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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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I. CHANGES IN THE PROVISION OF LEGAL SERVICES

A. *Corporate Counsel*

In April 2003, the Virginia State Bar's Task Force on Admission of Corporate Counsel submitted proposed Rule 1A:5 for review by the Supreme Court of Virginia.[1] The proposed rule required mandatory licensing of all in-house corporate counsel working in Virginia, but included a provision allowing corporate counsel to opt out of the requirements applicable to active bar members.[2] On June 4, 2003, the Supreme Court of Virginia approved proposed Rule 1A:5, which became effective September 1, 2003.[3]

Before the new rule was adopted, an individual could serve as in-house counsel even if that individual was not a licensed attorney admitted to practice law in Virginia or any other jurisdiction, because in-house activities were not considered the "practice of law" as defined by the Supreme Court of Virginia.[4] The new rule is therefore a substantial change.[5]

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1. James M. McCauley, *Frequently Asked Questions Regarding Virginia's New Corporate Counsel Rule*, VA. LAW REG., Aug.–Sept. 2003, at 1.

2. VA. SUP. CT. R. 1A:5 (Repl. Vol. 2004); *see also McCauley, supra* note 1, at 1.

3. VA. SUP. CT. R. 1A:5 (Repl. Vol. 2004).

4. *See* VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law Op. 178 (1994). According to the Supreme Court,

> the relation of attorney and client exists, and one is deemed to be practicing law whenever—

Under Part I of the new rule, a lawyer may obtain a corporate counsel certificate from the Virginia State Bar, which will provide for the lawyer's limited representation of one Virginia employer.[6] "A corporate counsel certificate authorizes the in-house counsel to represent his or her employer in state courts without having to meet the *pro hac vice* requirements applicable to foreign attorneys under Rule 1A:4."[7] As a prerequisite for obtaining a corporate counsel certificate, lawyers must meet all the requirements for Virginia State Bar membership, including the annual minimum continuing legal education ("MCLE") requirement.[8]

Another significant change made by Part I requires the period of time a lawyer practices law under a corporate counsel certificate to be considered in determining whether the lawyer may be admitted to the Virginia Bar without examination, pursuant to Rule 1A:1.[9]

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(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal—judicial, administrative, or executive—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

(4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

VA. SUP. CT. R. pt. 6, § I(B) (Repl. Vol. 2004).

5. *Compare* VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law Op. 178 (1994) (determining that employment of non-lawyer as in-house counsel to a Virginia corporation is not the unauthorized practice of law), *with* VA. SUP. CT. R. 1A:5 (Repl. Vol. 2004) (stating that "in-house counsel" must be licensed to work in Virginia).

6. *See* VA. SUP. CT. R. 1A:5 pt. I(a) (Repl. Vol. 2004). The practice of a corporate counsel shall be limited to representing the employer. *Id.* pt. I(f).

7. McCauley, *supra* note 1, at 1. Generally, attorneys not admitted in Virginia may not represent a party before a tribunal except in association with a Virginia admitted attorney. VA. SUP. CT. R. 1A:4 (Repl. Vol. 2004).

8. VA. SUP. CT. R. 1A:5 pt. I(h) (Repl. Vol. 2004). For a more complete explanation of Virginia's Mandatory Continuing Legal Education requirements, see http://www.vsb.org/mcle/index.html (last visited Sept. 24, 2004).

9. VA. SUP. CT. R. 1A:5 pt. I(k) (Repl. Vol. 2004). Attorneys not admitted in Virginia may move for admission without examination under Virginia's reciprocity rule. *Id.* 1A:1

Under Part II, an attorney in good standing in another state may opt out of the requirements for active membership in the bar, if he or she intends only to work as in-house counsel.[10] The rules require, however, that in-house counsel choosing to do so must still register with the bar as in-house counsel and pay all fees and dues.[11] Unlike attorneys licensed under Part I, in-house counsel licensed under Part II must associate a Virginia-admitted attorney and then request the court for admission *pro hac vice* before representing their clients in court.[12] Also, "their time in service as in-house counsel for a Virginia employer shall not be considered by the Board of Bar Examiners should such counsel seek admission to the Virginia Bar without examination."[13]

Any in-house lawyer recognized under either part of Rule 1A:5 is subject to the Virginia Rules of Professional Conduct and to the jurisdiction of the Virginia State Bar's Disciplinary System for any disciplinary complaints arising from their employment as in-house counsel in Virginia.[14] The Virginia State Bar petitioned the Supreme Court of Virginia for an amendment to the rule to authorize lawyers admitted to practice law in a foreign country to register under Part II.[15] The court rejected the bar's petition, chowever, meaning that non-U.S. attorneys cannot be licensed under Rule 1A:5.[16]

The deadline for corporate counsel to have registered with the bar was July 1, 2004.[17] All lawyers who currently serve, or intend to serve, as in-house counsel for an employer in Virginia must now either be active members of the Virginia State Bar or, if they are licensed in other states, be authorized to practice in Virginia

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(Repl. Vol. 2004). This assumes, however, that the state in which the foreign attorney is admitted permits Virginia attorneys to move for admission without examination. *Id.*

10. *Id.* 1A:5, pt. II; *see also* McCauley, *supra* note 1, at 1–3.

11. VA. SUP. CT. R. 1A:5 pt. II (Repl. Vol. 2004).

12. *Id.* 1A:5 pt. II(b)(1)(i); McCauley, *supra* note 1, at 1.

13. McCauley, *supra*, note 1, at 1; *see also* VA. SUP. CT. R. 1A:5 pt II(i) (Repl. Vol. 2004).

14. *Id.* 1A:5 pts. I(g), II(e) (Repl. Vol. 2004).

15. *Virginia Supreme Court to Review Proposed Amendments to Rules of Virginia Supreme Court Rule 1A:5, at* http://www.vsb.org/profguides/proposed/rule1A-5.html (last visited Sept. 24, 2004).

16. *See* VA. SUP. CT. R. 1A:5 (Repl. Vol. 2004).

