. Code § 19.2-62.

B. Ethical Obligations and Criminal Liability for Client's Counsel

Va. Code § 19.2-62 also opens an attorney up to *criminal liability*, if they know or have reason to know that the contents of the recording was obtained in violation of Va. Code § 19.2-62 and they use or attempt to use the information that was illegally obtained, or even if they disclose the information learned from the recording.

1. Admissibility of Recordings and Laying the Proper Foundation

i. Illegally Obtained Recordings

Virginia provides, similar to the federal statute, an explicit prohibition on the admissibility of illegally-intercepted evidence. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, commission, regulatory body, legislative committee or other agency of this Commonwealth or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. Va. Code Ann. § 19.2-65.

ii. Audio Recordings of Telephone Conversations

Virginia is a one consent jurisdiction except for Virginia Code § 8.01-420.2.

§ 8.01-420.2. Limitation on use of recorded conversations as evidence. No mechanical recording, electronic or otherwise, of a *telephone conversation* shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage. The parties' knowledge of the recording pursuant to clause (i) shall be demonstrated by a declaration at the beginning of the recorded portion of the conversation to be admitted into evidence that the conversation is being recorded. This section shall not apply to emergency reporting systems operated by police and fire departments and by emergency medical services agencies, nor to any communications common carrier utilizing service observing or random monitoring pursuant to § 19.2-62.

But note, this is a state rule only and will not bar admissibility in federal court. See Leitman v. McAusland, 934 F.2d 46 (4th Cir. 1991) ("A state evidentiary rule, such as that cited by appellants [8.01-420.2], does not control admissibility of evidence in federal proceedings. See, e.g., United States v. Horton, 601 F.2d 319 (7th Cir.), cert. denied, 444 U.S. 937, 100 S.Ct. 287, 62 L.Ed.2d 197 (1979); United States v. Keen, 508 F.2d 986 (9th Cir.1974), cert. denied, 421 U.S. 929, 95 S.Ct. 1655, 44 L.Ed.2d 86 (1975). In a hearing before a federal agency, federal procedural law would apply. Under federal law, it was sufficient that one party to the conversation, in this case, the government's informant, knew that the conversation was being taped. 18 U.S.C. Sec. 2511(2)(c)") (bid rigging case).

The Circuit Court of Loudoun County analyzed Virginia Code § 8.01-420.2 in *Pacific Century Development and Realty, Inc. v. Wheatland Farms, LLC*, 2007 Va. Cir. LEXIS 340 (Loudoun 2007). In the case, "a message left inadvertently on the voicemail of a party who was not available for a three-way call initiated by the other two parties to the conversation. The evidence suggests that after a message had been left, the device, unbeknownst to the parties to the conversation, continued to record a conversation between the two parties." The plaintiff party to the recording sought to exclude it under Virginia Code § 8.01-420.2. Interestingly, the Court did not exclude the recording under the following analysis:

In drafting the provisions of Va. Code Ann. § 8.01-420.2, the legislature carefully chose their words. It is the use of recorded "conversations" rather than "communications" that are the object of exclusion. While the former implicates an interaction of ideas among the parties, the latter would suggest no such an interchange in the transmission of ideas. Voicemail, while a mechanical device capable of recording messages, was never a party to a conversation. It is a mechanical device utilized by callers to communicate when the intended recipient of the call is unavailable to the person placing the call.

Both speakers were fully aware that the third party had not responded to their telephone call. For the convenience of all three parties, a voicemail message was left. The statute is clearly directed to recordings by parties to the conversation and not merely the conversation. Voicemail was not a participant in any purposeful activity that would find guidance in the words of the statute. Lastly, the voicemail device was not set in motion for the purpose to surreptitiously recording data arising out of conversations or communications by unsuspecting parties in the fashion of a wire tap, trap, or pen register.

In the divorce context, see Throckmorton v. Throckmorton, 13 Va. Cir. 250 (Henrico County 1988). Here, the husband wanted to use tape-recorded conversations he had made of his wife talking on the phone to a third party prior to their separation. The husband attached a cassette recorder to a phone jack in the basement of the marital home. He would also listen to the conversation as it occurred and as it was being recorded. "There was no tapping of the line or interception of the conversation between the point of origination and the point of reception." The husband recognized the voice of his wife on the telephone as he listened to the conversation between her and a third person. "The recordings were made from 1982 through October, 1985, when the parties separated."

The court held that the tapes were not admissible under § 8.01-420.2 as it was a recorded telephone conversation without notice and consent. The court also analyzed whether the husband could testify to what he heard on the calls. The court analyzed what is an interception under Va. Code § 19.2-62. If it was in interception, then it would not be admissible. If it was a recording of a communication already acquired then under *Cogdill v. Commonwealth*, it would not be an interception. 219 Va. 272 (1978). The court denied application of the exception in *Cogdill*,

which found that a telephone was excluded from the definition of a device under the act, due to the fact that the husband used earphones and a recorder.

iii. Audio Recordings of In-Person Conversations

So long as the client is present and a participate to the conversation—not merely eavesdropping on a conversation and recording same—their recording complies with Va. Code § 19.2-62.

iv. Video Recordings of Opposing Party

Introducing Video Tapes. Courts usually treat video tapes the same as photographs. The admissibility of a video tape is determined on a case-by-case basis according to the specific facts and circumstances. Courts consider 3 factors to determine the admissibility of a videotape: (1) whether it accurately depicts what it purports to represent [Authentication]; (2) whether it tends to establish a fact of the proponent's case [Relevancy]; and (3) whether it will aid the judge's understanding [Balancing Test of Probative Value vs. Unfair Prejudice].

v. Alternatives: Use of Recordings to Refresh Recollection or for Purposes of Impeachment

If you are unable to admit the recordings themselves, you may wish to question the other party to the conversation, on the stand and under oath, about whether or not they participated in those specific conversations with the individuals on the tape recording, on a certain date, at a certain place. Then you may ask very specific questions about whether verbatim statements were made or if certain statements are consistent with what is on the recording. When the opposing party claims they do not remember, you can then refresh their recollection by playing the actual recording, or when the opposing party testifies inconsistently with the words or statements on the recording, you can introduce the recording through your client for purposes of impeachment. Keep in mind that if there are other voices on the recording, you may run into a hearsay objection concerning statements from any other speakers.

Va. Code Ann. § 8.01-403. Witness proving adverse; contradiction; prior inconsistent statement

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the court prove adverse, by leave of the court, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. In every such case the court, if requested by either party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the purpose of contradicting the witness.

II. Hearsay and the Recognized Virginia Exceptions to Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended as an assertion.

Hearsay is inadmissible unless it falls under an exception to hearsay. A party relying upon an exception to the hearsay rule for the admissibility of evidence bears the burden of persuading the court that the evidence falls within the exception" and "the standard of proof to meet that burden is by a *preponderance of the evidence*." *Lynch v. Commonwealth*, 272 Va. 204, 207-08, 630 S.E.2d 482, 484 (2006).

- A. Examples of out of court statements <u>not</u> offered for the truth of the matter asserted:
- 1. Bennett v. Commonwealth, 69 Va. App. 475, 489-90, 820 S.E.2d 390, 397 (2018): Here, the Commonwealth explicitly offered the informant's recorded statements, made during his telephone conversations and meeting with the appellant, to establish "how [the appellant] react[ed] to what the informant [said]," not for the truth of the content of the informant's statements. Further, the prosecutor specifically argued that the "entire arc" of conversations was offered to prove that a transaction occurred between the informant and the appellant and that "no evidence [indicated that] the informant interact[ed] with" anyone else who might have given him the drugs. Accordingly, we presume that the trial court considered the informant's statements asking for specific drugs merely to provide context for the appellant's statements and to establish that the informant and appellant were present together during the relevant period of time.
- 2. Swain v. Commonwealth, 28 Va. App. 555, 507 S.E.2d 116 (1998): The court concluded that such statements are not hearsay when offered for the limited purpose of establishing context for the defendant's statements. In this case, a police officer overheard a conversation between the defendant and another person, who asked the defendant for a "twenty." The officer, in his testimony, repeated the conversation and explained that a "twenty" meant cocaine. On appeal, the court concluded that the Commonwealth offered the buyer's statement asking for a "twenty" "solely to give context to party admissions" comprising the defendant's part of the conversation, and the buyer's statement was not offered for its truth and, thus, the safeguards provided by the rule against hearsay were not implicated.

Prior Statements – a prior statement (whether under oath or not) is hearsay if offered in evidence to prove the truth of the matters it asserts, but may be received in evidence for all purposes if the statement is admissible under any hearsay exception.

In addition, if not excluded under another Rule of Evidence or a statute, a prior hearsay statement may also be admitted as follows:

- 3. A prior statement that is inconsistent with the hearing testimony of the witness is admissible for <u>impeachment</u> of the witness' credibility.
- 4. A prior statement that is consistent with the hearing testimony of the witness is admissible for purposes of <u>rehabilitating</u> the witness' credibility, but only if:
- i. The witness has been impeached using a <u>prior inconsistent</u> <u>statement</u>, or
- ii. The witness has been impeached based on <u>alleged improper</u> <u>influence</u>, or a motive to falsify testimony, such as bias, interest, corruption or relationship to a party or a cause, or by an express or implied charge that the in-court testimony is a recent

fabrication; and the proponent of the prior statement shows that it was made before any litigation motive arose for the witness to make a false statement.

B. HEARSAY EXCEPTIONS APPLICABLE REGARDLESS OF AVAILABILITY OF DECLARANT

1. Admission by party-opponent

i. A statement offered against a party that is the *party's own*

statement, or

ii. A statement of which the party has manifested adoption or belief

in its truth

Gaspa v. Gaspa, 2018 Va. App. LEXIS 61. The circuit court did not abuse its discretion when it admitted into evidence an exhibit that it used to value a wife's retirement accounts because the wife's responses to the questions from the husband's attorney manifested her belief in the truth of the exhibit pursuant to Va. Sup. Ct. R. 2:803(0)(B); the wife agreed she had the retirement accounts and that she produced in her discovery responses the document summarizing the retirement accounts; she agreed that the statement summarizing the retirement accounts, which the husband's attorney showed to her as she was testifying, was dated just before the parties' separation; and all of the wife's answers supported the conclusion that the exhibit constituted an adoptive admission.

