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Virginia State Bar Committee to Study the Virginia Code of Professional Responsibility: Substantive Differences between the Virginia Rules of Professional Conduct and the Code of Professional Responsibility

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**VIRGINIA STATE BAR COMMITTEE TO STUDY THE
VIRGINIA CODE OF PROFESSIONAL
RESPONSIBILITY:**

**SUBSTANTIVE DIFFERENCES BETWEEN THE
VIRGINIA RULES OF PROFESSIONAL CONDUCT
AND THE CODE OF PROFESSIONAL
RESPONSIBILITY**

Tom Spahn

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LIST OF NEWLY REQUIRED, PROHIBITED AND PERMITTED
CONDUCT

Substantive Differences Between the Virginia Rules of Professional Conduct and Code of Professional Responsibility

The Virginia Rules of Professional Conduct contain provisions that:

- require Virginia lawyers to take action that is not required under the Code;
- prohibit conduct that is permitted by the Code;
- permit conduct that is prohibited by the Code; and
- permit conduct that is not explicitly permitted by the Code.

The following lists describe these four categories of substantive changes.

Each change refers to the applicable Rules provision, as well as the relevant Code provision (if any).

For more detailed information, please refer to the Detailed Comparison Chart or to the Rules themselves.

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A. CONDUCT REQUIRED BY THE VIRGINIA RULES OF PROFESSIONAL CONDUCT BUT NOT REQUIRED BY THE CODE

Deferring to Clients' Decisions

Lawyers must defer to their clients' decisions about objectives and consult with their clients about the means of pursuing those objectives (Rule 1.2(a)) (DR 6-101)

Advising of Appropriate Dispute Resolution Processes

Lawyers must advise their clients of any dispute resolution processes that "might be appropriate" (Rule 1.2, Comment [1]; Rule 1.4, Comment [1a]) (DR 6-101)

"Informed Decisions"

Lawyers must provide sufficient information to allow their clients to make "informed decisions" (Rule 1.4(b)) (DR 6-101(C); DR 7-101(B)(1))

Reporting Other Lawyers' Misconduct

Lawyers must seek their clients' direction about reporting another lawyer's misconduct if it meets the required standard (Rule 1.6(c)(3)) (DR 1-103(A))

Business Transactions With Clients

Lawyers must give their clients the opportunity to seek independent counsel and must obtain their clients' consent in writing before entering into a business transaction with them (Rule 1.8(a)) (DR 5-104(A))

Adversity to Former Clients

Lawyers must obtain consent from both the former client and the current client before taking positions adverse to the former client if the lawyer represented the former client in the "same or a substantially related matter" or if the lawyer possesses material confidential information (Rule 1.9(a)) (DR 5-105(D))

Dealing With A Client Organization's Employees

Lawyers who deal with employees of an organization they represent must explain their role if the organization's interests differ from the employee's interests (Rule 1.13(d))

Segregating Disputed Client Property

Lawyers must segregate and maintain client property that is the subject of a dispute (Rule 1.15(b)) (DR 9-102; DR 9-103)

Lawyers as Fiduciaries

Lawyers must comply with new Rules governing their handling of clients' money as fiduciaries (Rule 1.15(d), (e)(2))

Advising Courts of "Controlling Legal Authority"

Lawyers must advise a court of "controlling legal authority in the subject jurisdiction" (Rule 3.3(a)(3)) (EC 7-20)

Advising Tribunals of Material Facts

Lawyers must advise tribunals of all material facts in ex parte proceedings (Rule 3.3(c))

Complying With Discovery

Lawyers must make "reasonably diligent effort[s]" to comply with discovery requests (Rule 3.4(e))

Disclosure to Avoid Assisting Client Misdeeds

Lawyers must disclose facts when "disclosure is necessary to avoid assisting a criminal or fraudulent act by a client" (Rule 4.1(b)) (DR 1-102(A)(4); DR 7-102(A)(3); DR 7-102(A)(5))

Advertisements

Lawyers must list the full name and office address of a Virginia lawyer responsible for each advertisement (Rule 7.1(e))

Reporting Judicial Misconduct

Lawyers must report judges' misconduct (Rule 8.3(b))

B. CONDUCT PROHIBITED BY THE VIRGINIA RULES OF PROFESSIONAL CONDUCT BUT PERMITTED BY THE CODE

Misuse of the Rules

Lawyers may not use the Rules as "procedural weapons;" an antagonist may lack standing to seek enforcement of the Rules (Preamble)

Clients' Gifts to Lawyers

Lawyers in a firm may not prepare an instrument giving any lawyer in the firm or any of the lawyer's immediate relatives any "substantial gift" from a client who is not a relative (Rule 1.8(c); Rule 1.10(a)) (DR 5-105(E); DR 5-104(B))

Government Lawyers' Job Negotiations

Government lawyers may not "negotiate for private employment" with a party or lawyer involved in a matter in which they are participating personally and substantially (except for law clerks) (Rule 1.11(d)(2))

Avoiding Frivolous Positions

Lawyers may not "bring or defend a proceeding" or "assert" or "controvert an issue" unless there is a basis for doing so that is not "frivolous" (replacing the Code's more subjective standard) (Rule 3.1) (DR 7-102(A)(1))

Avoiding Frivolous Discovery Requests

Lawyers may not make frivolous discovery requests (Rule 3.4(e)) (DR 7-102(A)(1); DR 7-102(A)(2))

Avoiding Disruption of Tribunals

Lawyers may not engage in conduct "intended to disrupt a tribunal" (establishing a broader restriction than the Code's prohibition on intentional or habitual violation of rules of procedure or evidence) (Rule 3.5(f)) (DR 7-105(C)(5))

Pre-Trial Communications

Lawyers may not issue pretrial communications in a criminal matter that will have a "substantial likelihood of interfering with the fairness of the trial by a jury" (evincing broader language than the Code's "clear and present danger" standard) (Rule 3.6(a)) (DR 7-106(A))

Lawyer-prosecutors may not direct or encourage anyone to make extrajudicial statements that violate the pre-trial communications rule (Rule 3.6(a); Rule 3.8(e))

Ex Parte Communications With Represented Adversaries

Lawyers may not communicate with a "person" the lawyer knows to be represented by another lawyer in the matter, unless the other lawyer consents (adopting broader language than the Code's reference to "party") (Rule 4.2) (DR 7-103(A)(1))

Treating Third Persons With Respect

Lawyers may not engage in activity that has no purpose other than to "embarrass, delay or burden a third person," or obtain evidence by methods that violate a third person's legal rights (Rule 4.4)

Lawyers Supervising Other Lawyers and Non-Lawyers

Lawyers supervising other lawyers may not order or ratify their misconduct or fail to take reasonable remedial action if they know of the misconduct (Rule 5.1(c))

Lawyers supervising non-lawyers may not order or knowingly ratify Rules violations or (if they have direct supervisory authority over the non-lawyers) fail to take reasonable remedial action when it would have some effect (Rule 5.3(c)) (DR 3-104(C))

Cooperation With Admissions and Disciplinary Investigations

Lawyers may not obstruct an admissions or disciplinary authority investigation or fail to respond to a lawful demand for relevant information in such an investigation (although they may protect confidential information) (Rule 8.1(c), (d))

Lawyers' Statements About Judges

Lawyers may not make statements about "the qualifications or integrity of a judge or other judicial official" knowing them to be false or with "reckless disregard" as the truth of the statements (Rule 8.2) (EC 8-6)

Avoiding Assistance of Judicial Misconduct

Lawyers may not knowingly assist judges' or judicial officers' misconduct (Rule 8.4(e))

Extra-Territorial Effect of the Virginia Rules

Lawyers may not violate the Virginia Rules when engaging in activity outside Virginia (Rule 8.5(a)) (DR 1-102(B))