17. *Id.* at 1A:5 intro. (Repl. Vol. 2004).

under Rule 1A:5.[18] Attorneys currently permitted to practice as in-house counsel are not exempt from the new rule.[19]

B. *Military Lawyers*

Virginia Code section 54.1-3900 authorizes the Supreme Court of Virginia to promulgate a limited practice rule for military lawyers.[20] At its meeting on June 13, 2002, the Virginia State Bar Council approved a new rule permitting military attorneys licensed in other states, but stationed in Virginia, to provide legal services to eligible low-income military personnel and their dependents.[21] The federal legal assistance program which the Virginia rule seeks to facilitate is defined in title 10, United States Code section 1044.[22]

The Supreme Court of Virginia approved and adopted new Rule 1A:6, which took effect on January 14, 2003.[23] The areas of law in which military lawyers can practice under the rule are limited to adoptions, guardianships, name changes, divorces, paternity, child custody and visitation, child and spousal support, representation of tenants in landlord-tenant disputes, consumer advocacy cases involving alleged breaches of contracts or warranties, repossession or fraud, garnishment defense, probate, enforcement of rights under the "Soldiers' and Sailors' Civil Relief Act" and "Uniformed Services Employment and Reemployment Rights Act," and such other matters "within the discretion of the court or tribunal before which the matter is pending."[24] The new rule allows the military lawyer to appear in court or before a tribunal as counsel for a client, as defined by the rule.[25]

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18. *See id.*

19. *See id.*

20. VA. CODE ANN. § 54.1-3900 (Repl. Vol. 2002) ("Nothing herein shall prohibit the limited practice of law by military legal assistance attorneys who are employed by a military program providing legal services to low-income military clients and their dependents pursuant to rules promulgated by the Supreme Court of Virginia.").

21. *Virginia Supreme Court to Review Proposed Rule Authorizing the Admission of Military Lawyers*, VA. LAW REG., Nov. 2002, at 25.

22. Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 651, 98 Stat. 2492, 2549–51 (1984) (codified as amended at 10 U.S.C. § 1044 (2000)).

23. VA. SUP. CT. R. 1A:6. (Repl. Vol. 2004).

24. *Id.* at 1A:6(e) (Repl. Vol. 2004).

25. *Id.* at 1A:6(f) (Repl. Vol. 2004).

Lawyers admitted under Rule 1A:6 are registered as active members of the Virginia State Bar and are "subject to the same membership obligations as those of other active members."[26] Like in-house counsel, the conduct of military lawyers is governed by the Virginia Rules of Professional Conduct, and they are likewise subject to the jurisdiction of the Virginia State Bar and its disciplinary procedures.[27] Also similar to the new rules for in-house counsel, the period of time a military lawyer practices under this rule shall be considered by the Board of Bar Examiners in determining whether the lawyer "has fulfilled the requirements for admission by waiver under Rule 1A:1."[28] An eligible military lawyer licensed outside the Commonwealth may apply to the Board of Bar Examiners for a Military Legal Assistance Attorney Certificate to practice under this new rule.[29]

C. *New Rules Governing Nonprofit and Court-Annexed Limited Legal Service Programs*

Recognizing the unique nature of such services and the increased need for public access to legal services, Virginia Rule of Professional Conduct 6.5 provides slightly less restrictive conflicts of interest rules for lawyers providing services via limited legal service programs.[30]

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26. *Id.* at 1A:6(i) (Repl. Vol. 2004).

27. *Id.* at 1A:6(h) (Repl. Vol. 2004). As the rule states, "[j]urisdiction of the Virginia State Bar shall continue whether or not the lawyer retains the Military Legal Assistance Attorney Certificate and irrespective of the lawyer's presence in Virginia." *Id.*

28. *Id.* at 1A:6(*l*) (Repl. Vol. 2004).

29. *Id.* at 1A:6(a) (Repl. Vol. 2004).

30. *Id.* pt. 6, § II, R. 6.5 (Repl. Vol. 2004). The rule states:

> (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
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> (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
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> (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
>
> (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Id.

D. *Unauthorized Practice of Law*

1. Representation in Corporate Arbitration, Negotiation, or Settlement Proceedings

In Unauthorized Practice of Law ("UPL") Opinion 206, the Virginia State Bar Committee on the Unauthorized Practice of Law (the "UPL Committee") held that a corporate officer who is not a lawyer may represent the corporation in an American Arbitration Association arbitration in Virginia.[31]

> While the definition [of the practice of law] and Rule 1-101 prohibit a non-lawyer from representing the interests of or appearing on behalf of his employer or a corporation before "a tribunal," the definition of "tribunal" in UPC 1-1 does not include an arbitration proceeding. It follows, therefore, that a non-attorney officer of a corporation can represent that corporation and provide legal advice to the corporation/employer within the context of an arbitration proceeding.[32]

According to UPL Opinion 208, a lay adjuster, employed by an independent adjusting company, may advise, counsel, and represent an insured in dealings with the insured's carrier concerning a fire loss.[33] The UPL Committee found that this conduct did not constitute the unauthorized practice of law.[34] In this case, the insured contacted a private adjusting firm to represent his interest because he was concerned about the limits on his policy and the

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31. VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law Op. 206 (2004).

32. *Id.* (citation omitted). VA. SUP. CT. R. pt. 6, § I, R.1, UPC 1-1 (Repl. Vol. 2004) provides:

> The term "tribunal" shall include, in addition to the courts and judicial officers of Virginia or of the United States of America, the State Corporation Commission of Virginia and its various divisions, the Virginia Workers' Compensation Commission, and the Alcoholic Beverage Control Board, or any agency, authority, board, or commission when it determines the rights and obligations of parties to proceedings before it, as opposed to promulgating rules and regulations of general applicability. Such term does not include a tribunal established by virtue of the Constitution or laws of the United States, to the extent that the regulation of practice before such tribunal has been preempted by federal law, nor does it include a tribunal established under the Constitution or laws of Virginia before which the practice or appearance by a non-lawyer on behalf of another is authorized by statute.

Id.

33. VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law Op. 208 (2004).

34. *Id.*

extent of its coverage.[35] The UPL Committee found that the lay adjuster's activities in this case were appropriate.[36] The rule further allows a lay adjuster to represent the interests of a principal, in this case, the insured, in the negotiation, settlement, or investigation of a claim to be paid under the principal's own insurance policy or contract.[37]

2. Representation in Bankruptcy Proceedings

The UPL Committee has reviewed, in the context of certain complaints, the issues raised by non-attorney bankruptcy petition preparers.[38] After researching the federal statute related to this issue as well as the federal bankruptcy court's local rules, the UPL Committee concluded that it is the unauthorized practice of law for a non-lawyer to prepare or file bankruptcy petitions and other pleadings for another.[39] The UPL Committee has communicated this position to the judges and clerks of the federal bankruptcy courts in Virginia.[40]

II. REGULATION OF LEGAL ADVERTISING

Legal advertising has created debate and controversy across the nation as the American Bar Association and individual state bars struggle with how best to reconcile economic and commercial speech interests of lawyers who advertise with the competing interest of protecting the public from false or deceptive legal advertising. The vast arena of legal advertising has escalated dramatically with the use of the internet to reach potential clients, not only all over the country, but virtually all over the world. Legal advertising is a constitutionally protected form of commercial

35. *Id.*

36. *Id.*

37. *Id.* (citing VA. SUP. CT. R. pt. 6, § I, R.2, UPR 2-105(A)(1) (Repl. Vol. 2004)).