- A. "Statements made in the presence and hearing of another, to which one does not reply, are admissible against him as tacit admissions of their truth or accuracy, when such statements are made under circumstances naturally calling for reply if their truth is not intended to be admitted. This principle rests upon that universal rule of human conduct which prompts one to repel an unfounded imputation or claim. The test for an adoptive admission 'is whether persons similarly situated would have felt themselves called upon to deny the statements affecting them in the event they did not intend to express acquiescence by their failure to do so." Gaspa v. Gaspa.
- B. "A declaration in the presence of a party to a cause becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth; for, if he is silent when he ought to have denied, there is a presumption of his acquiescence." *Gaspa v. Gaspa*, No. 1019-17-2, 2018 Va. App. LEXIS 61, at *6 (Ct. App. Mar. 13, 2018) (quoting *Sanders v. Newsome*, 179 Va. 582, 592, 19 S.E.2d 883, 887 (1942)).
- C. PRACTICE POINTER: The Wife did not say the statement was true about the values, she merely said she had those accounts, they were all earned during the marriage, and that yes, that was the statement from them that she received right before separation and had produced in discovery. It would be best to elaborate even further and ask the opponent, "Do you assert that this statement *accurately reflects* the balance/transactions/etc.?" in order to satisfy an adoptive admission hearsay exception.
- i. a statement **by a person authorized** by the party to make a statement concerning the subject, or

ii. A statement by the party's **agent or employee**, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment, or

iii. a statement by a **co-conspirator** of a party during the course and in furtherance of the conspiracy.

2. Present sense impression

A spontaneous statement describing or explaining an event or condition made contemporaneously with, or while, the declarant was perceiving the event or condition.

"In order for the present sense impression exception to apply, three requirements must be satisfied: '(1) the declaration must have been contemporaneous with the act; (2) it must explain the act; and (3) it must be spontaneous." Murray v. Commonwealth, No. 1167-09-2, 2010 Va. App. LEXIS 456, at *10 (Ct. App. Nov. 23, 2010) (quoting Wilder v. Commonwealth, 55 Va. App. 579, 587, 687 S.E.2d 542, 546 (2010) (quoting Clark, 14 Va. App. at 1070, 421 S.E.2d at 30).

3. Excited utterance

A spontaneous or impulsive statement prompted by a startling event or condition and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation.

<u>Examples</u>: victim was distraught, little time had elapsed between the alleged assault and the statements, and the statements were spontaneous. *Commonwealth v. Sumner*, 2017 Va. Cir. LEXIS 146 (Norfolk Aug. 11, 2017).

4. Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

<u>Examples</u>: Statement did not qualify under the state-of-mind exception, as it did not describe the victim's condition at the time she made it. *Moulds v. Commonwealth*, No. 1396-15-4, 2016 Va. App. LEXIS 284 (Ct. of Appeals Oct. 25, 2016).

5. Statements for purposes of medical treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

6. Recorded recollection

A memorandum or record concerning a matter about which a witness once had firsthand knowledge made or adopted by the witness at or near the time of the event and while the witness

had a clear and accurate memory of it, if the witness lacks a present recollection of the event, and the witness vouches for the accuracy of the written memorandum.

If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

7. Records of a regularly conducted activity

A record of acts, events, calculations, or conditions if:

- i. The record was made *at or near the time of the acts*, events, calculations, or conditions by--or from information transmitted by--someone with knowledge;
- ii. The record was *made and kept in the course of a regularly* conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- iii. Making and keeping the record was a *regular practice of that activity*;
- iv. All these conditions are shown by the testimony of the custodian or another qualified witness, or by a *certification*; and
- v. Neither the source of information nor the method or circumstances of preparation indicate a lack of *trustworthiness*.

Examples: The Supreme Court has explained the business records exception to the hearsay rule as follows: "In Virginia, the business records exception to the hearsay rule, also referred to as the 'modern shop book rule,' permits the admission of verified regular entries of a business provided that such evidence has a direct or circumstantial guarantee of trustworthiness. We have further explained that the trustworthiness or reliability of such records is guaranteed by the fact that they are regularly prepared and relied on in the conduct of business by the persons or entities for which the records are kept. Therefore, to be admissible as a business record, a document must be produced by its proper custodian, be a record kept in the ordinary course of business, and be made at the time of an event by a person having a duty to keep a true record of that event." 1924 Leonard Rd., L.L.C. v. Van Roekel, 272 Va. 543, 554-55, 636 S.E.2d 378, 385 (2006).

Circuit court admitted as business records a child's removal petition and an attached affidavit because the county department of social services child protective services worker who drafted them testified that she had *access* to the department records that others did not; the worker was *familiar* with the records and had access to them, and the circuit court accepted her as a custodian of the record based upon her *level of access* to the department records. Lane-Alvis v. Richmond Dep't of Soc. Servs., No. 0609-17-2, 2018 Va. App. LEXIS 53 (Mar. 6, 2018).

8. Public records and reports

In addition to categories of government records made admissible by statute, records, reports, statements, or data compilations, in any form, prepared by public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed within the scope of the office or agency's duties, as to which the source of the recorded information could testify if called as a witness.

The tax assessment records on Mrs. Gelber's property contained the *expert opinion* of the public official as to the value of Mrs. Gelber's home. Admission of the tax assessment records would have allowed the Executors to introduce expert opinion as to the value of Mrs. Gelber's home *without requiring them to qualify an expert or satisfy the foundational requirements for admission of expert testimony*. "The admission of hearsay expert opinion without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party. *Gelber v. Glock*, 293 Va. 497, 514, 800 S.E.2d 800, 810 (2017).

The underlying rationale which justifies admitting facts contained in official records as an exception to the hearsay rule is that the concern for reliability is largely obviated because the nature and source of the evidence enhance the prospect of its trustworthiness." Ingram v. Commonwealth, 1 Va. App. 335, 338, 338 S.E.2d 657, 658-59 (1986). Under this exception, "[c]opies of records . . . of the United States . . . shall be received as prima facie evidence provided that such copies are authenticated to be true copies either by the custodian thereof or by the person to whom the custodian reports, if they are different." *Adjei v. Commonwealth*, 63 Va. App. 727, 740, 763 S.E.2d 225, 231 (2014).

9. Records of vital statistics

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report was made to a public office pursuant to requirements of law.

10. Absence of entries in public records and reports

An affidavit signed by an officer, or the deputy thereof, deemed to have custody of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, stating that after a diligent search, no record or entry of such record is found to exist among the records in such office is admissible as evidence that the office has no such record or entry.

11. Records of religious organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

12. Marriage, baptismal, and similar certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

13. Family records

Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

14. Records of documents affecting an interest in property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution, and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

15. Statements in documents affecting an interest in property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution, and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

16. Statements in ancient documents

Statements generally acted upon as true by persons having an interest in the matter, and contained in a document in existence 30 years or more, the authenticity of which is established.

17. Market quotations

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown.

18. Learned treatises

See Rule 2:706.

19. Reputation concerning boundaries

Reputation in a community, arising before the controversy, as to boundaries of lands in the community, where the reputation refers to monuments or other delineations on the ground and some evidence of title exists.

20. Reputation as to character trait

Reputation of a person's character trait among his or her associates or in the community.

21. Judgment as to personal, family, or general history or boundaries

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

22. Statement of identification by witness

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person.

23. Recent complaint of sexual assault

In any prosecution for criminal sexual assault, the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness.

24. Price of goods

In shoplifting cases, price tags regularly affixed to items of personalty offered for sale, or testimony concerning the amounts shown on such tags.

D. Statements by Child

Proof of an out-of-court statement made by a child who is under 13 years of age at the time of trial or hearing, and who is the alleged victim of an offense against children as provided in Code § 19.2-268.3(A), which statement describes any act directed against the child relating to such alleged offense, shall not be excluded as hearsay under Rule 2:802 if both of the following apply:

The court finds, in a hearing conducted prior to a trial, that the time, content, and totality of circumstances surrounding the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. In determining such trustworthiness, the court may consider, among other things, the following factors:

- 1. The child's personal knowledge of the event;
- 2. The age, maturity, and mental state of the child;
- 3. The credibility of the person testifying about the statement;
- 4. Any apparent motive the child may have to falsify or distort the event, including bias or coercion;
- 5. Whether the child was suffering pain or distress when making the statement; and
- 6. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act; and
 - 7. The child testifies or is declared by the court to be unavailable as a witness.

E. Hearsay exceptions available when Declarant is unavailable (dead or otherwise)

1. Former testimony

Testimony given under oath or otherwise subject to penalties for perjury at a prior hearing, or in a deposition, if it is offered in reasonably accurate form and, if given in a different proceeding, the party against whom the evidence is now offered, or in a civil case a privy, was a party in that proceeding who examined the witness by direct examination or had the opportunity to cross-

examine the witness, and the issue on which the testimony is offered is substantially the same in the two cases.

2. Statement under belief of impending death (only for homicide cases)

3. Statement against interest

A statement which the declarant knew at the time of its making to be contrary to the declarant's pecuniary or proprietary interest, or to tend to subject the declarant to civil liability.

4. Statement of personal or family history

If no better evidence is available, a statement made before the existence of the controversy, concerning family relationships or pedigree of a person, made by a member of the family or relative.

5. Statement by party incapable of testifying

In an action by or against a person who, from any cause, is incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.

In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings.

For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party.

If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint.

F. Hearsay within Hearsay

Not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.

G. Attacking and Supporting Credibility of Hearsay Declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.

III. Practice Pointers: How to Avoid Issues of Admissibility Ahead of Trial

A. Joint Stipulations

Trial counsel will often accommodate their colleagues by stipulating to the foundational proof and agreeing to the admission into evidence of exhibits. This approach is generally laudable since you will save expenses and the time of witnesses, attorneys, and the Court. Most courts

and attorneys aggressively seek such stipulations during pretrial conferences or during trial. Practice Tip: Counsel should clarify whether the stipulation covers the foundation and admissibility of the document at issue (authentication) and whether it also covers the substance of the document, i.e., the facts contained therein (hearsay).

B. Business Records Notice

In a civil matter where a business record is material and admissible, it can be used at trial and not objected to on the basis of hearsay if the requirements of Rule 2:803(6) are met and if authenticated in accordance with § 8.01-390.3.

Per Rule 2:803(6), records of a regularly conducted activity are an exception to the hearsay rule if:

(A) the record was made at or near the time of the acts, events, calculations, or conditions by--or from information transmitted by-- someone with knowledge; (B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making and keeping the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness. NOTE: Rule 2:902(6) has the same language as Virginia Code § 8.01-390.3.

Authentication can be done through a custodian of records, through certification, or both. Importantly, if you intend to authenticate solely by certification, notice must be provided as follows:

The proponent of a business record shall (i) give written notice to all other parties if a certification under this section will be relied upon in whole or in part in authenticating and laying the foundation for admission of such record and (ii) provide a copy of the record and the certification to all other parties, so that all parties have a fair opportunity to challenge the record and certification. The notice and copy of the record and certification shall be provided no later than 15 days in advance of the trial or hearing, unless an order of the court specifies a different time. Objections shall be made within five days thereafter, unless an order of the court specifies a different time. If any party timely objects to reliance upon the certification, the authentication and foundation required by subdivision (6) of Rule 2:803 of the Rules of Supreme Court of Virginia shall be made by witness testimony unless the objection is withdrawn.