C. CONDUCT PERMITTED BY THE VIRGINIA RULES OF PROFESSIONAL CONDUCT BUT PROHIBITED BY THE CODE

Referral Fees

Lawyers may enter into fee-splitting arrangements without assuming full responsibility for co-counsel's conduct if the client consents after full disclosure (essentially allowing referral fees) (Rule 1.5(e)) (DR 2-105(D))

Paying Indigent Clients' Costs and Expenses

Lawyers may pay court costs and expenses of litigation on behalf of indigent clients without the clients being ultimately responsible for them (Rule 1.8(e)(2)) (DR 5-103(B))

In-House Lawyer Indemnity

Lawyers may enter into agreements prospectively limiting their malpractice liability if they are employed by the client and the client is separately represented in negotiating the agreement (Rule 1.8(h)) (DR 6-102(A))

Related Lawyers

Related lawyers may represent clients adverse to each other if both clients consent (Rule 1.8(i))

Sale of Law Practices

Lawyers may sell their practice (including "good will") under certain circumstances (Rule 1.17) (EC 4-6)

Advising Clients About Asserting Criminal Charges Against an Adversary
Lawyers may advise their clients about the possibility of criminal prosecution of or disciplinary charges against an adversary; however, lawyers are still prohibited from presenting or threatening to present such charges (Rule 3.4(h), Comment [5]) (DR 7-104(A))

Witness-Advocate Rule

Law firms may continue to represent their client even if one of their lawyers must be a witness on the client's behalf (Rule 3.7(c)) (DR 5-101(B); DR 5-102)

Government-Approved Settlement Restrictions on Practice

Lawyers may enter into agreements which broadly restrict their right to practice as part of a settlement if a tribunal or governmental entity approves (Rule 5.6(b)) (DR 2-106(B))

Certified Specialists

Lawyers may describe themselves as "certified" specialists in areas of the law other than patent and admiralty if the lawyers have been certified by the Virginia Supreme Court or they name the certifying organization and "clearly state" that Virginia has no procedure for approving certifying organizations (Rule 7.4) (DR 2-104(A)(1))

D. CONDUCT PERMITTED BY THE VIRGINIA RULES OF PROFESSIONAL CONDUCT BUT NOT EXPLICITLY PERMITTED BY THE CODE

Diligent and Prompt -- Not "Zealous" -- Representation

Lawyers may comply with their duty of loyalty to clients by acting with "reasonable diligence and promptness" (contrasting with the Code's "zealous" standard and allowing the use of collaborative strategies when appropriate) (Rule 1.3(a)) (DR 7-101)

Contingent Fees in Domestic Relations Matters

Lawyers may charge and collect a contingent fee in certain specified domestic relations matters (Rule 1.5(d)(1)) (EC 2-22)

"Mentoring"

Lawyers may consult with colleagues or other lawyers under certain circumstances as long as they preserve confidences (encouraging "mentoring") (Rule 1.6(a), Comment [7a]) (DR 4-101(B)(1))

Adversity to Current Clients

A lawyer may agree to represent a new client although the representation of that client may be adverse to an existing client only if (1) the lawyer "reasonably believes" the representation will not adversely affect the relationship with the existing client and (2) each client consents (replacing the Code's more objective "obvious" standard) (Rule 1.7(a)) (DR 5-105(C))

Adversity to Former Clients

Law firms may be adverse to a client formerly represented by a lawyer no longer in the firm as long as it does not involve the "same or substantially

related matter" as the former representation, and no lawyer remaining in the firm has any material confidential information (Rule 1.10(b)) (DR 5-105(E))

Screening Former Government Lawyers and Judges

Law firms that hire former government lawyers who are disqualified because they "participated personally and substantially" in a matter may avoid disqualification if they screen the lawyers (Rule 1.11(b), (e)) (DR 9-101(B))

Law firms that hire former government lawyers who are disqualified because they have material confidential information may avoid disqualification if they screen the lawyers (Rule 1.11(c), (f))

Law firms that hire former judges, adjudicative officers, arbitrators and law clerks who are disqualified because they "participated personally and substantially" in a matter may avoid disqualification if they screen the lawyers and notify the tribunal (Rule 1.12(a), (c)) (DR 9-101(A); EC 5-20)

Representing Organizations

Lawyers representing organizations may report to upper levels of the organization if they discover that the organization is being harmed by an employee's misconduct (Rule 1.13(b)(3)) (EC 5-18)

Assisting Impaired Clients

Lawyers whose clients' ability to make decisions becomes impaired may seek the appointment of a guardian or take "other protective action" if the lawyers believe that the clients cannot adequately act in their own interests (Rule 1.14)

Former Clients' Files

Lawyers may charge their former clients for copies the lawyers make of their files (other than client-furnished documents and originals of legal instruments or official documents) and may refuse to give their former clients "documents intended only for internal use," such as billing records (Rule 1.16(e)) (DR 2-108(D))

Collaborative Non-Advocate Roles

Lawyers may act as advisors, intermediaries, evaluators, third party neutrals and mediators under certain circumstances (Rules 2.1, 2.2, 2.3, 2.10, 2.11; see also Rule 1.1, Comment [2a]; Rule 1.3, Comment [1a]; Rule 1.4, Comment [1a]) (EC 5-20)

Refusing to Offer False Evidence

Lawyers may refuse to offer evidence that they "reasonably believe[]" is false (Rule 3.3(b)) (DR 7-102(A)(4))

Requesting Third Parties to Refrain From Cooperating With an Adversary
Lawyers may request that a client's relatives or current or former employees or agents refrain from voluntarily giving relevant information to another party in a civil matter (Rule 3.4(g)) (DR 7-103(A)(2))

Permissible Non-Lawyer Misrepresentations

Non-lawyers may engage in traditionally acceptable misrepresentations such as those involved in criminal "sting" operations and housing discrimination "tests" (Rule 5.3(c), Comment 1)) (DR 3-104(C))

Satisfying Pro Bono Goals Financially and Collectively

Lawyers may satisfy their aspirational two percent pro bono obligation by "direct financial support," and lawyers in a firm may satisfy it collectively (Rule 6.1) (ECs 2-28, 2-29, 2-30, 2-31, 2-32)

Legal Services Organizations

Lawyers may serve in a legal services organization that represents clients adverse to the lawyers' clients (as long as the lawyers avoid participation) (Rule 6.3)

QUICK REFERENCE LIST

Substantive Differences Between the Virginia Rules of Professional Conduct and the Code of Professional Responsibility

General Format

The Rules are organized by lawyers' roles and responsibilities: client representative; third party neutral; legal system officer; public citizen with special responsibility for the quality of justice (Preamble)

The Rules are authoritative; Comments are interpretive, unlike the Code's "aspirational" Ethical Considerations (Preamble)

Use of the Rules

Rule violations "should not give rise to a cause of action" and the Rules "are not designed to be a basis for civil liability." The Rules should not be invoked "as procedural weapons," and an "antagonist in a collateral proceeding or transaction" may lack standing to seek enforcement of the Rules (Preamble)

"Diligence" Requirement

Lawyers must represent clients with "reasonable diligence" (creating a standard broader than the Code's "zealous representation" standard and including collaborative strategies) (Rule 1.3)

"Informed Decisions" Requirement

Lawyers are explicitly required to give clients the information and opportunity to "make informed decisions" (Rule 1.4(b))

Fees

[Codification of Legal Ethics Opinions regarding domestic relations contingent fees] (Rule 1.5(d)(1))

Fee-splitting is permitted with client consent after full disclosure of the fee, the split and the lawyers' participation (Participating lawyers are not required to expressly assume responsibility for their co-counsel's actions; the Rules allow referral arrangements with client consent.) (Rule 1.5(e))

Confidences

[Comment on mentor discussions] (Rule 1.6(a), Comment [7a])

Lawyers are required to request a client's consent to blow the whistle on another lawyer's unethical conduct (Rule 1.6(c)(3))