38. *See* VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law Op. 58 (1984), 65 (1984), 175 (1994).

39. *See* VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law Op. 58; *see also In re* Elliott M. Schlosser, No. 01-010-1990 (VSB Disc. Bd. 2004) (reprimanding Mr. Schlosser publicly for, inter alia, improperly delegating signature authority on a number of bankruptcy petitions to a non-lawyer member of his staff).

40. *See* VSB Comm. on Unauthorized Practice of Law, Unauthorized Practice of Law Op. 58 (1984).

speech, but like any other form of commercial speech, a state may regulate it to protect the public.[41]

Effective January 1, 2000, the Virginia State Bar adopted the Rules of Professional Conduct.[42] Rules 7.1 through 7.5 apply to information about legal services.[43] Rule 7.1 and 7.2 specifically deal with lawyer communications and advertising.[44] Rule 7.3 addresses direct contact with prospective clients, namely solicitation and forms thereof;[45] Rule 7.4 regulates communication of the lawyer's fields of practice and certifications;[46] and Rule 7.5 deals with firm names and letterhead.[47]

A. *Rule Changes*

A recent amendment to Rule 7.2(a)(3) prohibits "advertis[ing] specific or cumulative case results, without a disclaimer. . . ."[48] This amendment incorporated the longstanding opinion of the VSB Standing Committee on Lawyer Advertising and Solicitation ("SCOLAS") regarding advertising case results[49] and enumerates specifically the required provisions and details of the disclaimer.[50]

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41. *See* Bates v. State Bar, 433 U.S. 350, 383–84 (1977).

42. VA. SUP. CT. R. pt. 6, § II (Repl. Vol. 2004).

43. *Id.* pt. 6, § II, R. 7.1–7.5 (Repl. Vol. 2004).

44. *Id.* pt. 6, § II, R. 7.1, 7.2. (Repl. Vol. 2004). In 2002, Rule 7.1 was split into two rules thus creating Rule 7.2. *Id.* pt. 6, § II, R. 7.1 (Repl. Vol. 2004). Rule 7.1 applies to all communications from a lawyer including advertising that is covered under Rule 7.2. *Id.*

45. *Id.* pt. 6, § II, R. 7.3 (Repl. Vol. 2004).

46. *Id.* pt. 6, § II, R. 7.4 (Repl. Vol. 2004).

47. *Id.* pt. 6, § II, R. 7.5 (Repl. Vol. 2004).

48. *Id.* pt. 6, § II, R. 7.2(a)(3) (Repl. Vol. 2004).

49. VSB Standing Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0106 (1994) (determining that it is misleading to advertise specific case results); VSB Standing Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0109 (1997) (that the statement "'we have obtained the largest jury verdict in the city' is inherently misleading").

50. *See* VA. SUP. CT. R. pt. 6, § II, R. 7.2(a) (Repl. Vol. 2004). The rule provides:

> Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> . . . .
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case

B. *Opinions*

SCOLAS has recently issued several opinions that have generated much discussion among members of the profession. Legal Ethics Opinion 1750 was issued in March 2001, and serves as a compendium Opinion of all advertising opinions to date.[51] Several critical issues considered in the Opinion include: required disclosures when using an actor in lawyer advertising; use of phrases such as "no recovery, no fee" or "no charge unless we win" without further explanation; use of a fictitious name as a law firm name; advertisement of specific or cumulative case results; use of comparative statements that cannot be substantiated; and use of third parties to make otherwise prohibited statements regarding the quality of a lawyer's services.[52] Legal Ethics Opinion number 1750 serves as guidance to lawyers who engage in many different forms of advertising.

Originally issued in June 2002, Legal Advertising Opinion A-0114 was revised and adopted by the Virginia State Bar Council in February 2003.[53] Opinion A-0114 addresses a law firm's television advertisement based on the truthful statement or claim that three of its lawyers are included in a publication, the title of which the law firm used to make further comparative statements about the quality of legal services provided by the law firm.[54] The advisory Opinion held that the hypothetical law firm could advertise the truthful fact that three of their lawyers were listed in the publication *Greatest Lawyers in the Country*.[55] In the committee's opinion, however, other claims or statements made in the adver-

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> results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and upper case letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Id.

51. VSB Standing Comm. on Lawyer Advertising and Solicitation, Legal Ethics Op. 1750 (2001).

52. *Id.*

53. VSB Standing Comm. on Lawyer Advertising and Solicitation, Lawyer Advertising Op. A-0114 (2003), *at* http://www.vsb.org/committees/standing/advertising/lao0114_022203.html (last visited Sept. 24, 2004).

54. *Id.*

55. *Id.*

tisement were false, fraudulent, misleading, or deceptive under Rule 7.1.[56]

C. *Challenging the Regulation of Legal Advertising*

In September 2002, a law firm and one of its members sued the Virginia State Bar in federal court seeking a declaration that Legal Advertising Opinion A-0114 violates the First Amendment's protection of commercial speech.[57] The plaintiff law firm sought an injunction prohibiting the enforcement of Rule 7.1 as interpreted and applied in the advisory Opinion.[58] Judge Richard L. Williams of the Eastern District of Virginia issued a preliminary injunction ordering the Bar to withdraw the advisory Opinion in question and denied the Bar's motion to dismiss.[59]

III. MULTI-JURISDICTIONAL PRACTICE (MJP): THE PERILS OF PRACTICING LAW IN A TRI-JURISDICTION REGION

A. *Current Unauthorized Practice of Law Rules in Virginia, Maryland, and the District of Columbia*

In the early twentieth century, states adopted unauthorized practice of law provisions that apply equally to both non-lawyers and to lawyers licensed in other states[60] and prohibit lawyers from engaging in the practice of law except in states in which they are licensed or are otherwise authorized.[61] There have been some recent enforcement actions involving UPL by foreign attorneys. In April 2004, a North Carolina judge sanctioned a Virginia lawyer for the lawyer's failure to secure permission to practice in North Carolina before filing pleadings on behalf of his North Carolina clients.[62] In another case arising out of North Carolina,