Once this code section is satisfied, the business record is self-authenticated.

C. Requests for Admission

Frequently, counsel can narrow the trial issues and avoid the necessity of producing many items of evidence by obtaining advance assurance that certain matters will not be disputed at trial. The long-standing practice of obtaining written stipulations from opposing counsel has been supplemented by the Rules of Court to provide that a party may serve upon another party a request for admission of any matters within the scope of discovery. Unless an answer or objection is made, the matter is conclusively established as true for purposes of that litigation.

VIRGINIA LEGAL ETHICS OPINION 1738

ATTORNEY PARTICIPATION IN ELECTRONIC RECORDING

WITHOUT CONSENT OF PARTY BEING RECORDED

You have asked the committee to reconsider prior opinions and opine as to whether it would be ethical under the Virginia Rules of Professional Conduct for an attorney to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but *without* the knowledge or consent of the other party. Stated differently, are there circumstances under which an attorney, or an agent under the attorney's direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge.

The applicable Rules of Professional Conduct are:

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

In its earliest opinion on the subject the committee addressed the issue of whether it is ethical for a Virginia attorney to tape record a telephone conversation with opposing counsel in pending litigation, concerning the subject matter of the litigation, without informing the opposing counsel that the conversation is being recorded. Legal Ethics Opinion 1217

(1989). The committee concluded that even though such a recording may be permissible under Virginia or federal law, it may nevertheless be improper under DR 1-102 (A)(4) if there are additional facts which would make such recording dishonest, fraudulent, deceitful or a misrepresentation.

One year later, the committee was presented with a situation in which an attorney was representing the wife in a divorce case. *Prior to engaging the attorney*, the wife had tape-recorded her husband's conversations on a telephone in the marital home. The tape recordings revealed the husband's intimate relationship with another woman. The attorney instructed the wife to immediately cease any further recording. While the committee did not decide whether the wife's conduct was unlawful (as this presented a legal question beyond its purview), and the issue of the attorney's involvement in the tape recording was not before the committee, (1) the committee opined in Legal Ethics Opinion 1324 (1990):

... even if non-consensual tape recording of telephone conversations is not prohibited by Virginia or federal law, a lawyer's engaging in such conduct, or assisting a client in such conduct, would be improper and violative of DR 1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law. In holding that a lawyer's advising a client to non-consensually tape record telephone conversations was proscribed by DR 1-102(A)(4), the Supreme Court of Virginia recently found that "conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful. . . . The surreptitious recordation of conversations authorized by Mr. Gunter ...was an 'underhand practice ' designed to 'ensnare ' an opponent." *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). (See also ABA Formal Opinion No. 337 (1974)).

In a later opinion, the committee concluded that even if non-consensual tape recordings are not illegal, a lawyer may not participate in such activity nor advise a client to do so. Legal Ethics Opinion 1448 (1992). In LEO 1448, an attorney represented a client who was the victim of child abuse at the hands of her father. Suffering from severe emotional distress as an adult, she consulted an attorney about a civil action against the father. The father and client were still seeing each other, and, on occasion, the father freely admitted his sexual abuse of the client. The question was whether the attorney could ethically advise the client to secretly tape record her conversations with the father in order to capture the father's testimony and corroborate her statement that the abuse had occurred. The committee opined that to have the client initiate a meeting with the father, under false pretenses, and secretly tape record their conversation, would be deceptive conduct. Thus, the attorney could not advise the client to do that which the attorney could not do directly. DRs 1-102 (A)(2), 1-102 (A)(4).

Finally, the committee applied the holding of LEO 1324 and LEO 1448 to prohibit an attorney acting only as an officer or agent of a corporation from tape recording a conversation between the attorney and a former employee of corporation with the employee's knowledge or consent. Legal Ethics Opinion 1635 (1995).

LEO 1324, LEO 1448 and LEO 1635 relied on the Supreme Court of Virginia's decision in Gunter v. Virginia State Bar, 238 Va. 617, 385 S.E.2d 597 (1989). Attorney Eugene Gunter represented a husband having marital difficulties with his wife, whom he suspected, was having an affair. Gunter employed an investigator to seek evidence of the wife's infidelity, but no evidence was found. Gunter directed the investigator to install a recording device on the phone of the marital home, which was activated whenever the receiver was picked up and recorded all of the conversations. The investigator reviewed the tape recordings and reported the substance of them to Gunter, including communications the wife had with attorneys and legal advice concerning divorcing her husband. After the device was removed, the wife discovered that it had been in place and that her husband and Gunter were culpable. She reported this to the state police and Gunter was indicted for conspiracy to violate the wiretap (intercept) statutes (Va. Code §§ 19.2-62, et seq.). Gunter was tried by jury and acquitted. Thereafter, the Virginia State Bar prosecuted Gunter for misconduct arguing that his conduct was a crime or deliberately wrongful act reflecting adversely on his fitness to practice law. DR 1-102 (A)(3). Alternatively, the bar argued that regardless of whether Gunter's conduct was unlawful, it was unethical under DR 1-102 (A) (4) as conduct involving fraud, dishonesty, deceit or misrepresentation reflecting adversely on Gunter's fitness to practice law. Gunter's appeal was based on the premise that his conduct was found not to have violated the Wiretap Act. Because his conduct was found not illegal, Gunter argued that his conduct could not be judged as unethical. The Court disagreed, holding that "the recordation, by a lawyer or by his authorization, of conversations between third persons, to which he is not a party, without the consent or prior knowledge of each party to the conversation, is 'conduct involving dishonesty, fraud, [or] deceit' under DR 1-102 (A) (4)." 238 Va. at 622 (emphasis added).

Gunter v. Virginia State Bar did not address whether it is unethical for an attorney to tape record a telephone conversation in which the attorney is a participant, if the other party to that conversation is unaware that it is being recorded. In its

appellee brief, the Virginia State Bar cited American Bar Association Formal Opinion 337 (1974), advising that it is unethical for an attorney to record a conversation without the knowledge and consent of all the parties, subject only to a limited exception for law enforcement officials. The Court expressly declined to decide that issue:

The ABA Opinion, as well as the cited decisions of other courts, however, embrace the recordation by a lawyer of conversations to which he is a party, a circumstance not present in the case before us. We are not called upon to decide whether that conduct violates DR 1-102 (A) (4), and we expressly refrain from deciding that question as well. Id. (emphasis added).

In addressing the questions presented, the committee assumes that the recording of a conversation with the consent of one party to the conversation is not illegal under Virginia or federal law. (2) The recording of a conversation in violation of any law would constitute a violation of Rule 8.4. In addition, the committee is mindful of the Court's admonition in *Gunter* that the mere fact that particular conduct is not illegal does not mean that such conduct is ethical. Lawyers are governed by the ethical standards in the Rules of Professional Conduct, which require lawyers to do more than comply with civil or criminal laws. However, the committee is concerned that its prior opinions have expanded the holding in *Gunter* and created a categorical ban, without qualification or exception, of any tape recording by an attorney or under the supervision of an attorney. Of all the state bar opinions issued on this subject, Virginia appears to be the only state that does not recognize any exception to the prohibition.

An unqualified prohibition ignores some important and compelling circumstances where tape recording of conversations is a legitimate and effective investigative practice for law enforcement authorities. Such law enforcement officials include attorneys or agents working under their direction or supervision. Indeed, the authority cited by the Virginia State Bar in *Gunter*; ABA Formal Opinion 337, at least recognized a limited "law enforcement exception" to its prohibition of attorneys secretly tape recording conversations:

There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements.

As stated above, the ethics opinions issued by this committee to date do not recognize *any* circumstances that would allow an attorney to secretly tape record his or her conversations with another or direct another to do so. The committee concludes that its prior opinions sweep too broadly and therefore they are overruled to the extent they are inconsistent with this opinion.

The practical impact on law enforcement of an absolute prohibition of attorney-supervised tape recordings cannot be overlooked. If such recordings are deemed prohibited, law enforcement counsel could not advise or instruct a crime victim or a "contact person" in an extortion or kidnaping case to wear a wire or record a telephone conversation with the suspect. Under our prior opinions, the lawful investigative technique employed in Cogdill, supra, would be deemed unethical if an attorney had advised the victim to wear a recording device and place such a device on her home phone. Without such recordings, the evidence may well have been the victim's word against the attorney's, making the case difficult, if not impossible, to prove beyond a reasonable doubt. Similarly, law enforcement counsel and federal agents (many of whom hold law licenses) are at risk of professional discipline if they participate in undercover operations in which contacts with suspected criminals are recorded. To prohibit this practice would impede law enforcement's capability to monitor the conduct of cooperating individuals and protect them from harm in the event their identity was discovered. Surveillance and recordings assist the police in conducting safe undercover operations and guidance by attorneys ensures that these activities are done in accordance with the law. Electronic and oral communications are often intercepted and recorded to establish the alleged wrongdoer's intent and mental state, which may be essential elements the government must prove at trial. Finally, since the prior opinions recognize no "authorized by law" exception, a literal reading of those opinions would prohibit a prosecutor from reviewing or approving wiretap applications or supervising those wiretaps as required under state or federal law.

LEO 1635 goes even further to opine that it is unethical for an attorney to surreptitiously tape record a telephone conversation with an unrepresented party, even when the attorney is acting in a non-professional capacity outside of the attorney-client relationship. In a situation where an attorney finds herself a victim of obscene, threatening or harassing phone calls to her home, prior opinions would seem to hold that it is unethical for the attorney to put a recording device on her own phone in order to identify or prosecute the caller. *See, e.g., Minn. Law. Prof. Resp. Bd. Eth. Op. 18* (1996) (a lawyer who is the subject of a criminal threat should not be subject to discipline for secretly recording the threat).

All of these scenarios demonstrate the need for limited exceptions and are far different from the facts in Gunter. While Gunter was cited as authority for the opinions holding that one-party consent tape recordings by an attorney are unethical, the committee believes that the holding in Gunter should be limited to the facts in that case. At issue in Gunter was the attorney's manner and purpose of the surreptitious, non-consensual recording of his adversary's conversations with others. The recordings made under the attorney's direction were made of third parties and without the consent of any parties to the conversation. The committee is informed that this is a classic type of interception that is illegal under federal and state law. (3) Moreover, the attorney continued to intercept the conversations of his client's wife after hearing her conversations with attorneys from whom she was seeking legal advice concerning desertion, support, child custody and property division, in contemplation of seeking a divorce from the attorney's client. Finally, the attorney used the information gleaned from the non-consensual interception to advise his client to take proactive steps in order to frustrate the wife's actions, based on the advice given her by attorneys with whom she had consulted. As stated above, the Court specifically refrained from deciding whether conversations between an attorney and another person may be tape-recorded without that person's consent. The committee does not construe the holding in Gunter as applicable to attorneys engaged in law enforcement, or agents under their control, who tape record conversations of suspects and witnesses, where such activity comply with federal and state law, and where other ethical rules, i.e., contacts with represented parties, have not been breached.