Conflicts of interest -- other clients' interest

Lawyers may be adverse to an existing client if the client consents and the lawyer "reasonably believes" it will not affect the representation with the other client (replacing the "obvious" standard in the Code) (Rule 1.7(a)(1))

Lawyers may not be adverse to former clients in the "same or a substantially related matter" to that in which the lawyer represented the client, unless both the present and former client consent (Rule 1.9(a))

A lawyer is disqualified from being adverse to a former client in the "same or substantially related matter" in which the lawyer's former firm represented the client, but only if the lawyer has material confidential information (providing a specific provision governing the conflicts rules for lawyers who move from firm to firm) (Rule 1.9(b))

A law firm may be adverse to a client represented by a lawyer who is no longer with the firm as long as it is not the "same or substantially related" matter in which the lawyer formerly represented the client and none of the lawyers remaining in the firm has any material confidential information about the client (Rule 1.10(b))

Conflicts of interest -- lawyer's own interest

Lawyers may not enter into business transactions with clients unless the transaction is fair, the client is given a "reasonable opportunity" to seek independent counsel, and the client consents in writing (Rule 1.8(a))

Lawyers may not prepare an instrument giving the lawyer or a member of the lawyer's immediate family a "substantial gift" from a client unless the client is a relative (Rule 1.8(c)) (This prohibition extends to the lawyer's entire firm. (Rule 1.10(a))

Advancing costs

Lawyers may pay costs and expenses for indigent clients without expecting reimbursement (Rule 1.8(e)(2))

Limiting liability

In-house lawyers may prospectively limit malpractice liability to their employers if the employers are independently represented in negotiating the agreement (Rule 1.8(h))

Related lawyers

Related lawyers may represent clients adverse to each other with consent (Rule 1.8(i))

Government lawyers

A former government lawyer may not undertake representations in matters in which the lawyer "participated personally and substantially" while a government employee unless the client and the government consent. The lawyer's firm may undertake the representation if the lawyer is screened, does not share in the fees and advises the government agency (The term "matter" is defined in part as "a particular matter involving a specific party or parties.") (Rule 1.11(b), (e))

A former government lawyer possessing material "confidential government information" about a person may not be adverse to that person, but the lawyer's firm may undertake the representation if the lawyer is screened and does not share in the fee (The term "confidential government information" is defined as information "obtained under governmental authority," the disclosure of which is prohibited by law and which is "not otherwise available to the public.") (Rule 1.11(c), (f))

A lawyer "serving as a public officer or employee" may not participate in a matter "in which the lawyer participated personally and substantially while in private practice or non-government employment" or "negotiate for private employment" with a party or lawyer in a matter in which the lawyer is "participating personally and substantially" (except for law clerks) (Rule 1.11(d))

Former judges, arbitrators and law clerks

Former judges, other adjudicative officers, arbitrators and law clerks may not participate in matters in which they were "personally and substantially" involved, unless all parties consent (This disqualification extends to their new law firms unless the disqualified lawyer is screened and the tribunal is notified in writing.) (Rule 1.12(a)(c))

Judges, adjudicative officers and arbitrators may not negotiate for employment with any party or lawyer involved in a matter in which they are "participating personally and substantially" (Law clerks may engage in such negotiations if they notify their judge.) (Rule 1.12(b))

Representing organizations

[Guidance for lawyers representing an organization who discovers that an employee or officer is hurting the organization] (Rule 1.13))

When dealing with an organization's constituents, a lawyer must "explain the identity of the client" if the constituents' interests are adverse to the organization's interests (Rule 1.13(d))

Representing clients under a disability

If a client's ability to make "adequately considered decisions" becomes "impaired," the lawyer shall try to maintain a normal relationship, but may seek the appointment of a guardian or take "other protective action" if the lawyer "reasonably believes that the client cannot adequately act in the client's own interest" (Rule 1.14)

Handling funds

Lawyers must segregate and maintain property that is the subject of a dispute (Rule 1.15(b), (e)(2))

[Specific guidelines for lawyers or law firms acting as fiduciaries (trustees, receivers, etc.)] (Rules 1.15(d), (e)(2))

Withholding files from a former client

Whether they are paid or not, lawyers must give former clients all original documents provided by the client (without charging for copying) and other work product prepared during the representation (The lawyer may bill the client for copying but may not withhold these documents until the copy bill is paid.); lawyers are not required to give former clients documents intended for internal use (including memoranda discussing "difficulties arising from the lawyer/client relationship") (Rule 1.16(e))

Sale of law practices

Lawyers intending to cease practicing law in the "geographic area" in which they practice may sell all or part of their practice (including "good will") if they provide actual written notice to the clients and the clients affirmatively consent to the sale; lawyers must make their entire practice available for purchase, but may sell only part of it; clients' fees may not be increased "by reason of the sale" (Rule 1.17)

Lawyer's role as advisor, intermediary, evaluator, third party neutral and mediator

[Specific new Rules governing lawyers' roles and emphasizing disclosure of the lawyer's role in a particular setting] (Rules 2.1, 2.2, 2.3, 2.10, 2.11; see also Rule 1.1, Comment [2a], Rule 1.3, Comment [1a], Rule 1.4, Comment [1a])

Lawyers must advise clients of alternative dispute resolution options "that might be appropriate" (Rule 1.2, Comment [1])

Non-frivolous positions

Lawyers may only bring or defend cases or take positions if there is an objectively-determinable non-frivolous basis for doing so (unless the lawyer is arguing for a modification of law or is defending a criminal case) (Rule 3.1)

Dealing with adversaries

Lawyers may not "present or threaten to present" criminal or disciplinary charges solely to obtain an advantage in a civil matter; this prohibition does not extend to "participating" in such conduct, so lawyers may advise their clients of their rights under the criminal laws (Rule 3.4(h), Comment [5])

Dealing with non-clients

In civil cases, lawyers may ask relatives and current or former employees or other agents of a client to refrain from providing information to other parties (Rule 3.4(g), Comment [4])

Lawyers may not communicate ex parte with a person (not just a party) who is represented in the matter (Rule 4.2)

Dealings with tribunals

Lawyers must advise the court of "controlling legal authority in the subject jurisdiction" (Rule 3.3(a)(3))

Lawyers may refuse to offer evidence that they reasonably believe is false

(The Code offers no guidance to lawyers who suspect but do not "know" of such falsity.) (Rule 3.3(b))

In an ex parte proceeding, lawyers shall fully advise the court of all relevant facts and law (Rule 3.3(c))

[Prohibition on frivolous discovery requests and failing to diligently respond to discovery requests] (Rule 3.4(e))

Lawyers "shall not engage in conduct intended to disrupt a tribunal" (Rule 3.5(f))

[Prohibition on pre-trial communications in a criminal matter that have a substantial likelihood of interfering with the fairness of a jury trial] (Rule 3.6)

Witness-Advocate Rule

Lawyers may not act as advocates in an "adversarial proceeding" if the lawyer is "likely to be a necessary witness" (Rule 3.7(a))

The witness-advocate rule disqualification is not imputed to the entire law firm (Rule 3.7(c))

Required disclosure to avoid assisting wrongful conduct

Lawyers must disclose facts "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client" (Rule 4.1(b))

Respect for third persons

Lawyers may not engage in activity that has no purpose other than to "embarrass, delay or burden" a third person, or obtain evidence that violates the legal rights of a third person (Rule 4.4)

Supervision of lawyers and non-lawyers

Supervisory lawyers are responsible for another lawyer's or a non-lawyer's misconduct if they order or ratify the conduct or fail to take reasonable remedial actions (Rule 5.1, 5.3)

Non-lawyers may engage in such traditionally acceptable misrepresentations as those involved in criminal "sting" operations and housing discrimination "tests." (Rule 5.3, Comment [1])