56. *Id.*
57. Allen, Allen, Allen & Allen v. Williams, 254 F. Supp. 2d 614, 616 (E.D. Va. 2003).
58. *Id.*
59. *Id.* at 629.
60. *See* State Bar Council Unauthorized Practice of Law Opinions, intro. (Repl. Vol. 2002).
61. *See, e.g.*, VA. SUP. CT. R. pt. 6, § I intro. (Repl. Vol. 2004).
62. Cole v. Yarbrough (Pasquotank County Sup. Ct. 04 CvS 246) (Apr. 14, 2004).

two Georgia lawyers were indicted for unauthorized practice.[63] In addition to the sanctions exemplified above, lawyers who cross borders to a sister state where they are not authorized to practice may also trigger disciplinary actions in the state where they are admitted to practice.[64]

The Virginia UPL rules begin with the admonition that: "No *non-lawyer* shall engage in the *practice of law* in the Commonwealth of Virginia or in any manner hold himself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute."[65] The rules conclude with the mandate that

> a lawyer who provides services not authorized by this rule must associate with an attorney authorized to practice in Virginia.
>
> . . . .
>
> Failure of the foreign attorney to comply with the requirements of these provisions shall render the activity by the attorney in Virginia to be the unauthorized practice of law.[66]

The term "non-lawyer" includes out-of-state attorneys not admitted to practice in Virginia.[67]

> The term "non-lawyer" [does] not include foreign attorneys who provide legal advice or services in Virginia to clients under the following restrictions and qualifications:
>
> (1) Such the foreign attorney must be admitted to practice and in good standing in any state in the United States; and
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> (2) The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and

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63. As reported in the April 8, 2004, *Fulton County Daily Report*, two Atlanta, Georgia lawyers traveled to North Carolina to conduct an internal investigation into actions by the President of Gardner-Webb University. Jonathan Ringel, *Georgia Lawyers Indicted for Advising N.C. College*, FULTON COUNTY DAILY REPORT (Georgia), Apr. 8, 2004. The Georgia lawyers' report must not have been very popular because the two lawyers and their Atlanta law firm were indicted for the unauthorized practice of law in North Carolina. *Id.*

64. *See, e.g.*, VA. SUP. CT. R. pt. 6, § II, R. 5.5 (Repl. Vol. 2004) (prohibiting an attorney from practicing law in a jurisdiction where he or she is not authorized to practice).

65. *Id.* pt. 6, § I(A) (Repl. Vol. 2004) (emphasis added).

66. *Id.* pt. 6, § I(C) (Repl. Vol. 2004).

67. *See id.* pt. 6, § I(C)(1)–(3) (Repl. Vol. 2004).

(3) The client must be informed that the attorney is not admitted in Virginia.[68]

Disciplinary rules in the District of Columbia, provide that "[n]o person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar."[69] Unlike Virginia, there is no incidental representation provision under the D.C. rules.[70]

Maryland Court of Appeals Rule 14 provides that out-of-state lawyers should be allowed special admission to practice law only before courts and administrative agencies so long as he or she has co-counsel who is licensed in Maryland.[71] Likewise, there is no incidental representation exception under the Maryland rules.[72]

B. *Consequences for the Unauthorized Practice of Law by Foreign Lawyers*

Lawyers seeking admission by reciprocity to other state bars are asked, in connection with bar admission character and fitness requirements whether they have ever practiced law in a jurisdiction where they are not admitted.[73] If they have, their application for admission may be denied.[74]

In addition to facing difficulty seeking admission to the bar of another state, a foreign attorney faces criminal sanctions for engaging in the unauthorized practice of law. In Virginia, Maryland, and the District of Columbia, the unauthorized practice of

68. *See id.*

69. D.C. CT. APP. R. 49(a) (2004).

70. *Compare* VA. SUP. CT. R. pt. 6, § I(C)(2) (Repl. Vol. 2004), *with* D.C. CT. APP. R. 49(c) (2004).

71. MD. CT. APP. R. 14(d) (Repl. Vol. 2004).

72. *See id.* MD. CT. APP. R. 14.

73. *See, e.g.*, VIRGINIA BOARD OF BAR EXAMINERS, APPLICANT'S CHARACTER AND FITNESS QUESTIONNAIRE (2004), *available at* http://www.vbbe.state.va.us/pdf/cfq.pdf (last visited Sept. 24, 2004).

74. *See, e.g.*, *In re* Chukwujindu Victor Mbakpuo, 829 A.2d 217, 218–20 (D.C. 2003) (denying the application of a former Ohio lawyer who had been previously found to have engaged in the unauthorized practice of law in Maryland and the District of Columbia based upon his disbarment in Ohio and his subsequent unauthorized practice of law).

law is a Class I misdemeanor.[75] Finally, a lawyer practicing in a jurisdiction where he or she is not admitted faces the risk of disciplinary action. For example, in 2001 the Virginia State Bar Disciplinary Board revoked an attorney's license to practice law in Virginia.[76] The respondent was admitted in Virginia but not in Maryland.[77] The Maryland court "disbarred" the respondent for conduct "involving dishonesty, fraud, deceit, and misrepresentation," based upon conflicts of interest, the unauthorized practice of law, lack of candor to a tribunal, and misrepresentation of the lawyer's services.[78]

In a similar case, the Maryland Court of Appeals disciplined a Maryland lawyer for engaging in unauthorized practice of law in Virginia.[79] In yet another decision, the court disbarred a New York lawyer for various ethics violations, including the unauthorized practice of law.[80] The lawyer established an office in Maryland and practiced in state court from that office for several months prior to taking the Maryland bar examination.[81] While the court acknowledged that some of the lawyer's practice was in federal court, that fact did not

> negate the respondent's willful and intentional violation of the unauthorized practice rules. Indeed, the respondent was found to have begun his practice both in Maryland and in the federal court before he had been admitted by the federal court and that, even after admission to the federal court, he continued to practice in the State court without license to do so and without apprising prospective clients that he was restricted to practicing only in federal court.[82]

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75. *See* VA. CODE ANN. § 54.1-3904 (Repl. Vol. 2002); MD. CODE ANN., BUS. OCC. & PROF. § 10-606 (Repl. Vol. 2004).