The law has long recognized that law enforcement may employ tape recording in undercover operations. See Lopez v. United States, 373 U.S. 427 (1963). In addition, the courts have recognized that deception in the search for truth is justified in some circumstances in both the law enforcement and private realms. Sorrells v. United States, 287 U.S. 435, 441 (1932) (artifice and stratagem are "frequently essential to the enforcement of the law" in order to "reveal criminal design; to expose illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators to the law"); Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) (stating that contraband offenses "are so difficult to detect in the absence of undercover Government involvement"); United States v. Russell, 411 U.S. 423, 432 (1973) (asserting that infiltration of drug rings, the only practicable means of detecting unlawful conduct, is a recognized and permissible means of investigation); Hamilton v. Miller, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("it would be difficult indeed to prove discrimination in housing without [the tester's] means of gathering evidence"). Prior opinions of this committee disregard these decisions, and, when read literally, prohibit any sort of undercover activity or misleading behavior if conducted, directed or supervised by a member of the bar.

The courts have also approved one party consent tape recording in certain civil investigations. In housing discrimination cases, testers have long been approved by the courts as a valid means to enforce the Fair Housing Act of 1968, which creates an enforceable right to truthful information concerning the availability of housing. 42 U.S.C. §3604 (d); *Havens Realty Co. v. Coleman*, 455 U.S. 363 (1982) (tester given false information concerning availability of housing by realtor suspected of "racial steering" has standing to sue despite lack of actual interest in the subject property). *See also Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990) (housing organization had standing to sue under Fair Housing Act using evidence gathered by testers); *Richardson v. Howard*, 712 F.2d 319 (7th Cir. 1983) (observing that the evidence obtained by testers is frequently indispensable and that the requirement of deception is a relatively small price to pay to defeat racial discrimination); *Northside Realty Associates v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979) (holding that testers acted legally and sought only publicly available information and that "the element of deceit has no significant effect"); *Zuch v. Hussey*, 394 F.Supp. 1028 (E. D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977) (evidence gathered by testers may be the only competent evidence available to prove unlawful conduct).

The current prohibition also creates a dilemma for an attorney who relies on investigators in criminal or civil matters. If the lawyer directly supervises police or other non-lawyer investigators who employ tactics that are regarded as unethical, then such behavior is imputed to the lawyer who faces discipline. Rules 5.3 (c)(1) and 8.4 (a). To avoid these consequences, the lawyer may choose to exercise no control or supervision over the investigator. This can result in police being deprived of critical legal guidance or, in a civil case, an unsupervised investigation in which important matters may have been overlooked that might have been discovered had the investigator been supervised.

The scenarios described in your request for opinion involve far more artifice and stealth than merely using a recording device to capture a conversation. The "testing" scenario typically entails more deception and fabrication than the tester surreptitiously recording conversations (i.e., misrepresentation of identity, qualifications, financial ability, intent or purpose) in order for the investigation to succeed. The same can be said for participants in law enforcement undercover operations. The most obvious example is the police officer misrepresenting himself as a drug dealer. In fact, very few

criminal conspiracies could be infiltrated without the use of outright deceit and deception on the part of prosecuting attorneys and the law enforcement officers they supervise. Both realms involve the use of misrepresentation by the investigator and the investigations are likely to be supervised by lawyers. Thus, on their face, setting aside the tape recording issue, these activities involve conduct violative of Rules 4.1 (a), 5.3 (c) and 8.4 (a) and (c). Yet, in the housing discrimination cases, Congress specifically created a cause of action for the tester, knowing full well that testers have no interest in purchasing the subject property and that their purpose is to expose discrimination by falsely posing as a prospective buyer. Fair Employment Council of Greater Washington v. BMC Marketing Corp., 28 F.3d 1268, 1271-72 (D.C. Cir. 1994) (it did not matter whether the testers merely posed as interested renters or purchasers because regardless of their intentions the statute gave them an enforceable right to truthful information about the availability of housing).

Despite the fact that these law enforcement and testing practices are longstanding and widespread, there have been no reported judicial decisions or ethics committee opinions addressing the ethical propriety of a lawyer directing such practices. David B. Isbell & Lucantonio N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8 Geo. L. J. Legal Ethics 791, 794 (1995) ("Isbell"). However, some bar opinions have created some limited exceptions under which an attorney or an agent under his control may tape record their conversations with another without the other person's knowledge. In certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards. Minn. Law. Prof. Resp. Bd. Eth. Op. 18 (1996) (ethical rules against tape recording do not prohibit a government lawyer charged with criminal or civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation without the knowledge of all parties to the conversation without the knowledge of all parties to the conversation without the knowledge of all parties to the conversation; Ohio Bd. Com. Griev. Disp. Adv. Op. 97-3 (1997) (recognized exceptions to the prohibition on surreptitious recording include prosecuting and law enforcement attorney exception; criminal defense attorney exception; and extraordinary circumstances exception).

In the facts you present, the committee acknowledges that the conduct of undercover investigators and discrimination testers acting under the direction of an attorney involves deception and deceit. The conduct about which you have inquired arises in the context where information would not be available by other means and without which an important and judicially-sanctioned social policy would be frustrated. These methods of gathering information in the course of investigating crimes or testing for discrimination are legal, long-established and widely used for socially desirable ends.

As a result, the committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat.

The committee recognizes that there may be other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical. However, the committee expressly declines to extend this opinion beyond the facts cited herein and will reserve a decision on any similar conduct until an appropriate inquiry is made.

Committee Opinion April 13, 2000

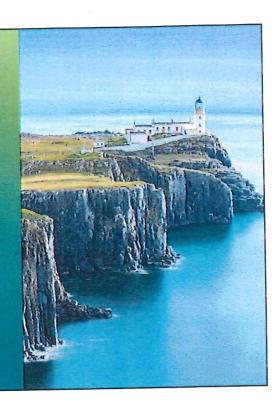
- 1. The issue in LEO 1324 was whether the attorney could use the tapes which the wife had made prior to engaging the attorney, not the propriety of an attorney or agent making a non-consensual recording of a conversation with another.
- 2. § 19.2-62(A)(2), Code of Virginia of 1950, as amended; 18 U.S.C. § 2511(2)(c) and (d); Cogdill v. Commonwealth, 219 Va. 272, 247 S.E.2d 392 (1978) (tape recording of conversation between woman and attorney who was trying to procure her for prostitution where recording was made by a woman using recording device on her phone did not violate wiretap laws; Wilks v. Commonwealth, 217 Va. 885, 234 S.E.2d 250 (1977) (not unlawful for a person to intercept a wire or oral

communication if such person is a party to the communication or if one of the parties to the verbal exchange has given prior consent to the interception); See also 85-86 Va. Atty. Gen. Op. 132 (1985) (party to a communication who tape records without other party's knowledge falls under exception contained in Va. Code § 19.2-62 (B)(2)); 87-88 Va. Atty. Gen. Op. 67 (1988) (neither recording of telephone conversation to which one is a party nor subsequent disclosure of recorded communication violates Va. Code §§ 19.2-62, et seq.).

3. In *Gunter*, the Virginia State Bar took the position that notwithstanding his acquittal, the attorney nevertheless violated the wiretap laws, and thus violated DR 1-102 (A)(3)(criminal act). 238 Va. at 621. The Court held, however, that the legality of the attorney's acts was immaterial to its analysis. *Id*.

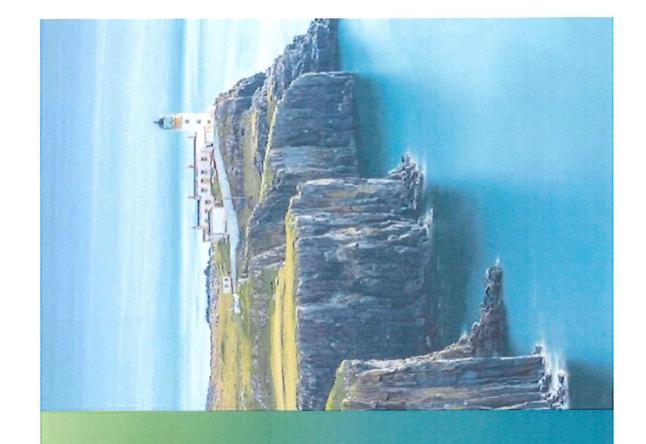
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Presented by:

Hon. Salvatore R. laquinto

Virginia Beach Circuit Court

Hon. Sandra S. Menago

Virginia Beach General District Court

Hon. Paul D. Merullo

Virginia Beach General District Court

Hon. Jennifer B. Shupert

Virginia Beach Juvenile & Domestic Relations District Court

Hon. Salvatore R. laquinto

Virginia Beach Circuit Court

undergraduate degree from the University of Tennessee at Chattanooga in 1990 and assumed office on April 1, 2024. Before his appointment to the Circuit Court, he appointment to the bench, he was a Delegate to the Virginia House of Delegates, served as a Judge for the General District Court, beginning in 2013. Prior to his Sal laquinto was appointed to the Circuit Court of the 2nd Judicial Circuit and representing the 84th District in Virginia Beach. Judge laquinto received his his J.D. from the Regent University School of Law in 1996.

Hon. Sandra S. Menago

Virginia Beach General District Court

Judge Menago was appointed to the Virginia Beach General District Court in 2019 Justice from Old Dominion University in 1998 and a Juris Doctorate from Regent injury, tort and civil litigation. She served on the Board of the Virginia Beach Bar spent her law career practicing criminal and traffic defense, plaintiff's personal University in 2001. Judge Menago was a partner with Byler & Sampson, PC and Association and has been a speaker at numerous Continuing Legal Education and began serving as the Chief Judge in 2024. She received a B.S. in Criminal

Bio

Hon. Paul D. Merullo

Virginia Beach General District Court

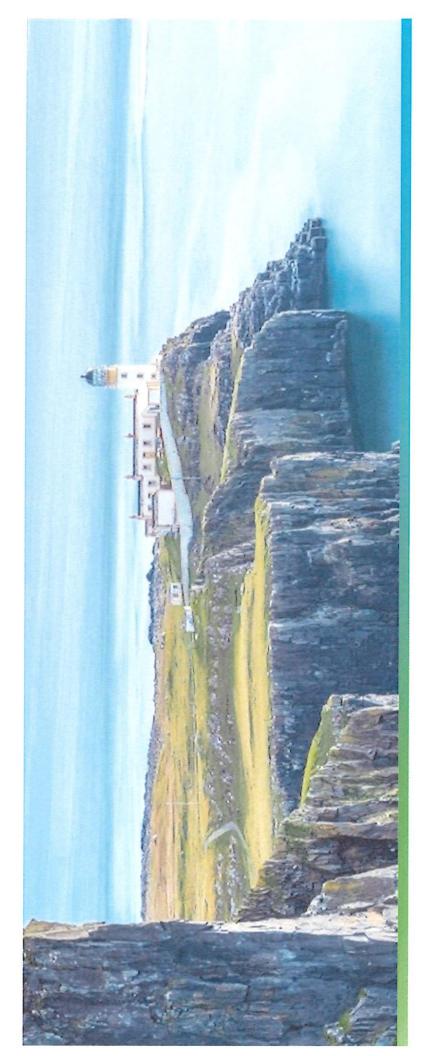
bench. His main practice areas were plaintiffs personal injury, medical malpractice, Shuttleworth, Ruloff, Swain, Haddad and Morecock until he was appointed to the Judge Merullo was appointed to the General District Court in 2014. He graduated from William and Mary School of Law in 2000 and worked at the law firm of miscellaneous tort litigation, criminal and traffic defense.