Restrictions on practice

Lawyers may not enter into settlement agreements that broadly restrict their practice unless a tribunal or governmental entity approves (Rule 5.6)

Pro bono work

Lawyers should devote two percent of their time each year to pro bono legal services or provide "direct financial support" to pro bono activities; lawyers in a firm may satisfy this aspirational responsibility collectively (Rule 6.1)

Lawyer's other activities

Lawyers may participate in a legal services organization even if it represents clients adverse to the lawyers' clients, as long as they recuse themselves (Rule 6.3)

Advertising

All advertisements must include the name and address of a Virginia lawyer responsible for its content (Rule 7.1(e))

Lawyers may describe themselves as "patent" or "admiralty" lawyers (as under the Code) and may also describe themselves as a "certified" specialist in other areas of the law as long as either: (1) the lawyers have been certified as specialists by the Virginia Supreme Court; or (2) the lawyers name the certifying organization and "clearly state" that Virginia has no procedure for approving certifying organizations (Rule 7.4)

Statements about judges

Lawyers may not make statements with knowing falsity or "reckless disregard" about the "qualifications or integrity of a judge or other judicial officer" (Rule 8.2)

Cooperation with Bar investigations

Lawyer may not obstruct admissions or disciplinary authority investigations and must respond to requests for information (unless the information is protected by confidentiality rules) (Rule 8.1(c), (d))

Reporting other lawyers' ethics violations

Lawyers must report another lawyer's ethics violation which meets the specified standard if they have "reliable" information about the violation (Rule 8.3(a))

Judge misconduct

Lawyers must report a judge's misconduct under certain circumstances (Rule 8.3(b))

A lawyer may not knowingly assist a judge or other judicial officer in violating "applicable rules of judicial conduct or other law" (Rule 8.4(e))

Choice of laws

Conduct in court proceedings is governed by whatever ethics code the court follows; Virginia lawyers are subject to Virginia rules for

misconduct elsewhere; another state's rules might apply if the lawyer is licensed there and the conduct has its predominant effect there (Rule 8.5)

EXPLANATORY LIST

Substantive Differences Between the Virginia Rules of Professional Conduct and Code of Professional Responsibility

Format

The main distinction between the Rules of Professional Conduct and the Code of Professional Responsibility involves format.

The Rules:

- include mandatory Rules and interpretive Comments
- group the applicable Rules according to lawyers' roles and relationships (including descriptions of and guidelines for lawyers' various roles)

Substantive changes

The Rules differ in some substantive ways from the Code. When analyzing the differences, it is worth considering the justification for the new Rules.

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- E. Rules That Provide Guidance on Ethics Issues That Have Become Increasingly Important in Recent Years and Therefore Are Not Addressed in the Code
- F. Rules That Reflect Conscious Policy Changes

- A. Rules That Explicitly State What Is Implicit in the Code

These Rules do not change any ethics principles governing Virginia lawyers, but rather offer explicit statements of ethics principles that the Virginia Bar always found implicit in the Code.

Lawyers must allow clients to determine the objectives of a representation and must consult about the means of pursuing those objectives (The Code does not specifically include these requirements.) (Rule 1.2(a))

Lawyers must provide clients with enough information that they can make informed decisions (The Code does not include this bedrock rule.) (Rule 1.4(b))

[Specific rules governing permissible contingent fees in domestic relations matters (following the Bar's Legal Ethics Opinions)] (Rule 1.5(d)(1))

Lawyers deciding whether to report another lawyer's ethics violation--when the disclosure requires client consent--must request such consent (The general duty of communication may already require such client consultation, but this explicit provision assures client input and prevents lawyers from protecting their colleagues from discipline.) (Rule 1.6(c)(3))

[Basic simultaneous conflict-of-interest rule prohibiting any lawyer from being adverse to a current client without the client's consent] (The Code merely implies this most elemental conflicts principle.) (Rule 1.7(a))

Lawyers who leave a firm may be adverse to that firm's clients in any matter unless the lawyers worked on that matter while at the firm or acquired material confidential information about the client while at the firm (The Code does not explicitly address lawyers moving and does not explicitly state the "confidential information" component of this conflicts rule.) (Rule 1.9(b))

Law firms may be adverse to clients represented by a lawyer who is no longer in the firm as long as it is not the "same or substantially related to" the matter on which the lawyer represented the client and no lawyer remaining in the firm has any material confidential information (This approach is consistent with the Code's emphasis on "material confidential information" as the key to determining if a lawyer may be adverse to a former client.) (Rule 1.10(b))

[Prohibition on extrajudicial public communications in a criminal case that will have a "substantial likelihood of interfering with the fairness of the trial by a jury" (replacing the "clear and present danger standard" in the Code and complying with the United States Supreme Court standard)] (Rule 3.6(a))

Lawyers may not act as advocates in an "adversarial proceeding" in which they are likely to be a "necessary" witness (This approach is consistent with Virginia Legal Ethics Opinions and case law, which apply the witness-advocate rule to proceedings other than trials, but only if the lawyer must be a necessary witness.) (Rule 3.7(a))

Lawyers may not communicate ex parte with any represented "person" in the same matter without the other lawyer's consent (The term "person" rather than the Code's "party" matches the Bar's application of this rule to non-litigation contexts.) (Rule 4.2)

B. Rules That Are Consistent with the Code and That Probably Should Have Been Included in the Code

These Rules correct what might be seen as "oversights" in the Code by stating principles that many Virginia lawyers already think apply.

The prohibition on lawyers preparing instruments under which they receive benefits from a non-relative client extends to the lawyer's entire firm (This imputed disqualification rule rests on the same prophylactic basis as the prohibition itself.) (Rule 1.8(c); Rule 1.10(a))

Lawyers may not be adverse to former clients in the "same or a substantially related matter" unless both the former and present client consent (On its face, the Code requires only the former client's consent.) (Rule 1.9(a))

[Rules governing former judges, arbitrators and mediators, requiring lawyers to report judicial misconduct, and prohibiting lawyers from assisting a judge's improper conduct (filling gaps in the Code)] (Rule 1.12; Rule 8.3(b); Rule 8.4(e))

Lawyers must advise the Court of "controlling legal authority" (The Code has only an aspirational statement to this effect.) (Rule 3.3(a)(3))

Lawyers may refuse to offer evidence they "reasonably believe" is false (The Code prohibits lawyers from offering evidence they "know" is false but provides no guidance for lawyers who suspect falsity.) (Rule 3.3(b))

Lawyers in ex parte proceedings must advise the court of all material facts known to the lawyer that the court needs to make an informed decision (This is the factual equivalent of the duty to disclose controlling authority.) (Rule 3.3(c))

Lawyers may not engage in conduct intended to disrupt a tribunal (The

Code forbids such conduct only if it would violate a rule of procedure or evidence.) (Rule 3.5(d))

Lawyer-prosecutors may not encourage anyone associated with the prosecutor to make unethical extrajudicial statements (preventing prosecutors from doing indirectly what they cannot do directly) (Rule 3.8(e))

Lawyers must disclose their clients' confidences if disclosure is necessary to avoid assisting a crime or fraud (The Code forbids the assistance but does not include this corollary requirement.) (Rule 4.1(b))

Lawyers "shall not use means that have no purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person" (The Code's general provisions would prohibit such conduct.) (Rule 4.4))

Advertisements must include the full name and office address of a Virginia lawyer responsible for their content (Most states' ethics rules include this requirement, which is the only difference in the advertising provisions between the Rules and the Code.) (Rule 7.1(e))

Lawyers may not obstruct or withhold non-confidential information from bar admissions or disciplinary authorities (This Rule is analogous to the provisions applicable to tribunals.) (Rule 8.1(c),(d))

Lawyers may not make statements with knowing falsity or "reckless disregard" as to the "qualifications or integrity of a judge or other judicial officer" (This Rule makes mandatory what is "aspirational" in the Code.) (Rule 8.2)

Lawyers must report another lawyer's ethics violation that meets the specified standard if they have "reliable" information about the violation (The Code uses only the term "information," but Virginia Legal Ethics Opinions have required that the information be reliable.) (Rule 8.3(a))

C. Rules That Provide Limited Exceptions to General Ethics Principles in the Rules and the Code

These Rules offer limited exceptions to ethics principles found in the Rules and in the Code--based on Virginia's experience with the Code.