76. *In re* Dana Wilbur Johnson, No. 01-000-2639 (VSB Disc. Bd. 2001), *available at* http://www.vsb.org/disciplinary_orders/johnson_opinion.html (last visited Sept. 24, 2004).

77. *Id.*

78. Attorney Grievance Comm'n of Md. v. Johnson, 770 A.2d 130, 151 (Md. 2001).

79. Attorney Grievance Comm'n of Md. v. Velasquez, 846 A.2d 422, 428 (Md. 2004). The Maryland Circuit Court for Prince George's County held that the respondent had committed a number of ethical violations, including violating Maryland Rule 5.5(a), which prohibits a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. *Id.* at 425. The Maryland Circuit Court also held that, by violating Virginia's statutory prohibition, the respondent had committed a criminal act reflecting adversely on his trustworthiness or fitness as a lawyer. *Id.* at 425–26.

80. Attorney Grievance Comm'n of Md. v. Alsafty, 838 A.2d 1213, 1224 (Md. 2003).

81. *Id.* at 1216.

82. *Id.* at 1224.

On this basis, the court held that "under the facts and circumstances of [the] case, the proper sanction is disbarment."[83]

C. *Application of Unauthorized Practice Rules for a Multijurisdictional Lawyer—A Hypothetical*

Attorney Tom Jones lives in Alexandria and commutes every morning into Washington, D.C., which is the only jurisdiction in which he is admitted to practice law. His next door neighbor is the president and chair of the board of directors of a prominent defense contracting firm with offices in Tysons Corner, Virginia. When a dissident shareholder launched a hostile takeover to change control of the company, the neighbor asked Jones to advise him on that officer's fiduciary duties, and, in that capacity, to accompany the neighbor to a board of directors meeting in Tysons Corner. The dissident shareholder later filed a lawsuit, alleging that the director violated his fiduciary duties and that he was not entitled to rely upon any legal advice from a lawyer not authorized to practice law in Virginia.

1. Analysis Under the Virginia Rules

In Virginia, Jones could render informal advice to a client on an incidental basis, but only if carrying out an engagement for a client that Jones was representing in a jurisdiction where he is admitted to practice.[84] Jones cannot generate new clients in Virginia. Nevertheless, under Virginia's rules, since Jones is rendering legal advice to his neighbor without compensation, he is not engaged in the unauthorized practice of law.[85]

2. The Effect of Expected *Pro Hac Vice* Admission

The next question under the hypothetical is whether Jones's actions would be considered unauthorized practice if litigation

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83. *Id.*

84. *See* VA. SUP. CT. R. pt. 6, § I(C) (Repl. Vol. 2004).

85. *See id.* pt. 6, § I(B)(1) (Repl. Vol. 2004). The definition of the "practice of law" in Virginia requires compensation, direct or indirect, to the lawyer for giving legal advice to another. *Id.*

had already been contemplated and Jones expected to be admitted *pro hac vice* in a Virginia court. Under Virginia's current rules, the existence of contemplated litigation and the expectation that an attorney will be admitted to practice in a Virginia court on a *pro hac vice* basis would not make any difference.[86] Jones would still be engaged in the unauthorized practice of law, however, if he were compensated.[87] On the other hand, if Virginia were to adopt the amendments to Rule 5.5 set forth by the American Bar Association ("ABA,") a "safe harbor" provision would permit Jones to advise his neighbor.[88]

3. Analysis Under Applicable Maryland Guidelines

Under the present hypothetical, if both the attorney and his neighbor were Maryland residents and the meeting was held in Maryland, the result would still be the same. In this case, Jones would be engaged in the unauthorized practice of law under applicable Maryland rules, just as in Virginia.[89]

4. Analysis Under Applicable District of Columbia Guidelines

As previously indicated,[90] the Rules of the Court of Appeals for the District of Columbia do not include an "incidental representation" rule, nor a safe harbor for pre-suit consultation similar to ABA Model Rules of Professional Conduct Rule 5.5(c)(2).[91] As such, if attorney Jones was licensed to practice only in Virginia, but lived in the District of Columbia and was approached by his

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86. *See id.* at 1A:4 (Repl. Vol. 2004).

87. *See id.* pt. 6, § I(B)(1) (Repl. Vol. 2004).

88. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (2003).

> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that
>
> . . . .
>
> are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.

Id.

89. *See* MD. CODE ANN., BUS. OCC. & PROF. § 10-101(g) (Repl. Vol. 2004).

90. *See* D.C. CT. APP. R. 49 (2004).

91. *See supra* notes 68–70 and accompanying text.

neighbor in the District, applicable District of Columbia rules would still not permit him to offer legal advice.

IV. SIGNIFICANT CHANGES IN ATTORNEY DISCIPLINARY PROCEDURES

A. *Elimination of Disciplinary Sanctions Formerly Termed "Dismissals"*

Provisions of the Rules of Court, effective January 1, 2004, address the disciplinary sanctions previously denominated "dismissal with terms," "dismissal *de minimis*," and "dismissal for exceptional circumstances."[92] The amendments replaced the word "dismissal" with "admonition" in the phrase "dismissal with terms" and clarified the definitions of "dismissal *de minimis*" and "dismissal for exceptional circumstances."[93]

Contrary to what the term "dismissal" suggested to the public and many lawyers, a "dismissal with terms" was a sanction predicated upon one or more findings of attorney misconduct and became part of the respondent's disciplinary record.[94] Thus, what was formerly referred to as a "dismissal with terms" is now called an "admonition with terms."[95] Changing this designation will help avoid confusion over whether there was a finding of misconduct resulting in a disciplinary record, while preserving the availability of a lesser sanction than a reprimand in matters where greater discipline is not warranted.

The amendments also clarify that a "dismissal *de minimis*" is predicated upon one or more findings of misconduct of small magnitude, further mitigated by precautions the respondent has taken to prevent a recurrence.[96] The amendments also clarify that

92. *See* VA. SUP. CT. R. pt. 6, § IV, para. 13(A), 13(B)(8)(d), 13(F)(3)(c), 13(G)(1)(a), 13(G)(1)(d), 13(G)(4), 13(G)(5), 13(H)(2)(l)(2), 13(H)(2)(n), 13(H)(2)(o), 13(H)4(a), 13(I)(2)(f)(2) (Repl. Vol. 2003). References to "Paragraph 13" are provisions contained in the *Procedure for Disciplining, Suspending and Disbarring Attorneys*, adopted by the Supreme Court of Virginia. The current rules are found at VA. S. CT. R. pt. 6, § IV, para. 13 (Repl. Vol. 2004).