Bio

Hon. Jennifer B. Shupert

Virginia Beach Juvenile & Domestic Relations District Court

Judge Shupert holds a B.S. in Family Studies & Child Development with a minor in Relations District Court in 2022. She is the Chairman of the Board for Seapointe College and Secretary of the l'Anson Hoffman Inn of Court. She is the author of Psychology from Oklahoma Christian University, and a Juris Doctorate from the Virginia for 18 years, focusing on the areas of Family Law and Adoption. Judge Regent University School of Law. She practiced law in the Commonwealth of Shupert was appointed as a Judge for the Virginia Beach Juvenile & Domestic Cooperative Communication: Tips to Improve Coparenting.



Issue: Getting your case heard in the time allotted

(A.K.A. Lawyer Time)

Here is the scene:

- You told the Court that your matter will take _____
 minutes/days (or it has been set for that amount of time).
- 2. In preparation for your hearing, you realize that this matter is likely going to need more than the time that was scheduled.

What do you do now?

- Contact the Court to try and extend the time.
- ☐ Contact opposing counsel to discuss stipulations.
- □ Trim down your presentation.
- Make your opening succinct and to the point.
- Prioritize your arguments and evidence.
- o Create demonstrative exhibits for lengthy or complicated evidence.
- o Be prepared to proffer.

Rules of the Supreme Court of Virginia

Rule 2:1006. Summaries

chart, summary, or calculation, the originals or although admissible, cannot conveniently be examined in court may be represented in the parties at a reasonable time and place. The Reasonably in advance of the offer of such The contents of voluminous writings that, examination or copying, or both, by other form of a chart, summary, or calculation. court may order that they be produced in duplicates must be made available for court.

What could you have done to prevent this issue?

- Be more realistic when you estimate the time needed.
- Prepare in advance so that your estimate will be based in
- Manage your client's expectations as to the number of issues that can really be addressed in the time allotted.
- □ Request a Pre-Trial Conference per Rule 1:19

Rules of the Supreme Court of Virginia

Rule 1:19. Pretrial Conferences

trial, the court must schedule a final pretrial conference cases set for trial for five days or more, upon request of appropriate time before the commencement of trial. In within an appropriate time before commencement of request of counsel of record, or in its own discretion, provided for by Rule 4:13, each trial court may, upon counsel of record may consider any of the following: any counsel of record, made at least 45 days before trial. At the final pretrial conference, which the trial court in its discretion may conduct in person or by In addition to the pretrial scheduling conferences telephone or by videoconference, the court and schedule a final pretrial conference within an

Rules of the Supreme Court of Virginia

Rule 1:19.
Pretrial
Conferences
(cont'd)

- (a) settlement;
- whether any amendments to the pleadings are necessary; (b) a determination of the issues remaining for trial and
- (c) the possibility of obtaining stipulations of fact, including, but not limited to, the admissibility of documents;
- (d) a limitation of the number of expert and/or lay witnesses;
- (e) any pending motions including motions in limine;
- (f) issues relating to proposed jury instructions; and
- (g) such other matters as may aid in the disposition of the action.

Rule 1.3: Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

Rule 1.1: Competence

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

Rule 2.1: Advisor

economic, social and political factors, In rendering advice, a lawyer may refer In representing a client, a lawyer shall judgment and render candid advice. exercise independent professional that may be relevant to the client's considerations such as moral, not only to law but to other situation.

Tips From the Circuit Court

- Be familiar with the Motion Docket Procedures
- Choose objections wisely
- Keep it professional

COMMONWEALTH OF VIRGINIA

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JAMES C. LEWIS
KEVIN M. DUFFAN
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SECOND JUDICIAL CIRCUIT

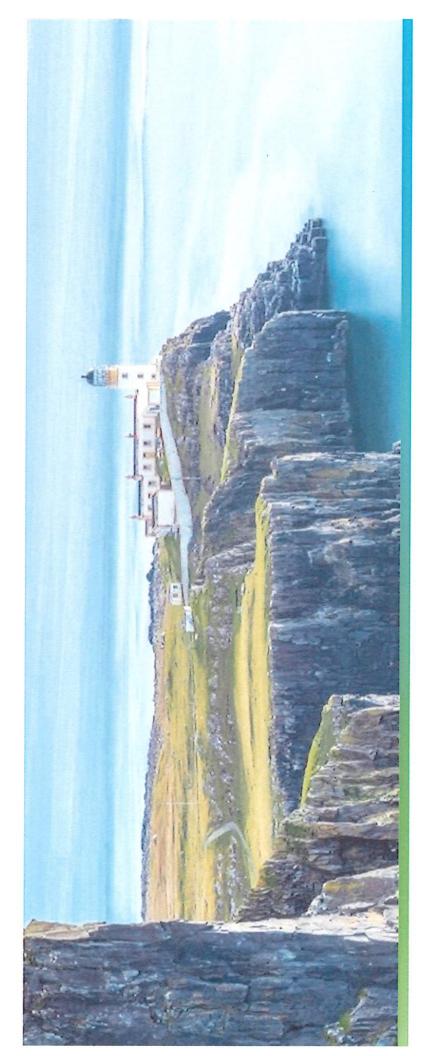
Our docketing procedure is largely dependent on the time estimates provided to the court by the attorneys. A substantial number of hearings and trials have carried over far beyond the time estimated. That has had a negative impact on all other existing cases and on our ability to schedule future matters. All parties and their attorneys should expect that all currently scheduled and future matters will be held to the attorneys' time estimates or will be continued by the court prior to start of the trial or hearing if it is determined that far too little time has been scheduled on the docket. We realize that unexpected delays can and will happen. But when considering your time estimates, please be mindful of the common occurrences that can extend the length of a matter, including (but not limited to) complexity of the issues, lack of stipulations, voluminous documentary evidence or case law, numerous jury instructions, need for interpreters, and cases involving self-represented litigants. It is far easier to accommodate a case that takes less time than has been requested than it is to accommodate a case that takes more. If you currently have a case pending on the docket that you believe might have an underestimated time slot, please do not hesitate to contact the court (Brandi Little for civil matters, Dawson Entwisle for criminal matters) immediately to see if additional time can be added without the need for a continuance.

Tips From the General District Court

- Focus on what is disputed. Use a "Yes, but..."
- contact the Court in writing to notify of the situation and For cases with multiple witnesses or co-defendants, request accomodation.
- Plea Agreements and Settlements can be put in writing ahead of time.
- Ask to look at the file before the day of trial.

Tips From the JDR Court

- (stipulations or facts not in controversy). Start with what has been agreed to
- Be clear on what you are asking for.
- Keep questions simple.



Issue: Discovery Battles

(A.K.A. Majoring in minors)

Here is the scene:

- You issued discovery in January. Trial is in June.
- You receive some discovery responses, but they are late and incomplete or objected to.
- You file a motion to compel and a hearing on the motion is set in April.

Things you should do BEFORE the Motion to Compel is FILED.

- □ Deficiency letter this helps both sides have clarity on what is missing.
- □ CALL opposing counsel to go over the deficiencies and further clarify what you really need.

Rules of the Supreme Court of Virginia

Rule 4:12.
Failure to Make Discovery;
Sanctions

other affected parties in an effort to resolve faith conferred or attempted to confer with certification that the movant has in good A motion... must be accompanied by a the dispute without court action.

**This applies to both a Motion to Compel and a Motion for Sanctions.

Things you should do BEFORE the Motion to Compel is HEARD

- Prepare your attorney fees affidavit, redacting confidential information and making sure you only include fees incurred for discovery deficiencies.
- ☐ Make sure you have clean hands! Has your client responded to discovery fully?
- ☐ Make sure you are familiar with the remedies available under Supreme Court Rule 4:12.
- ☐ Be clear on what you are asking for and why.
- o Don't major on the minors do you really need 5 years of bank statements?
- Know that dismissals on discovery issues are rare in JDR

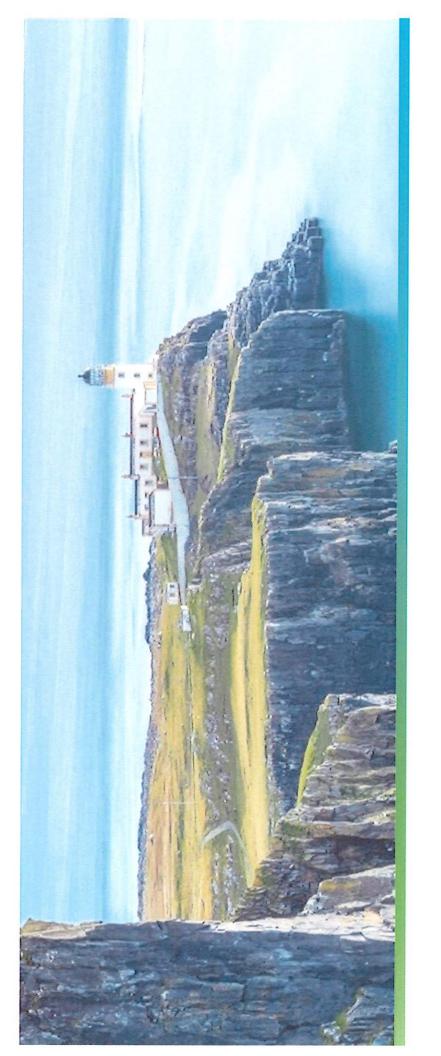
Rule 3.4
Fairness to
Opposing Party
and Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or material having potential evidentiary value for the evidence. A lawyer shall not counsel or assist alter, destroy or conceal a document or other purpose of obstructing a party's access to another person to do any such act.

:

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.