Lawyers are entitled to fee-splitting provided the client is advised and consents to all lawyers involved, the terms of the fee arrangement are disclosed to the client, the total fee is reasonable, and the agreement is obtained in writing in advance of the rendering of legal services; lawyers

involved in a fee-splitting arrangement may take a portion of the fee without being totally responsible for co-counsel's activities (This "referral fee" provision allows clients to consent to their lawyers' associating with others who may be more experienced in dealing with the client's matter.) (Rule 1.5(e))

Lawyers who are close relatives may represent clients who are adverse to one another if the clients consent (A per se prohibition might deprive clients of their chosen lawyers.) (Rule 1.8(i))

Indigents need not be ultimately responsible for litigation costs (This exception serves societal goals by easing indigents' access to the legal system.) (Rule 1.8(e)(2))

In-house lawyers may arrange with their clients/employers to limit their liability if the client/employer is separately represented in making the arrangement (This allows in-house lawyers to obtain the type of indemnification other corporate officers enjoy, while assuring that the client/employer has independent counsel in agreeing to the liability limit.) (Rule 1.8(h))

Lawyers are not prohibited from "participating" in presenting criminal charges to gain an advantage in civil litigation--allowing them to fully advise their clients (The prohibition remains on lawyers "presenting or threatening to present" charges.) (Rule 3.4(h))

Disqualification under the witness-advocate rule is not imputed to the entire firm (This should discourage disqualification motions filed for tactical reasons.) (Rule 3.7(c))

Lawyers may restrict their right to practice as part of a settlement if the settlement is approved by a tribunal or a governmental entity (This narrow exception applies only for officially-approved settlements.) (Rule 5.6)

D. Rules That Provide Guidance on Ethics Issues That Lawyers Have Always Confronted but That Are Not Addressed in the Code

These Rules provide guidance in situations that Virginia lawyers may have faced for many years, but which are not addressed in the Code.

Lawyers must be "diligent" in representing clients, a broad term interpreted to include collaborative strategies (The Code's "zealous representation" requirement sometimes inhibits collaborative approaches.) (Rule 1.3(a))

Lawyers representing an organization must explain that they represent the organization when dealing with employees with interests potentially

adverse to the organization and must work within the organization to seek corrective action before disclosing an employee's wrongful conduct to outsiders (This Rule includes specific suggestions for lawyers dealing with these issues.) (Rule 1.13)

Lawyers representing clients who seem unable to make informed decisions may, as a last resort, seek the appointment of a guardian or take "other protective action" (The Code contains no guidance for lawyers facing this difficult situation.) (Rule 1.14)

Lawyers supervising other lawyers and non-lawyers are responsible for their unethical conduct if the lawyers ordered or ratified the misconduct or could have stopped it in time to avoid harm (This Rule will encourage lawyers to adequately supervise their employees.) (Rules 5.1, 5.3)

Virginia lawyers "should" devote two percent of their time to pro bono work (This aspirational provision offers specific guidance for lawyers heeding our profession's noble calling. Lawyers may satisfy this responsibility through financial contributions, and lawyers in a firm may satisfy it collectively.) (Rule 6.1)

E. Rules That Provide Guidance on Ethics Issues That Have Become Increasingly Important in Recent Years and Therefore Are Not Addressed in the Code

These Rules provide ethics guidance in situations that Virginia lawyers traditionally have not faced or that have become increasingly important in recent years.

Lawyers must advise their clients of dispute resolution options in "appropriate" circumstances (This assures that clients are fully informed of their options.) (Rule 1.2, Comment [1]; Rule 1.4, Comment [1a])

[Extensive ethics Rules governing lawyers' possible alternative dispute resolution roles as advisor (Rule 2.1), intermediary (Rule 2.2), evaluator (Rule 2.3), third party neutral (Rule 2.10), mediator (Rule 2.11)] (The Code offers no guidelines for lawyers acting in these roles.) (See also Rule 1.1, Comment [2a]; Rule 1.3, Comment [1a]; Rule 1.4, Comment [1a])

[Extensive Rules governing lawyers holding their clients' money as fiduciaries] (The Code did not contain any explicit provisions.) (Rule 1.15(d))

Lawyers may carefully seek the advice or "mentoring" of colleagues without violating client confidentiality principles (This reflects current practice and ultimately serves clients by allowing lawyers-- especially

young lawyers--to obtain wisdom from other lawyers.) (Rule 1.6(a), Comment [7a])

[More extensive Rules governing in-house lawyers] (Rule 1.8(h)'s approval of indemnity; Rule 1.13's guidance for lawyers representing organizations)

[Extensive provisions governing former government lawyers (allowing their firms to avoid disqualification with notice to the government and creation of an "ethics screen") and government lawyers who moved from private practice (prohibiting participation in matters in which they "personally and substantially" participated while in private practice, and negotiations for a job from their opponents)] (These will provide guidelines for lawyers moving to and from the government and ease the transition so lawyers are not discouraged from public service.) (Rule 1.11)

[Detailed provisions governing former judges, other adjudicative officers, arbitrators and law clerks (prohibiting them from participating in matters in which they were earlier involved unless all parties consent)] (Disqualification will not extend to their new law firm if they are screened and notify the tribunal.) (Rule 1.12(a), (c))

Judges, other adjudicative officers and arbitrators may not negotiate for employment with a party or lawyer in a matter in which they are "participating personally and substantially;" law clerks may do so if they notify the judge (Rule 1.12(b))

Lawyers who intend to stop practicing may sell their practice as long as the affected clients explicitly consent (This Rule will create a "level playing field" between lawyers practicing by themselves or in small firms and lawyers in large firms, as well as help clients in the transition.) (Rule 1.17)

[New "civility" provisions] (Preamble's prohibition on using the Rules as a procedural weapon or to support a cause of action; Rule 3.4(e)'s prohibition on frivolous discovery requests and failing to diligently respond to discovery; Rule 3.5(f)'s prohibition on conduct intended to disrupt a tribunal; Rule 3.7(c)'s elimination of imputed disqualification under the witness-advocate rule)

Lawyers may serve in a legal services organization whose clients are adverse to the lawyers' clients as long as the lawyers recuse themselves in the case of conflicts (This new provision applies the general rules that govern lawyers' involvement in other organizations.) (Rule 6.3)

Lawyers may advertise that they are "certified specialists" in a field of law

by a named organization as long as they identify the organization and include a disclaimer that Virginia has no procedure for approving such organizations (This increases the information consumers receive without misleading them.) (Rule 7.4)

[Choice of law rule for lawyers with licenses in multiple jurisdictions] (Lawyers are governed by the ethics rules of the state most affected by their behavior.) (Rule 8.5)

F. Rules That Reflect Conscious Policy Changes

These Rules reflect deliberate changes in the ethics principles governing certain matters.