93. VA. SUP. CT. R. pt. 6, § IV, para. 13(A) (Repl. Vol. 2004).

94. VA. SUP. CT. R. pt. 6, § IV, para. 13(A) (Repl. Vol. 2003).

95. *Compare* VA. SUP. CT. R. pt. 6, § IV, para. 13(A) (Repl. Vol. 2004), *with* VA. SUP. CT. R. pt. 6, § IV, para. 13(A) (Repl. Vol. 2003).

96. VA. SUP. CT. R. pt. 6, § IV, para. 13(A) (Repl. Vol. 2004).

a dismissal for exceptional circumstances involves a finding of attorney misconduct, but where "there exist exceptional circumstances mitigating against further proceedings."[97] The facts constituting "exceptional circumstances" must be set forth in writing whenever such a dismissal is imposed.[98]

B. *Failure to Comply with Disciplinary Terms Does Not Result in a Trial De Novo*

Whenever an attorney receives a public reprimand with terms, the determination must provide an alternate sanction to be imposed if the respondent fails to comply with the terms.[99] A suspension is usually the alternate sanction imposed for failure to comply with terms associated with a public reprimand.[100] Because a district committee cannot suspend an attorney's license,[101] a new procedure had to be devised for the Disciplinary Board to consider cases where an attorney has allegedly failed to comply with terms and a suspension is the alternate sanction.

Recent amendments establish a procedure entitled "Certification for Sanction Determination."[102] The new procedure provides for certification of matters for hearing by the Disciplinary Board where the bar has challenged the adequacy of an attorney's compliance with terms and sets suspension as the alternate sanction.[103] The Disciplinary Board only hears issues of compliance and of whether the alternate sanction should be imposed.[104] The new procedure thus obviates the need for de novo hearings before the Disciplinary Board.

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97. *Id.*

98. *Id.*

99. *Id.* pt. 6, § IV, para. 13(G)(5)(b) (Repl. Vol. 2004).

100. *See id.*

101. *Id.* para. 13(H)(2) (Repl. Vol. 2004). The disciplinary sanctions that a district committee may impose are limited to dismissal *de minimus*, dismissal for exceptional circumstances, admonition (with or without terms), or public reprimand (with or without terms). *See id.*

102. *Id.* para. 13(B)(5)(a)(11), para. 13(H)(2)(p)(2) (Repl. Vol. 2004).

103. *Id.* para. 13(B)(5)(a)(11) (Repl. Vol. 2004).

104. *Id.* para. 13(I)(4) (Repl. Vol. 2004).

C. *Service of Subpoena Duces Tecum in Attorney Disciplinary Proceedings*

Recent amendments also allow service of a subpoena duces tecum upon an attorney by certified mail, return receipt requested, addressed to the respondent's last address on record with the bar.[105] The amendments conform with other provisions authorizing service on a respondent by certified mail, including notice of district committee hearings and certification of matters to the Disciplinary Board.[106] This change has eliminated difficulties in obtaining service on respondents actively seeking to avoid personal or posted service.

D. *Cost Assessments*

The General Assembly further clarified that the Clerk of the Disciplinary System shall assess costs against a respondent whenever sanctions are imposed for violations of the Rules of Professional Conduct, the Consumer Real Estate Protection Act or Virginia State Bar regulations issued in accordance therewith.[107] The Rules of Court further provide procedures for respondents to challenge costs assessments.[108]

E. *Continuances of Disciplinary Board Hearings*

New amendments also provide that a respondent must request continuance of a Disciplinary Board hearing no later than fourteen days after the notice of hearing is mailed if such continuance is to be effective.[109] This rule change will eliminate routine requests for continuances shortly before long-scheduled hearings. The amendment further provides that the Disciplinary Board may honor late requests for continuances where exceptional circumstances exist and a continuance is necessary to prevent manifest injustice.[110]

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105. *Id.* para. 13(B)(5)(b)(2), para. 13(B)(6)(a)(4) (Repl. Vol. 2004).
106. *Id.* para. 13(B)(6)(a)(4) (Repl. Vol. 2004).
107. *Id.* para. 13(B)(8)(c) (Repl. Vol. 2004).
108. *Id.* para. 13(B)(8)(c)(6) (Repl. Vol. 2004).
109. *Id.* para. 13(I)(1)(d) (Repl. Vol. 2004).
110. *Id.*

V. APPLICATION OF RECENTLY ADOPTED RULES AND POLICIES IN ATTORNEY DISCIPLINARY MATTERS

A. *Interim Administrative Suspension for Failure to Comply with Subpoena Duces Tecum or a Disciplinary Board Order*

Paragraph 13(B)(5)(b)(3), adopted on September 18, 2002, authorizes the Disciplinary Board to impose an interim suspension upon an attorney who fails to comply with a subpoena for trust account or other records maintained by the attorney or his associates.[111] If an attorney has allegedly failed to comply with a subpoena, bar counsel may serve a noncompliance notice advising the attorney that the attorney's license will be suspended on an interim basis unless he or she petitions the board for a hearing within ten days.[112] If a hearing is granted, the attorney has the burden of proving good cause for the alleged noncompliance.[113] If the attorney does not request a hearing, the board will likewise suspend the attorney's license on an interim basis until such time as the attorney fully complies with the subpoena.[114]

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111. *Id.* para. 13(B)(5)(b)(3) (Repl. Vol. 2004). All Virginia State Bar disciplinary actions are published regularly in the Virginia Lawyer Register. Decisions of the Disciplinary Board and the District Committees are also available on the Virginia State Bar's Website at http://www. vsb.org./disciplinary.html (last visited Sept. 24, 2004).