Issue: The Devil is in the Details

(A.K.A. Get to the point)

Here is the scene:

- 1. You have a case that is going to trial.
- You prepare your testimony questions, starting with foundational information and building to the major issues.
- The case begins, you employ your strategy as you begin to question your client:

You: "You are employed by the Navy, correct?

Opposing Counsel: "Objection - leading the witness!"

How do you respond to the objection?

which is allowed by Supreme Court Rule 2:611(c). Your Honor, I am just developing the testimony,

Rules of the Supreme Court of Virginia Rule 2:611.

Mode and Order
of Interrogation
and Presentation

discretion to allow a party to develop the Whenever a party calls a hostile witness, adverse, interrogation may be by leading testimony. Leading questions should be direct examination of a witness except as may be permitted by the court in its adverse interest, or a witness proving an adverse party, a witness having an questions should not be used on the permitted on cross-examination. (c) Leading questions. Leading questions.

Is there a better way, to avoid the objection?

- ☐ Before the case begins, ask opposing counsel to stipulate to uncontested facts.
- some leeway to avoid needless consumption of time, which ☐ Before questioning your witness, ask the Judge to allow is allowed by Supreme Court Rule 2:611(a).

Rules of the Supreme Court of Virginia Rule 2:611.

Mode and Order
of Interrogation
and Presentation

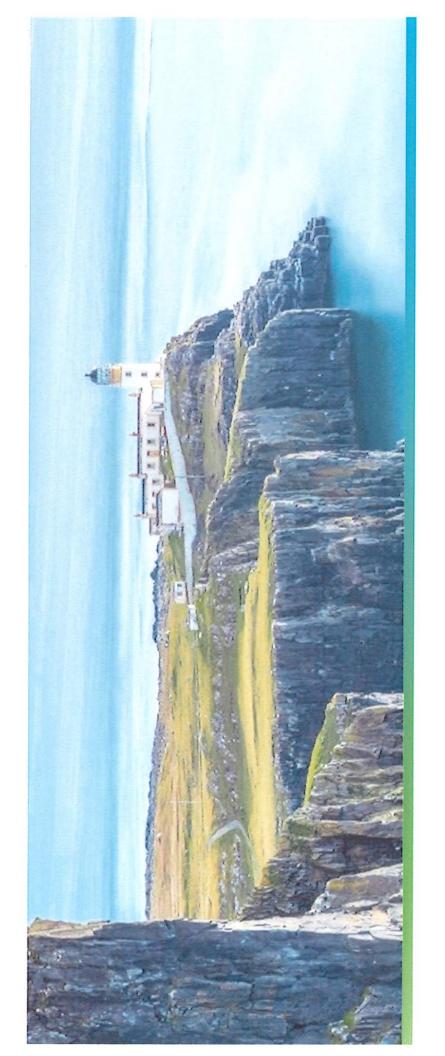
may be determined by the court so as witnesses from harassment or undue consumption of time, and (3) protect to (1) facilitate the ascertainment of witnesses and presenting evidence (a) Presentation of evidence. The mode and order of interrogating the truth, (2) avoid needless embarrassment.

3.3 Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- the lawyer which will enable the tribunal to make an informed decision, whether or not the facts (c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to
- (d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing client shall promptly reveal the fraud to the tribunal.
- (e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

Tips for presenting digital evidence

- Familiarize yourself with the Courtroom's technology before the time of trial.
- Prepare the Court for what to focus on during the presentation.
- Be ready to replay any key parts to ensure the Court saw what you wanted them to see.



Thank you for your time and attention!

RULES OF SUPREME COURT OF VIRGINIA PART TWO VIRGINIA RULES OF EVIDENCE

ARTICLE X. BEST EVIDENCE

Rule 2:1006. SUMMARIES.

The contents of voluminous writings that, although admissible, cannot conveniently be examined in court may be represented in the form of a chart, summary, or calculation. Reasonably in advance of the offer of such chart, summary, or calculation, the originals or duplicates must be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Adopted and promulgated by Order dated June 1, 2012; effective July 1, 2012.

Last amended by Order dated November 13, 2020; effective July 1, 2021.

RULES OF SUPREME COURT OF VIRGINIA PART ONE RULES APPLICABLE TO ALL PROCEEDINGS

Rule 1:19. Pretrial Conferences.

In addition to the pretrial scheduling conferences provided for by Rule 4:13, each trial court may, upon request of counsel of record, or in its own discretion, schedule a final pretrial conference within an appropriate time before the commencement of trial. In cases set for trial for five days or more, upon request of any counsel of record, made at least 45 days before trial, the court must schedule a final pretrial conference within an appropriate time before commencement of trial. At the final pretrial conference, which the trial court in its discretion may conduct in person or by telephone or by videoconference, the court and counsel of record may consider any of the following:

- (a) settlement;
- (b) a determination of the issues remaining for trial and whether any amendments to the pleadings are necessary;
- (c) the possibility of obtaining stipulations of fact, including, but not limited to, the admissibility of documents;
 - (d) a limitation of the number of expert and/or lay witnesses;
 - (e) any pending motions including motions in limine;
 - (f) issues relating to proposed jury instructions; and
 - (g) such other matters as may aid in the disposition of the action.

Last amended by Order dated May 5, 2021; effective July 5, 2021.

The amendment effective March 12, 2022, adopted January 11, 2022.

Separated paragraph (c) into paragraphs (1) and (2) and added new paragraph (3); for Comment [12], added "Paragraph (c)(2)" after "...to a lawful enterprise."; removed the following phrase: "The last clause of paragraph (c)", and added a new Comment [13].

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in

advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

- [2] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.
- [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.
- [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters,

the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

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

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."

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

COMMITTEE COMMENTARY

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

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

RULE 1.4 Communication

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

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

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 Competence

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

COMMENT

Legal Knowledge and Skill

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

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted

lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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

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

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

Thoroughness and Preparation

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

Maintaining Competence

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

[7] A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. *See also* Rule 1.16(a)(2).

VIRGINIA CODE COMPARISON

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

COMMITTEE COMMENTARY

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

In addition, the Committee added the second sentence under Maintaining

Competence Comment section to note Virginia's Mandatory Continuing Legal Education requirements.

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

The amendments effective October 31, 2018, added Comment [7].

RULE 1.2 Scope of Representation

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

Effective July 15, 2025 (Rules 1.5(g) and 6.5)

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Effective date – This rule and commentary thereto became effective June 21, 2011.

The amendment effective December 23, 2020, removes a phrase from Comment [6] to the Rule, "and the lawyer believes that an effective screen could not be engaged to protect the client," which is inconsistent with the section of the rule the comment is interpreting.

COUNSELOR AND THIRD-PARTY NEUTRAL

RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice

- [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
- [2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It could also ignore, to the client's disadvantage, the relational or emotional factors driving a dispute. In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances.
- [2a] It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
- [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may

accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, moral or ethical consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is

unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. DR 5-106(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 stated that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations.... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.... In the final analysis, however, the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client...."

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* verbatim because it sets forth more clearly than the Disciplinary Rules the scope of a lawyer's advisory role.

RULE 2.2 Intermediary

The amendments effective January 1, 2004, this rule was deleted in its entirety.

MOTION DOCKET PROCEDURES FOR THE VIRGINIA BEACH CIRCUIT COURT Revised: June 23, 2025

POLICY OVERVIEW

- A. The Virginia Beach Circuit Court has two dockets for hearing motions in unassigned civil cases:
 - Friday Motion Docket
 - Duty Judge Docket
 - <u>Note</u>: Hearings on motions in cases to which a judge has been assigned ("assigned cases")
 will be subject to any specific requirements or procedures established by that judge and must
 be scheduled directly with that judge's judicial assistant.
- B. Motions practice in all cases shall comply with Rule 4:15 of the Rules of the Supreme Court of Virginia, except as otherwise set forth in these procedures.
- C. The court, in the judge's discretion, may postpone any hearing, defer any ruling on the motion, and may require the filing of briefs.
- D. A party may request that a motion be heard by a specific judge only when the motion:
 - is for entry of an order based upon a specific ruling previously made by that judge;
 - is in a case that has been assigned to that judge by the Chief Judge;
 - is in a case that the judge has advised counsel that a specific motion shall be placed on that judge's docket; or
 - concerns a demurrer in a case where the judge previously granted a demurrer.
- E. A proposed order should be brought to the hearing to avoid multiple hearings on the same motion.
- F. Motions for reconsideration of a ruling may not be set for a hearing either on the Friday Motion Docket or on the Duty Judge Docket. Hearings on motions for reconsideration may only be scheduled when requested by a judge in accord with the procedures in section 3.0 below.

1.0 Friday Motion Docket

A. General Rules

- The Friday Motion Docket is for hearings on matters that will take no more than 30 minutes unless otherwise extended by the presiding judge (pendente lite hearings may be allotted 45 minutes at the judge's discretion).
- All Friday Motion Docket hearings are scheduled to begin at 9:30 a.m. and are heard as soon as possible thereafter.
- Motions may be set on the Friday Motion docket by submitting a written notice and motion to the clerk's office no later than the Monday immediately before the Friday selected for hearing.

A certificate of service is required in accordance with Rule 1:12 of the Rules of the Supreme Court of Virginia.

 Motions in unassigned cases for which briefs or memoranda are filed shall not be set on the Friday Motion Docket and must be set on the Duty Judge Docket. See sections 2.0 (B) "General Rules" and 2.0 (D) "Briefing" below.

B. Motions and other matters that must be set on Friday Motion Docket:

- Default Judgment motions.
- <u>Pendente lite</u> (temporary) hearings, including pendente lite <u>visitation and support</u> <u>hearings.</u>
- Claim of Exemption from a Levy or Garnishment.
- Show Cause against Distribution of an Estate.
- <u>Uncontested Final Divorce Hearing before a Judge</u>. See <u>Uncontested Divorce Procedures</u>
 <u>Manual.</u>
- Petition to Celebrate the Rites of Marriage.

2.0 Duty Judge Docket

- A. Motions, petitions, and other matters that must be set on the Duty Judge Docket:
 - All motions accompanied by a written brief or memorandum of law (See section 2.0 (D) "Briefing" below).
 - Wrongful Death Settlements (All counsel of record and the parties in interest or their representative must be present).
 - <u>Infant Settlements</u> (All counsel of record and the infant (unless excused) must be present).
 - Administrative Process Act Appeal, Appeal of an Agency Decision, and Grievability Determinations. NOTE: If the hearing will take more than 1 hour, it must be set on the trial docket).
 - <u>Uncontested Guardian/Conservator appointments</u> and <u>Petitions to Transfer or Modify Guardian/Conservatorships (limited to 30 minutes)</u>. The maximum number of guardianships per day is three (3). Contested Guardian/Conservator Appointments, Transfers, and Modifications must be set on the court's trial docket unless approved by a judge to be set on the Duty Judge Docket.
 - Judicial Authorization for Medical Treatment.
 - <u>Pre-trial Conferences in Contested Divorces</u> (limited to 30 minutes and the parties and counsel must attend the pretrial conference in person).
 - Petition for Sterilization.