Under the most elemental conflicts principle, a lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client (even on matters unrelated to the representation of the client) unless: (1) both clients consent; and (2) the lawyer "reasonably believes" that the representation will not adversely affect the relationship with the clients (This standard is essentially subjective, in contrast to the more objective standard of the Code, which requires it to be "obvious" that the lawyer may adequately represent each client.) (Rule 1.7(a))

Lawyers entering into business transactions with their clients must give the clients the opportunity to seek independent counsel and must obtain their clients' consent to the transaction in writing (The Rules add these two prerequisites while continuing the requirement that the transaction be fair to the client.) (Rule 1.8(a))

Whether they are paid or not, lawyers must give former clients all original documents provided by the client (without charging for copying) and other work product prepared during the representation (The lawyer may bill the client for copying but may not withhold these documents until the copy bill is paid.); lawyers are not required to give former clients documents intended for internal use (including memoranda discussing "difficulties arising from the lawyer/client relationship") (This provides detailed guidance for lawyers facing disputes with clients about files, in contrast to the Code's vague "prejudice" standard.) (Rule 1.16(e))

Lawyers may bring or defend cases or take positions only if there is an objectively determinable non-frivolous basis for doing so (unless the lawyer is arguing for a modification of law or is defending a criminal case) (This objective test contrasts with the Code's emphasis on the lawyer's knowledge and intent.) (Rule 3.1)

Lawyers may ask relatives or clients' current or former employees or

agents to refrain from voluntarily giving information to civil litigation adversaries (This allows lawyers to ask those on the periphery of the attorney-client relationship to insist on formal rather than informal ex parte discovery by an adversary.) (Rule 3.4(g))

DETAILED COMPARISON CHART

Substantive Differences Between the Virginia Rules of Professional Conduct and Code of Professional Responsibility

RULES PROVISION	RULES	CODE PROVISION	CODE
Preamble	The Preamble sets the context for the Rules and describes the lawyer's responsibilities as a representative of clients, a third party neutral, an officer of the legal system and a public citizen having special responsibility for the quality of justice. The text of each Rule and the Terminology section which follows the Preamble are authoritative and the Comments accompanying each Rule are interpretative.	Preamble	The Code consists of three separate parts: Canons, Disciplinary Rules and Ethical Considerations. They express the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system and with the legal profession. The Canons are norms, the Disciplinary Rules are mandatory and the Ethical Considerations are "aspirational."
Preamble	Rule violations "should not give rise to a cause of action" and the Rules "are not designed to be a basis for civil liability." The Rules should not be invoked "as procedural weapons" and an "antagonist in a collateral proceeding or transaction" may lack standing to seek enforcement of the Rules.		The Code contains no similar provision.
1.2 (a)	This Rule requires lawyers to defer to their clients' decisions about their	DR 6-101	The Code requires lawyers to promptly and fully advise clients of material facts, but

	objectives and to consult with their clients about the means of pursuing those objectives.		there is no specific requirement to abide by the client's decision about objectives and to consult with the client about the means to be used.
1.2 Comment [1] See also 1.4 Comment [1a]	<p>Comment: Lawyers shall advise their clients "about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate. . ."</p> <p>This requirement to advise clients about ADR processes "that might be appropriate" recognizes lawyers' inherent obligation to consult about the means to accomplish the clients' goals and reflects the increasing availability and popularity of ADR options. <u>See also</u> Rule 1.1, Comment [2a]; Rule 1.3, Comment [1a]; Rule 1.4, Comment [1a].</p>	DR 6-101	The Code requires lawyers to promptly and fully advise clients of material facts, but there is no specific requirement to mention ADR options when appropriate.
1.3(a)	<p>"A lawyer shall act with reasonable diligence and promptness in representing a client."</p> <p>This "diligence" requirement represents a broader concept than the "zealous representation" standard of the current Code, and includes use of collaborative strategies when appropriate.</p>	DR 7-101	The Code requires lawyers to "zealously" represent their clients.
1.4(b)	"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."	DR 6-101(C) DR 7-101(B)(1)	These and other provisions of the Code address a lawyer's duty to keep a client informed and follow the client's direction, but the Code has no explicit "informed decision"

1.5(d)(1)	"A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee . . . in a domestic relations matter, except in rare instances" (which are described in some detail in the Comment section).	EC 2-22	provision. "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.
1.5(e) Comment [4]	The Comment section summarizes the Legal Ethics Opinions issued by the Bar that identify the "rare instances" where it would be appropriate to charge a contingent fee in a domestic relations matter. Fee-splitting is permissible if the total fee is reasonable and if the client consents (preferably in writing) after being fully informed of the fee, the proposed split and the lawyers' participation. As long as the client consents after full disclosure, a lawyer may enter into a fee-splitting arrangement without assuming full responsibility for co-counsel's conduct. This essentially allows referral arrangements provided the client consents after full disclosure.	DR 2-105(D)	The Code requires each participating lawyer to "expressly assume responsibility to the client," which the Bar has interpreted to require more than "the mere recommendation or referral of the case to another lawyer" or "ministerial or mechanical tasks." (LEO 1488)
1.6(a) Comment [7a]	A lawyer shall not reveal confidential information except (among other reasons) for disclosures that are impliedly authorized in order to carry out the representation. The Code has no "impliedly	DR 4-101(B)(1)	"[A] lawyer shall not knowingly . . . reveal a confidence or secret of his client", unless certain exceptions apply.

authorized" exception to a lawyer's duty of confidentiality.

The Comment describes circumstances under which lawyers may consult with colleagues or other attorneys to competently represent their clients' interests.

- 1.6(c)(3) A lawyer shall "promptly reveal" information about another lawyer's misconduct if the client consents. A lawyer is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney (emphasis added).
- DR 1-103(A) A lawyer is obligated to report another lawyers misconduct unless the information is protected by the duty of confidentiality. There is no explicit requirement to seek the clients consent to disclosure (the general principles of communication and advocacy may currently require lawyers to seek their clients' views about reporting another lawyer's misconduct, but there is no specific requirement that they do so)
- 1.7(a) "A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation" (emphasis added).
- DR 5-105(C) "[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and each consents to the representation after full disclosure of the possible effect of such representation in the exercise of his independent professional judgment on behalf of each."

This Rule states the bedrock conflict-of-interest principle that a lawyer may never be adverse to a current client

unless it will not hurt the client and the client consents after full disclosure, but uses a "reasonably believes" standard rather than the Code's more objective "obvious" standard.

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| 1.8(a) | Lawyers may not enter into business transactions with clients or "acquire an ownership, possessory, security, or other pecuniary interest adverse to a client" unless the transaction is "fair and reasonable to the client," the client is "given a reasonable opportunity to seek the advice of independent counsel in the transaction" and the client "consents <u>in writing</u> " (emphasis added). | DR 5-104(A) "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure under the circumstances and provided that the transaction was not unconscionable, unfair or inequitable when made." |
| 1.8(c)
1.10(a) | A lawyer may not prepare an instrument giving the lawyer or an immediate relative any "substantial gift" from a client unless the client is related to the donee.

This disqualification is imputed to the lawyer's entire firm under Rule 1.10(a). | DR 5-104(B) Under the Code, the prohibition on a lawyer preparing an instrument giving the lawyer or a member of the lawyer's family a gift from a client who is not a relative (DR 5-104(B)) does not disqualify the lawyer's entire firm. |
| 1.8(e)(2) | "[A] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." | DR 5-103(B) A lawyer may "advance or guarantee the expenses of litigation provided the client remains ultimately liable for such expenses." |

The Bar has held that a lawyer may advance an expert fee for a death row inmate even if there is "no probability" that the client could ultimately reimburse the lawyer (LEO 997), but

- has not recognized a broad exception for indigent clients.
- 1.8(h) A lawyer may enter into an agreement prospectively limiting malpractice liability to a client of which the lawyer is an employee if the client is independently represented in negotiating the agreement. DR 6-102(A) In-house lawyers may not prospectively limit their malpractice liability (LEO 1364).
- 1.8(i) Related lawyers may represent clients adverse to each other if the clients consent. As interpreted by the Bar, the Code absolutely prohibits adversity between related lawyers. (LEO 190)
- 1.9(a) "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation" (emphasis added). DR 5-105(D) "A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure." (emphasis added).
- 1.9(b) "A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated previously had represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by [the confidentiality rules] that is material to the matter." DR 5-105(D) The general conflicts rule governing adversity to former clients does not specifically address lawyers moving to other firms, and does not specifically include the disqualifying factor of lawyers having material confidential information.
- 1.10(b) A law firm may be adverse to a former client which was represented by a lawyer who has since left the firm unless The Code contains no similar provision.

the matter is "the same or substantially related" to that in which the former lawyer represented the client, or any lawyers remaining in the firm have material information on the matter.