112. VA. SUP. CT. R. pt. 6, § IV, para. 13(B)(5)(b)(3) (Repl. Vol. 2004).

113. *Id.*

114. *Id.* The Virginia State Bar Disciplinary Board has enforced this new provision by administratively suspending a lawyer's license for failure to comply with a subpoena. *In re* Steven Edgar Bennett, Nos. 04-060-1381, 04-060-1660, 04-060-1932, 04-060-1386, 04-060-1811, 04-060-1632, 04-060-1931 (VSB Disc. Bd. 2004) (suspending the attorney's license to practice law for failure to respond to a bar subpoena duces tecum for trust account records and client files); *In re* Oliver Stuart Chalifoux, No. 03-033-3680 (VSB Disc. Bd. 2003) (suspending license administratively for failing to comply fully with a subpoena duces tecum for financial records lawfully requested in connection with a disciplinary matter); *In re* Eli S. Chovitz, No. 04-021-0555 (VSB Disc. Bd. 2003) (suspending license for failure to respond to a bar subpoena duces tecum); *In re* Roger Cory Hinde, No. 03-031-3887 (VSB Disc. Bd. 2003) (imposing a four-year suspension for failing to respond to a bar subpoena duces tecum for trust account records and client files); *In re* Bernice Marie Stafford-Turner, Nos. 02-032-3876, 03-032-1259, 03-032-1534 (VSB Disc. Bd. 2003) (ordering a suspension for failure to comply fully with a subpoena duces tecum for trust account information). The Board will lift the suspension once the Respondent attorney has demonstrated compliance with the bar subpoena. VA. SUP. CT. R. pt. 6, § IV, para. 13(B)(5)(b)(3) (Repl. Vol. 2004).

B. *Discipline Imposed for Obstruction and Failure to Respond to Lawful Demands*

Implementing Rule of Professional Conduct 8.1,[115] the Virginia State Bar Disciplinary Board recently sanctioned an attorney for obstruction and for failure to respond to a lawful demand for information.[116]

Attorney Francis Gerard McBride executed a consent to revocation of his law license on March 19, 2004.[117] Surrendering his license to practice law, Mr. McBride admitted, among other things, that he had violated Rule 8.1(c) and (d) by failing to produce bank records and files pertaining to his administration of an estate that the bar subpoenaed on two occasions.[118]

C. *Failure to Fulfill Duties Owed to Clients in Criminal Matters*

1. The Spangenberg Group Report

In January 2003, the Spangenberg Group issued a report entitled "A Comprehensive Review of Indigent Defense in Virginia."[119] Among other things, the review concludes:

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115. VA. SUP. CT. R. pt. 6, § II, R.8.1(c), (d) (Repl. Vol. 2004). The rule provides:

> Bar Admission And Disciplinary Matters.
>
> An applicant for admission to the bar, or a lawyer, in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, or in connection with a disciplinary matter, shall not:
>
> . . . .
>
> (c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or
>
> (d) obstruct a lawful investigation by an admissions or disciplinary authority.

Id.

116. *In re* Francis Gerard McBride, Nos. 02-051-3103, 03-051-2905, 03-051-2906, 03-051-3541 (VSB Disc. Bd. 2004).

117. *Id.*

118. *Id.*

119. Spangenberg Group, *A Comprehensive Review of Indigent Defense in Virginia* (January 2004) [hereinafter The Spangenberg Report], *available at* www.abanet.org/legal services/downloads/sclaid/indigentdefense/va-report2004.pdf (last visited Sept. 24, 2004). The report was prepared on behalf of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants. *Id.*

> 1. Virginia's indigent defense system fails to adequately protect the rights of poor people who are accused of committing crimes. . . .
>
> 2. Two primary factors - inadequate resources and an absence of an oversight structure - form the basis of an indigent defense system that fails to provide lawyers with the tools, time and incentive to provide adequate representation to indigent defendants. . . .
>
> . . . .
>
> 4. *The deeply flawed system puts lawyers at substantial risk of violating professional rules of conduct when representing indigent defendants.* . . .
>
> . . . .
>
> 8. Substandard practice has become the accepted norm in Virginia's indigent defense system. . . .
>
> 9. Virginia ranks last in average indigent defendant cost per case among a group of 11 states for which such data was collected for FY 2002.[120]

2. Failure to Fulfill Ethical Duties to Criminal Defense Clients

Complaints that court-appointed and retained criminal defense attorneys failed to file or perfect the client's appeal of a criminal conviction have served as the basis for disciplinary action.[121] In addition, lawyers have been disciplined for failing to provide competent[122] and diligent[123] representation in criminal defense

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120. *Id.* at 82–84 (emphasis added). The states surveyed were Alabama, Colorado, Georgia, Iowa, Maryland, Massachusetts, Missouri, North Carolina, Ohio, Virginia, and West Virginia. *Id.* at 84, n.158.

121. *See, e.g.*, Virginia State Bar *ex rel* First District Committee v. Carter, No. 12496-RW (Cir. Ct. July 14, 2003) (Newport News City). The case was heard in a three-judge court proceeding in Newport News. *Id.* Ms. Carter, by agreed disposition, accepted a two-year suspension of her law license, with terms, for engaging in misconduct in a number of different client matters, including, failure to file a petition for appeal in a criminal matter and not responding to client's communications. *Id.*; *see also In re* Robert Charles Neeley, Jr., No. 03-021-3256 (2d Dist. Comm. 2004) (imposing an admonition with terms for failing to file a criminal appeal and for failing to advise the client regarding the right to an appeal).

122. Rule 1.1 of the Virginia Rules of Professional Conduct requires a lawyer to provide competent representation to a client. VA. SUP. CT. R. pt. 6, § II, Rule 1.1 (Repl. Vol. 2004).

123. Rule 1.3 requires a lawyer to act with reasonable diligence in representing a client. VA. SUP. CT. R. pt. 6, § II, R. 1.3 (Repl. Vol. 2004); *see, e.g., In re* Timothy Wade Roof, No. 0021-0334 (VSB Disc. Bd. 2003). The Disciplinary Board imposed a public reprimand because the attorney did not act diligently when he submitted, without a filing fee, a client's hand-written draft of a petition for a writ of habeas corpus to the Supreme Court of Virginia without first correcting the errors in the writ. *In re* Timothy Wade Roof, No. 0021-

cases and for keeping the client adequately informed[124] of the status of his case.[125]

3. Indigent Defense Task Force

In February 2004, the Virginia State Bar Council authorized creation of an Indigent Defense Task Force to recommend improvements in Virginia's indigent defense system.[126] The council also adopted the American Bar Association's "Ten Principles of a Public Defense Delivery System."[127]

0334 (VSB Disc. Bd. 2003). The board further found that, given the manner and quality of the representation, Mr. Roof's $1,000 fee was unreasonable. *Id.* Finally, the board found that Mr. Roof violated trust account rules by not depositing the fee into his trust account and holding it until he earned the fee. *Id.* The terms imposed in connection with the public reprimand required Mr. Roof to refund the fee, to prepare written fee agreements in all cases, and to take twenty-four hours of Continuing Legal Education. *Id.*

124. VA. SUP. CT. R. pt. 6, § II, R. 1.4 (Repl. Vol. 2004) (requiring a lawyer to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information).