- <u>Temporary injunction</u> under § 8.01-624. If an ex parte hearing is requested, the Duty Judge must first determine if the matter will be allowed to be set without notice to the adverse party.
- Ex parte Detinue hearing under § 8.01-114.
- Ex parte hearing for issuance of an attachment under § 8.01-540.
- Writ of Mandamus.
- <u>Name Change</u> request that the record be sealed or upon a written motion for an ex parte hearing to consider a waiver of the notice requirement involving the name change of a minor (Chief Judge's Duty Docket only).
- <u>Contested Name Change of a Minor</u> must be set on the court's trial docket unless approved by a judge to be set on the Duty Judge Docket.
- Adoption motions. NOTE: Contested Adoptions including those that require proof of abandonment must be set on the court's trial docket unless approved by a judge to be set on the Duty Judge Docket.
- A <u>pretrial conference</u> provided for by Rule 1:19 and Rule 4:13 <u>for a civil jury trial case</u>. Standard time slot is 30 minutes. The Chief Judge may approve a 1-hour hearing by counsel submitting a written request directly to the Chief Judge.
- Demurrers
- Plea in Bar
- Motion to Compel
- Summary Judgments
- Pendente lite hearings involving custody and visitation must be set on the Duty Judge
 Docket and shall be allocated one-hour unless a hearing of up to two hours is requested
 in writing in accord with the procedures set forth in sections 2.0 (B) "General Rules" and
 2.0 (C) "Procedure for Scheduling Hearings on the Duty Docket" below and approved
 by the judge scheduled to conduct the hearing. These hearings must be set on the Friday
 Duty Judge Docket in a designated 10 am, 11 am, or 12 pm timeslot.
 - Contested pendente lite motions for custody or visitation of more than two hours will not be heard on the Duty Judge Docket. If a custody or visitation hearing will require more than two hours total, it must be set for trial on the court's trial docket.
- Emergency custody hearings must be approved by the duty judge scheduled to conduct the hearing. A certificate of service for the hearing date to all parties or their counsel of record and any guardian ad litem is required in accordance with Supreme Court Rules 1:12 and 4:15(b).

B. General Rules

- Motions must be filed with the Circuit Court Clerk's Office prior to requesting a hearing and no later than 5 business days prior to the hearing date. Setting a Duty Judge hearing prior to filing motions could result in the hearing being removed from the docket. A purpose of the Duty Judge Docket is for the court to review the motion in advance of the hearing. Therefore, all written motions placed on the duty judge docket must sufficiently identify the issues or basis of the motion and the relief sought. For example, the motion could be noticed as a motion in limine, then state that it seeks to exclude experts for failure to timely identify them. Exceptions: Infant Settlements; Wrongful Death Settlements; Pretrial Conferences; Petition to Celebrate Rites of Marriage; Uncontested Guardian/Conservator appointments and Petitions to Transfer Guardian/Conservatorships; Judicial Authorization for Medical Treatment; Contested Continuance Motions; emergency injunctions or hearings; attachments; and name changes.
 - Duty Docket matters are set for a specific date and time. All parties must agree to the
 date and time unless an ex parte hearing is permitted by statute, Rule or by the
 judge.
 - Absent express approval pursuant to the requirements of the next paragraph, the Duty Judge Docket is available for matters that will take no longer than 1 hour. Hearings shall be scheduled and conducted in either 30 minute or 1-hour increments in accord with the procedures set forth in sub-section 2.0 (C) "Procedure for Scheduling Hearings on the Duty Judge Docket" below.
 - In exceptional cases, a request for up to a two-hour hearing may be submitted. The request shall be submitted in accord with the procedures set forth in sub-section (C) "Procedure for Scheduling Hearings on the Duty Judge Docket" below, along with an explanation of the perceived need for a hearing in excess of one hour. The request will be submitted by the judicial assistant to the Duty Judge scheduled to conduct the hearing. That judge will determine whether or not to grant an exception to the one-hour time limit policy. The judge's decision will be communicated to the parties.
 - Except in cases of emergency, matters may not be placed on the Duty Judge Docket until
 a written motion or petition that sufficiently identifies the issue(s) has been filed. Only
 those issues raised in the motion or petition filed will be heard at the scheduled hearing.
 Subsequent motions that attempt to raise additional issues will not be heard unless
 otherwise agreed upon by all parties and approved in advance by the duty judge
 scheduled to conduct the hearing.

C. Procedure for Scheduling Hearings on the Duty Judge Docket

- Hearings shall be scheduled electronically by going to the circuit court website at <u>courts.virginiabeach.gov</u> (Click on Circuit Court, then click on the "Motion and Duty Docket" tab on the left side of the main circuit court page).
- On the Motion and Duty Judge Docket page you will see instructions for the "Online Duty Judge Calendar" and the Duty Judge Hearing Request Form. The Online Duty Judge Docket Calendar will show all appointments that are currently scheduled. This calendar shall be used to determine and coordinate available dates and times among the parties prior to submitting a Duty Judge Hearing Request Form as set forth below.

- After determining an available date and time, complete the *Duty Judge Hearing Request Form* and submit the completed *Duty Judge Hearing Request Form* via email to (<u>dutyjudg@vbgov.com</u>). The *Duty Judge Hearing Request Form* will be reviewed upon receipt. If in compliance with the Court's procedures, you will receive an email confirmation (a "Duty Judge Docket Hearing Confirmation") and the judicial assistant will print a copy of the Duty Judge Hearing Request Form for the case file.
- Hearings in which a party, witness, or counsel request to appear remotely (such as by WebEx or other remote platform) require approval of the duty judge scheduled to conduct the hearing. The request for a remote (WebEx) hearing and the reason(s) for the request must be included on the *Duty Judge Hearing Request Form*.
 - If a remote hearing is <u>not</u> approved, the hearing will automatically be scheduled as an in-person hearing at which all participants will be expected to be present.

D. Briefing

- Unless otherwise specified by the court, all briefs or memoranda must be filed and served in accord with the following requirements:
 - Briefs or memoranda must be filed with the Clerk and served on all counsel of record sufficiently before the hearing to allow consideration of the issues involved.
 - Absent leave of court, if a brief/memorandum in support of a motion is five or fewer pages in length, the required notice and the brief must be filed and served at least 14 days before the hearing and any brief in opposition to the motion must be filed and served at least seven days before the hearing. If a brief will be more than five pages in length, the parties or their counsel are required to confer with each other to agree upon a briefing schedule that will allow time for any response and rebuttal briefs or memoranda, regardless of page length, to be filed at least seven days before the hearing. Counsel may want to consider completing briefing before seeking to set the matter for hearing.
 - Absent leave of court, the length of a brief may not exceed 20 pages, double spaced.

3.0 Motions for Reconsideration.

- Motions for reconsideration of a ruling must be filed with the Clerk, accompanied by a cover letter requesting that the motion be submitted for review by the judge who made the ruling. The cover letter shall state whether or not a hearing and oral argument is requested.
- Pursuant to Supreme Court Rule 4:15(d), a hearing on a motion for reconsideration may not be scheduled on the Court's Motion or Duty Judge docket unless the Court requests the parties to schedule the hearing.

>	Upon reviewing such motion, the Court shall (i) enter an order denying or granting such motion, or (ii) advise counsel to schedule hearing and oral argument with the judge's judicial assistant.

RULES OF SUPREME COURT OF VIRGINIA PART FOUR PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:15. Motions Practice.

All civil case motions in circuit court will be scheduled and heard using the following procedures:

- (a) Scheduling All civil case motions in circuit court will be scheduled and heard using the following procedures:
 - 1. Presenting the motion on a day the court designates for motions hearings, or
- 2. Contacting designated personnel in the office of the clerk of the court or the chambers of the judge or judges of the court.
- (b) *Notice* Reasonable notice of the presentation of a motion must be served on all counsel of record. Absent leave of court, and except as provided in paragraph (c) of this Rule, reasonable notice must be in writing and served at least seven days before the hearing. Counsel of record must make a reasonable effort to confer before giving notice of a motion to resolve the subject of the motion and to determine a mutually agreeable hearing date and time. The notice must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. In an Electronically Filed Case, the notice provisions of this paragraph and the filing and service requirements of paragraph (c) of this Rule is accomplished in accord with Rule 1:17.
- (c) Filing and Service of Briefs Counsel of record may elect or the court may require the parties to file briefs in support of or in opposition to a motion. Any such briefs should be filed with the court and served on all counsel of record sufficiently before the hearing to allow consideration of the issues involved. Absent leave of court, if a brief in support of a motion is five or fewer pages in length, the required notice and the brief must be filed and served at least 14 days before the hearing and any brief in opposition to the motion must be filed and served at least seven days before the hearing. If a brief will be more than five pages in length, an alternative hearing date, notice requirement, and briefing schedule may be determined by the court or its designee. Absent leave of court, the length of a brief may not exceed 20 pages, double spaced.
- (d) Hearing Except as otherwise provided in this subparagraph, upon request of counsel of record for any party, or at the court's request, the court will hear oral argument on a motion. Oral argument on a motion for reconsideration or any motion in any case where a pro se incarcerated person is counsel of record will be heard orally only at the request of the court. A court may place reasonable limits on the length of oral argument. No party may be deprived of the opportunity to present its position on the merits of a

motion solely because of the unfamiliarity of counsel of record with the motions procedures of that court. A court, however, at the request of counsel of record, or in the judge's discretion, may postpone the hearing of the motion, or require the filing of briefs to assure fairness to all parties and the ability of the court to review all such briefs in advance of the hearing.

(e) *Definition of Served* — For purposes of this Rule, a pleading is deemed served when it is actually received by, or in the office of, counsel of record through delivery, mailing, facsimile transmission or electronic mail as provided in Rule 1:12.

Last amended by Order dated November 23, 2020; effective March 1, 2021.

COMMONWEALTH OF VIRGINIA

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SECOND JUDICIAL CIRCUIT

Our docketing procedure is largely dependent on the time estimates provided to the court by the attorneys. A substantial number of hearings and trials have carried over far beyond the time estimated. That has had a negative impact on all other existing cases and on our ability to schedule future matters. All parties and their attorneys should expect that all currently scheduled and future matters will be held to the attorneys' time estimates or will be continued by the court prior to start of the trial or hearing if it is determined that far too little time has been scheduled on the docket. We realize that unexpected delays can and will happen. But when considering your time estimates, please be mindful of the common occurrences that can extend the length of a matter, including (but not limited to) complexity of the issues, lack of stipulations, voluminous documentary evidence or case law, numerous jury instructions, need for interpreters, and cases involving self-represented litigants. It is far easier to accommodate a case that takes less time than has been requested than it is to accommodate a case that takes more. If you currently have a case pending on the docket that you believe might have an underestimated time slot, please do not hesitate to contact the court (Brandi Little for civil matters, Dawson Entwisle for criminal matters) immediately to see if additional time can be added without the need for a continuance.