- 1.11(b), (e) A former government lawyer may not represent a private client in which the lawyer "participated personally and substantially as a public officer or employee" unless the client and the government agency consent. The lawyer's firm may undertake such a representation if the disqualified lawyer is "screened from any participation in the matter and is apportioned no part of the fee" and if the government agency receives written notice.
- DR 9-101(B) "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee unless the public entity by which he was employed consents after full disclosure."

The term "matter" is defined to include any "judicial or other proceeding, application, request for a ruling, or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties."

- 1.11(c), (f) A former government lawyer having "confidential government information" about a person may not undertake a representation adverse to that person "in a matter in which the information could be used to
- The Code does not define the term "matter."
- The Code contains no similar provision, although general conflicts of interest and confidentiality rules might prohibit such conduct.

the material disadvantage of that person." The lawyer's firm may undertake the representation if the lawyer is screened and does not share in any of the fees.

The term "confidential government information" is defined as information "obtained under governmental authority," the disclosure of which is prohibited by law and which is "not otherwise available to the public."

- 1.11(d) A lawyer "serving as a public officer or employee" may not participate in a matter "in which the lawyer participated personally and substantially while in private practice or non-governmental employment" or "negotiate for private employment" with a party or a lawyer involved in such a matter (except for law clerks). The Code contains no similar provision.
- 1.12 Former judges, adjudicative officers, arbitrators and law clerks may not represent anyone "in connection with a matter in which [they] participated personally and substantially," unless all parties consent. This disqualification extends to any law firm they join unless they are "screened from any participation in the matter," are "apportioned no part of the fee therefrom," and provide written notice to the tribunal. Arbitrators picked as partisans by one party may DR 9-101(A) EC 5-20 The Code prohibits a judge from accepting private employment in a matter upon the merits of which he has acted in a judicial capacity and advises that a lawyer should not thereafter represent in the dispute any of the parties involved if the lawyer had undertaken to act as an impartial arbitrator or mediator.

later represent that party.

Judges, adjudicative officers and arbitrators may not negotiate for employment with any party or lawyer involved in a matter in which they are "participating personally and substantially." Law clerks may engage in such negotiations if they notify their judge.

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| 1.13(b) | This Rule governs lawyers representing organizations, and includes a section offering guidance to lawyers who discover that an officer or employee of the organization is acting in a manner that is prejudicial to the organization. | EC 5-18 | The Code contains no similar provision, except for the statement in EC 5-18 that a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity" and should not be influenced by the personal desires of any of the entity's constituents.. |
| 1.13(d) | "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." | | The Code contains no similar provision, although lawyers wishing to avoid misunderstanding would be wise to make this disclosure under general ethical principles |
| 1.14 | This Rule provides guidelines for a lawyer whose client's ability to make decisions becomes impaired. The lawyer shall try to maintain a normal client-lawyer relationship but may seek the appointment of a guardian or take "other protective action" if the lawyer "reasonably believes that the client cannot adequately act in the client's | | The Code contains no similar provision. |

- own interest."
- 1.15 This Rule governs lawyers' DR 9-102 handling of others' funds. The DR 9-103 Rule differs in a number of ways from the Code. For example, Rule 1.15(b) requires a lawyer to segregate and maintain property which is the subject of a dispute. Rules 1.15(d) and (e)(2) provide specific guidelines for a lawyer or law firm acting as a fiduciary (such as a trustee, receiver or similar role). The term "escrow account" is defined in section (f)(1)(vi) as an account maintained by a lawyer representing a client rather than acting as a fiduciary such as a trustee, receiver or similar role.
- 1.16(e) Whether the client has fully DR 2-108(D) paid them or not, lawyers must provide the following documents to their former client upon request: (1) "original client-furnished documents and any originals of legal instruments or official documents" (lawyers must pay for any copies they wish to retain); (2) "lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents . . . ; pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product . . . research
- These Code provisions govern Virginia lawyers duties to separately maintain client funds and maintain certain records.
- "Upon termination of representation, a lawyer shall . . . deliver [] all papers and property to which the client is entitled . . . the lawyer may retain papers relating to the client to the extent permitted by applicable law."
- In a series of Legal Ethics Opinions (culminating in LEO 1690), the Bar has indicated that lawyers may not retain a former client's files pending payment of their bills if the client would be "prejudiced."

materials; and bills previously submitted to the client." (Lawyers may charge the client for a copy of these documents, but may not withhold the documents until the client pays for the copies.)

Lawyers are not required to give a former client "copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/client relationship."

This Rule avoids a "prejudice" standard, and instead specifically describes how different categories of documents must be handled.

1.17

Lawyers intending to cease practicing law in the "geographic area" in which they practice may sell all or part of their practice (including "good will") if they provide actual written notice to the clients and the clients affirmatively consent to the sale; lawyers must make their entire practice available for purchase, but may sell only part of it; clients' fees may not be increased "by reason of the sale."

The Code contains no similar provision.

2.1
2.2

These Rules govern a lawyer's activities as an

EC 5-20

The Code contains no similar provisions, except for the

<p>2.3 2.10 2.11</p>	<p>advisor (Rule 2.1), intermediary (Rule 2.2), evaluator (Rule 2.3), third party neutral (Rule 2.10) and mediator (Rule 2.11).</p> <p>In addition to describing these different roles, the Rules emphasize the lawyer's responsibility to fully disclose and explain to the client the lawyer's role in a given setting.</p>	<p>acknowledgment in EC 5-20 that a lawyer is often asked to serve as an impartial arbitrator or mediator in matters involving present or former clients, and that the lawyer may serve in either capacity if he first discloses such present or former relationships to the parties.</p>
<p>3.1</p>	<p>Lawyers shall not "bring or defend a proceeding" or "assert or controvert an issue" unless "there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Criminal defense lawyers may "nevertheless" insist that the prosecution prove every element of the offense.</p> <p>Unlike the Code, this Rule includes an objective requirement that a lawyer's position not be frivolous (with a limited exception for criminal lawyers).</p>	<p>DR 7- 102(A)(1)</p> <p>"In his representation of a client, a lawyer shall not . . . file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."</p>
<p>3.3(a)(3)</p>	<p>A lawyer <u>must</u> advise the court of "controlling legal authority in the subject jurisdiction."</p>	<p>EC 7-20</p> <p>Disclosure of adverse authority is only aspirational.</p>
<p>3.3(b)</p>	<p>"A lawyer <u>may</u> refuse to offer evidence that the lawyer <u>reasonably believes is false</u>" (emphasis added).</p> <p>This Rule protects lawyers from a client's complaint for refusing to offer suspicious</p>	<p>The Code prohibits a lawyer from offering evidence that the lawyer "knows" to be false (DR 7-105(C)(6)), but does not offer any guidance for lawyers who suspect the falsity of evidence the client wants presented.</p>