RULES OF THE SUPREME COURT OF VIRGINIA PART FOUR PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:12. Failure to Make Discovery; Sanctions.

- (a) *Motion for Order Compelling Discovery*. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
- (1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the county or city where the deposition is to be taken. An application for an order to a deponent who is not a party must be made to the court in the county or city where the deposition is being taken.
- (2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 4:5 or 4:6, or a corporation or other entity fails to make a designation under Rule 4:5(b)(6) or 4:6(a), or a party fails to answer an interrogatory submitted under Rule 4:8, or if a party, in response to a request for inspection submitted under Rule 4:9, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

A motion under subdivision (a) of this Rule must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 4:1(c).

- (3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.
- (4) Award of Expenses of Motion. If the motion is granted, the court must, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court must, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

- (b) Failure to Comply With Order.—
- (1) Sanctions by Court in County or City Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or city in which the deposition is being taken, the failure may be considered a contempt of that court.
- (2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b) (6) or 4:6(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 4:10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
- (A) An order that the matters regarding which the order was made or any other designated facts will be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
- (E) Where a party has failed to comply with an order under Rule 4:10(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court must require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

- (c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 4:11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court must make the order unless it finds that (1) the request was held objectionable pursuant to Rule 4:11(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.
- (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Requests for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b)(6) or 4:6(a) to

testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 4:8, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under Rule 4:9, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may — without prior entry of a Rule 4:12(b) order to compel regarding this failure—impose any of the sanctions listed in paragraphs (A), (B), and (C) of subdivision (b)(2) of this Rule. In lieu of any order or in addition thereto, the court must require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 4:1(c).

A motion under subdivision (d) of this Rule must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

Last amended by Order dated June 13, 2022; effective August 12, 2022.

The amendments effective December 1, 2016, deleted "..., subject to Rule 1.6" at the end of paragraph (a)(2); rewrote the second half of paragraph (d) to read "...upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal."; added paragraph (e); deleted the phrase from Comment [6] "Upon ascertaining that material evidence is false" and replaced it with "If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false"; deleted Comments "[7 – 9] ABA Model Rule Comments not adopted."; added Comments [7], [8], and [9]; removed the language "ABA Model Rule Comments not adopted" from Comment [10] and added the remainder of the comment; changed "cooperate" to "cooperates" in Comment [11]; and added "Duration of Obligation" before adding new Comment [15].

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

- (b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:
 - (1) reasonable expenses incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;
 - (3) a reasonable fee for the professional services of an expert witness.
- (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
- (e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
- (f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal

opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

- (g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.
- (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the information is relevant in a pending civil matter;
 - (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and
 - (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
- (i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.
- (j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

COMMENT

- [1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
- [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.
- [3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.
- [3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in

consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. *See* also Rule 1.2(c).

- [4] Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2.
- [5] Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.
- [6] Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a

justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

[7] In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

[8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of

procedural formalities, and similar matters which do not prejudice the rights of the client.

A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 7-108(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."

Paragraph (b) is identical to DR 7-108(B).

Paragraph (c) is substantially similar to DR 7-108(C) which provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness." EC 7-25 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (d) is substantially the same as DR 7-105(A).

Paragraph (e) is new.

Paragraph (f) is substantially similar to DR 7-105(C)(1), (2), (3) and (4) which stated:

In appearing in his professional capacity before a tribunal, a lawyer

shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness. (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused, but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Paragraph (g) is identical to DR 7-105 (C)(5).

Paragraph (h) is new.

Paragraph (i) is similar to DR 7-104, although a lawyer is no longer prohibited from "participat[ing] in presenting" criminal charges and therefore may freely offer advice to the client about the client's rights under the criminal law.

Paragraph (j) is identical to DR 7-102(A)(1).

COMMITTEE COMMENTARY

The Committee attempted to join the best of both the *Virginia Code* and *ABA Model Rule* 3.4 in this Rule. For example, paragraph (a) was adopted because it appears to place a broader obligation on lawyers than DR 7-108(A), but DR 7-108(B) was added to the Rule as paragraph (b) because it states explicitly what is only implicit in paragraph (a).

Language from DR 7-108(C) was added to paragraph (c) to make it clear that certain witness compensation is permitted—something not clear from the language of the *ABA Model Rule*, although it is stated in the *ABA Model Rule*'s Comment.

The language of DR 7-105(A) was adopted as paragraph (d) in lieu of the *ABA Model Rule* language because it states more clearly what is apparently intended by the Rule. However, the Committee deleted as unnecessary the word "appropriate" preceding "steps."

With respect to paragraph (e), the Committee saw no reason to limit the discovery request provisions to the pretrial period, as is explicitly the case in the *ABA Model Rule*.

Paragraph (f) parallels similar provisions in DR 7-105(C) and paragraph (h) covers a subject not addressed in the *Virginia Code*.

Paragraph (i) is similar to DR 7-104, although the Committee voted to delete the reference to "participate in presenting." This deletion allows a lawyer to offer advice to the client about the client's rights under the criminal law without violating this Rule.

The Committee determined that the existing language of DR 7-102(A)(1) should appear as paragraph (j), although the *ABA Model Rules* do not contain this section.

The amendments effective January 1, 2004, added present paragraph (g) and redesignated former paragraphs (g) through (i) as present paragraphs (h) through (j).

RULE 3.5 Impartiality And Decorum Of The Tribunal

- (a) A lawyer shall not:
- (1) before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law;
 - (2) after discharge of the jury from further consideration of a case:
 - (i) ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service;

RULES OF SUPREME COURT OF VIRGINIA PART TWO VIRGINIA RULES OF EVIDENCE

ARTICLE VI. WITNESS EXAMINATION

Rule 2:611 MODE AND ORDER OF INTERROGATION AND PRESENTATION (Rule 2:611(c) derived from Code § 8.01-401(A))

- (a) Presentation of evidence. The mode and order of interrogating witnesses and presenting evidence may be determined by the court so as to (1) facilitate the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
 - (b) Scope of cross-examination.
 - (i) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
 - (ii) In a criminal case, if a defendant testifies on his or her own behalf and denies guilt as to an offense charged, cross-examination of the defendant may be permitted in the discretion of the court into any matter relevant to the issue of guilt or innocence.
- (c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be permitted by the court in its discretion to allow a party to develop the testimony. Leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, a witness having an adverse interest, or a witness proving adverse, interrogation may be by leading questions.

Adopted and promulgated by Order dated June 1, 2012; effective July 1, 2012.

(for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

COMMITTEE COMMENTARY

Although Rule 3.1 is similar in substance to existing *Virginia Code* provisions, the Committee concluded that the objective standard of the *ABA Model Rule* was preferable and more closely paralleled Section 8.01-271.1 of the *Code of Virginia*, dealing with lawyer sanctions.

RULE 3.2 Expediting Litigation

ABA Model Rule not adopted.

RULE 3.3 Candor Toward The Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.
- (e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

COMMENT

[1] The advocate's task is to present the client's case with persuasive force.

Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the

evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

[2] ABA Model Rule Comment not adopted.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, Section 8.01-271.1 of the *Code of Virginia* states that a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

False Evidence

- [5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.
- [6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character

should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

- [7] ABA Model Rule Comment not adopted.
- [8] The prohibition against offering false evidence only applies if the lawyer knows the evidence is false. A lawyer's reasonable belief or suspicion that evidence is false does not preclude its presentation to the trier of fact. A lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, but the lawyer cannot ignore an obvious falsehood.
- [9] Although paragraph (a)(4) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness, offers testimony during that proceeding that the lawyer knows to be false. In such situation or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in

deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[12] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[13] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other

hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[13a] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[13b] The ultimate resolution of the dilemma, however, is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. *See* Rule 1.2(c).

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position

is expected to be presented by the opposing party. However, in an exparte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. For purposes of this Rule, ex parte proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear. However, a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding. If so, the lawyer must comply with a disclosure demand by the tribunal or challenge the action by available legal means. The failure to disclose information as part of a legal challenge to a demand for disclosure will not constitute a violation of this Rule.

Duration of Obligation

[15] The obligation to rectify false evidence or false statements of law and fact should have a practical time limit. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within

the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

VIRGINIA CODE COMPARISON

Paragraph (a)(1) is substantially similar to DR 7-102(A)(5), which provided that "[i]n his representation of a client, a lawyer shall not knowingly make a false statement of law or fact."

With regard to paragraph (a)(2), DR 7-102(A)(3) provided that "[i]n his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal."

Paragraph (a)(3) has no direct counterpart in the *Virginia Code*. EC 7-20 stated: "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part."

With regard to paragraph (a)(4), the first sentence of this paragraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use perjured testimony or false evidence." DR 4-101(D)(2), adopted here as Rule 1.6(c)(2), made it clear that the "remedial measures" referred to in the second sentence of paragraph (a)(4) could include disclosure of the fraud to the tribunal.

Paragraph (b) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

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

Paragraph (d) is identical to DR 7-102(B).

COMMITTEE COMMENTARY

The Committee generally adopted the *ABA Model Rule*, but it deleted the word "material" from paragraph (a)(1) to make it identical to DR 7-102(A)(5) and from paragraph (a)(2) because it appeared to be redundant. Additionally, the word "directly," preceding "adverse" was deleted from paragraph (a)(3).

With respect to paragraph (a)(3), the Committee believed it advisable to adopt a provision requiring the disclosure of controlling adverse legal authority. While there was no corresponding provision within the Disciplinary Rules of the *Virginia Code*, there is a corresponding provision within the *ABA Model Code*, DR 7-106(B)(1). However, the Committee deleted the word "directly" from the paragraph in the belief that the limiting effect of that term could seriously dilute the paragraph's meaning.

The Committee determined to retain the obligation to report a non-client's fraud on the tribunal, and therefore repeated the provisions of DR 7-102(B) in paragraph (d).

The amendments effective December 1, 2016, deleted "..., subject to Rule 1.6" at the end of paragraph (a)(2); rewrote the second half of paragraph (d) to read "...upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal."; added paragraph (e); deleted the phrase from Comment [6] "Upon ascertaining that material evidence is false" and replaced it with "If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false"; deleted Comments "[7 – 9] ABA Model Rule Comments not adopted."; added Comments [7], [8], and [9]; removed the language "ABA Model Rule Comments not adopted" from Comment [10] and added the remainder of the comment; changed "cooperate" to "cooperates" in Comment [11]; and added "Duration of Obligation" before adding new Comment [15].

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.