	evidence.		
3.3(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."		The Code contains no similar provision.
3.4(e)	"A lawyer shall not . . . [m]ake a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."	DR 7-102(A)(1) DR 7-102(A)(2)	There is no similar provision in the Code (except for the provisions in DR 7-102(A)(1) and (2) prohibiting activities that are undertaken "merely to harass or maliciously injure another" or that are unwarranted under existing law).
3.4(g)	A lawyer may request a non-client to refrain from voluntarily giving relevant information in a pending civil matter to another party as long as the person is a "relative or a current or former employee or other agent of a client" and will not be "adversely affected."	DR 7-103(A)(2)	A lawyer shall not "give advice to a person who is not represented by a lawyer, other than the advice to secure counsel" if the person has conflicting interests. This provision presumably prohibits a lawyer from asking an unrepresented non-client to refrain from providing information to another party.
3.4(h)	"A lawyer shall not . . . present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter." Because lawyers are not prohibited from "participating" in presenting criminal charges under this Rule, they may offer advice about the client's rights under the criminal law.	DR 7-104(A)	"A lawyer shall not present, <u>participate in presenting</u> , or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter." (emphasis added)
3.5(f)	"A lawyer shall not engage in conduct intended to disrupt a	DR 7-105(C)(5)	"A lawyer shall not intentionally or habitually

	tribunal."		violate any established rule of procedure or of evidence where such conduct is disruptive of the proceedings."
3.6(a)	A lawyer may not issue pretrial communications in a criminal matter that will have a substantial likelihood of interfering with the fairness of the trial by a jury", using the language approved by the United States Supreme Court in <u>Gentile v. State Bar of Nevada</u> , 501 U.S. 1030 (1991).	DR 7-106(A)	The Code prohibits pre-trial publicity in a criminal matter based on a clear and present danger standard.
3.7(a)	Lawyers may not act as advocates in "an <u>adversarial proceeding</u> " in which the lawyer is "likely to be a <u>necessary witness</u> " unless the testimony relates to an "uncontested issue," the testimony involves the "nature and value of legal services rendered in the case" or if disqualifying the lawyer "would work substantial hardship on the client." (emphasis added)	DR 5-101(B); DR 5-102(A)	A lawyer is disqualified from acting as an advocate and must "withdraw from the conduct of the <u>trial</u> " if the lawyer "learns or it is obvious" that the lawyer "ought to be called as a <u>witness</u> ," unless certain exceptions apply. (emphasis added)
3.7(c)	A law firm may continue to act as trial counsel even if one of its lawyers must be a witness on behalf of its client, unless a conflict of interest exists.	DR 5-101(B); DR 5-102	The entire firm is disqualified if one of its lawyer is disqualified under the witness-advocate rule.
3.8(c)	A lawyer-prosecutor shall not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense.	DR 8-102(A)(3)	A public prosecutor or a government lawyer shall "not discourage a person from giving relevant information to the defendants.
3.8(e)	A lawyer-prosecutor shall not direct or encourage . . . persons . . . associated with		The Code contains no similar provision.

	the prosecutor . . . to make an extrajudicial statement [in violation of Rule 3.6].		
4.1(b)	"In the course of representing a client a lawyer shall not knowingly: (b) [f]ail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."	DR 1-102(A)(4) DR 7-102(A)(3) DR 7-102(A)(5)	These provisions prohibit lawyers from engaging in affirmative misrepresentations and concealing "that which he is required by law to reveal," but the Code contains no explicit duty of disclosure to avoid assisting a client's wrongful acts.
4.2 Comment [2]	In representing a client, a lawyer shall not communicate about the subject of the representation with a <u>person</u> the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. (emphasis added).	DR 7-103(A)(1)	The Code has essentially the same provision, but uses the term party rather than person.
	Using the word person rather than party makes it clear that the prohibition in this Rule applies to pre-litigation and non-litigation settings (although the Comment indicates that certain investigative contacts in a pre-indictment, non-custodial circumstance are authorized).		
4.4	Lawyers may not "use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."	DR 7-105(C)	Lawyers participating in a trial may not ask questions that are "intended to degrade a witness or other person."
5.1	This Rule governs relationships within law firms, and provides that		The Code contains no similar provision.

supervisory lawyers are responsible for another lawyer's misconduct if they order or ratify the conduct or fail to take reasonable remedial actions despite knowing of the misconduct.

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| 5.3(c)
Comment [1] | Lawyers are responsible for conduct by a non-lawyer employed or retained by the lawyer that would be a violation of the Rules if the lawyer orders or knowingly ratifies the conduct, or if the lawyer is a partner in the law firm employing the person (or has "direct supervisory authority" over the person) and knows or should have known of the conduct when "its consequences can be avoided or mitigated" but "fails to take reasonable remedial action." | DR 3-104(C) | This Code provision requires that lawyers exercise a "high standard of care" to assure compliance by non-lawyer personnel with applicable Code provisions, but does not specifically address a lawyer's responsibility for any violations. |
| 5.6 | Non-lawyers may engage in such traditionally acceptable misrepresentations as those involved in criminal "sting" operations and housing discrimination "tests."

"A lawyer shall not participate in offering or making: (b) an agreement in which a broad restriction on the lawyer's right to practice is part of the settlement of a controversy, except where such a restriction is approved by a tribunal or a governmental entity." | DR 2-106(B) | "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that broadly restricts his right to practice law." |
| 6.1 | Lawyers should devote two percent of their time each year to pro bono legal services or provide "direct | EC 2-28
EC 2-29
EC 2-30
EC 2-31 | The Code discusses pro bono work in Ethical Considerations. |

- financial support" to pro bono activities. Lawyers may satisfy this aspirational responsibility through financial contributions, and lawyers in a firm may satisfy it collectively. EC 2-32
- 6.3 This Rule governs a lawyers membership in a legal services organization; it permits lawyers to serve in such an organization even if it represents clients adverse to the lawyers clients (although lawyers may not participate in discussions or activities incompatible with their obligations to their clients). The Code contains no similar provision.
- 7.1(e) "Any communication made pursuant to this [advertising] Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content." The Code provision governing advertising (DR 2-101) contains no similar provision.
- This is the only difference in the advertising provisions between the Rules and the Code.
- 7.4 Lawyers may describe themselves as "patent" or "admiralty" lawyers (as under the Code), and may also describe themselves as "certified" specialists in other areas of the law as long as either: (1) the lawyers have been certified as specialists by the Virginia Supreme Court; or (2) the lawyers name the certifying organization and "clearly state" that Virginia has no DR 2-104(A)(1) The Code allows lawyers to describe themselves as patent, trademark or admiralty lawyers , but does not allow lawyers to describe themselves as certified specialists in other areas of the law.

	procedure for approving certifying organizations		
8.1(c), (d)	Lawyers may not obstruct an admissions or disciplinary authority investigation and may not fail to respond to a lawful demand for information from such an authority (although they need not disclose information protected by the confidentiality or self-incrimination rules).		The Code contains no similar provision.
8.2	Lawyers shall not make comments about "the qualifications or integrity of a judge or other judicial official" with "reckless disregard" or knowing the comments to be false.	EC 8-6	"While a lawyer as a citizen has the right to criticize [judges and other judicial officers], he should be certain of the merit of his complaint, use appropriate language and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."
8.3(a)	Lawyers must inform the "appropriate professional authority" if they have " <u>reliable</u> information" of another lawyer's ethics violaton that raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." (emphasis added)	DR 1-103(A)	Lawyers must advise the "appropriate professional authority" if they have "information" of another lawyer's ethics violation that raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law in other respects."
8.3(b)	Lawyers having "reliable information" that a judge has committed a violation of judicial conduct rules that "raises a substantial question as to the judge's fitness for office" must inform the appropriate authorities.		The Code contains no similar provision.
8.4(e)	"It is professional misconduct for a lawyer to: (e) knowingly assist a judge or		The current Code contains no similar provision.

judicial officer in conduct
that is a violation of
applicable rules of judicial
conduct or other law."

- 8.5 This Rule provides choice of laws guidance: conduct in a court proceeding is governed by the ethics rules designated by the court; a Virginia lawyer is subject to the Virginia Rules even if practicing elsewhere; but another states rules might apply if the lawyer is licensed in that jurisdiction and the conduct has its predominant effect there.
- DR 1-102(B) Virginia lawyers are subject to discipline by the Virginia Bar wherever they practice, unless that jurisdictions ethics rules permit the activity.