125. *See, e.g., In re* Perry Henry Harrold, No. 03-090-2433 (9th Dist. Comm. 2003) (imposing a dismissal with terms requiring Mr. Harrold to attend two hours of ethics CLE and to meet with the Virginia State Bar risk manager within six months for breaching the duty to communicate with his client by failing to advise him that his appeals had been denied); *In re* David Albert Powers, III, No. 03-033-1314 (3rd Dist. Comm. 2004). The Committee publicly reprimanded Powers because he failed to provide competent and diligent representation, to keep his client informed about the status of his appeal, and to promptly comply with his client's requests for information. *In re* David Albert Powers, III, No. 03-033-1314 (3rd Dist. Comm. 2004). The committee additionally found that Mr. Powers made false statements to the Court of Appeals of Virginia and to the Virginia State Bar. *Id.*

126. *Highlights of Council Meeting*, VA. LAW. WKLY., Apr. 2004, at 10.

127. *Id.* According to the ABA, the "Ten Principles" "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." *Ten Principles of a Public Defense Delivery System*, ABA Standing Comm. on Legal Aid and Indigent Defendants (2002), *available at* www.abanet.org/legalservices/downloads/sclaid/resolution107.pdf (last visited Sept. 24, 2004). The "Ten Principles" are intended to be used "to assess promptly the needs of its public defense delivery system and clearly communicate those needs to policy makers. *Id.*

The ten principles are:

> 1. The public defense function, including the selection, funding, and payment of defense counsel, is independent. . . .
>
> 2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. . . .
>
> 3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. . . .

D. *Consent to Revocation of License*

Part Six, Section IV, Paragraph 13(L) of the Rules of the Supreme Court of Virginia requires an attorney who wishes to surrender his or her license, but is the subject of a disciplinary complaint, investigation, or proceeding involving misconduct allegations, to tender an affidavit.[128] The attorney's affidavit must acknowledge that certain material facts upon which the misconduct allegations are predicated are true and that, if charges of misconduct were prosecuted, the attorney could not successfully defend them.[129]

This rule prevents attorneys from avoiding the creation of a disciplinary record that may be used to impose reciprocal discipline in another jurisdiction, or from opposing their readmission to the Virginia State Bar.[130]

> 4. Defense counsel is provided sufficient time and a confidential space with which to meet with the client. . . .
>
> 5. Defense counsel's workload is controlled to permit the rendering of quality representation. . . .
>
> 6. Defense counsel's ability, training, and experience match the complexity of the case. . . .
>
> 7. The same attorney continuously represents the client until completion of the case. . . .
>
> 8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. . . .
>
> 9. Defense counsel is provided with and required to attend continuing legal education. . . .
>
> 10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. . . .

Id.

128. VA. SUP. CT. R. pt. 6, § IV, para. 13(L)(2) (Repl. Vol. 2004).

129. *Id.* para.13(L)(2)(c)–(d) (Repl. Vol. 2004).

130. A recent Disciplinary Board case illustrates the use of the affidavit required of an attorney who surrenders his or her license with disciplinary charges pending. *See In re* John Henry Partridge, Nos. 03-053-3119, 03-053-3305, 03-053-3306, 03-053-3798, 04-053-0355, 04-053-0703, 04-000-0929 (VSB Disc. Bd. 2003). The Disciplinary Board revoked Mr. Partridge's license to practice law. *Id.* In an affidavit consenting to the revocation of his license, Mr. Partridge admitted that,

> with respect to a number of his clients, he did not comply with the Virginia Supreme Court rule requiring that he notify his clients, opposing counsel, and presiding judges in pending litigation, of the suspension of his law license, and that he make appropriate arrangements for the disposition of client matters. Mr. Partridge also admitted that he terminated a client's pending litigation without the knowledge and consent of the client; failed to communicate with clients; failed to perform the legal services for which he

VI. OTHER SIGNIFICANT ATTORNEY DISCIPLINARY MATTERS

A. *Trust Account Violations*

With the exception of felony convictions, misappropriation of client funds continues to warrant the most severe discipline the bar can impose for attorney misconduct and typically results either in revocation or a multi-year suspension of the attorney's license.[131] Failing to maintain the trust account records and perform the procedures required by Rule 1.15 will also result in the imposition of significant discipline.[132]

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had been engaged; failed to return client files; and failed to refund fees that had been paid for work he did not perform.

Id.

131. *See, e.g., In re* Robert Dean Eisen, Nos. 01-022-0845, 01-022-1356, 01-222-2414, 02-022-1800, 02-022-3844, 02-022-4096 (VSB Disc. Bd. 2004). The Board revoked Eisen's license upon a finding that he had converted client funds, failed to appropriately deposit or maintain advance fee payments for several clients, neglected client matters, failed to communicate with clients and failed to keep appropriate account records. *Id.* The attorney's disability defense was rejected. *Id.* In *In re* Margaret L. McLeod Cain, No. 04-070-0740 (VSB Disc. Bd. 2003), the attorney submitted an affidavit consenting to the revocation stipulating that, without her client's knowledge, she had settled a personal injury claim and received a settlement check made payable jointly to her and her client. She deposited the check, bearing her client's purported endorsement, into an account that she controlled and did not advise the client of the settlement or give the client any of the settlement proceeds. *Id.* In *In re* Sam Garrison, No. 02-080-3027 (VSB Disc. Bd. 2004), the Board revoked the attorney's license based on his obtaining $6,728.84 from Wachovia Bank through a check kiting scheme. *Id.* The attorney admitted that he had kited checks on other occasions when his financial position was poor. *Id.* In *In re* Gay Lynn Tonelli, No. 01-090-3362 (VSB Disc. Bd. 2003), on an affidavit consenting to revocation, the attorney admitted to multiple charges of misconduct, including that she failed to deposit an advance fee payment in her trust account pending completion of the work she was hired to do. *Id.* After the client fired her, the attorney refused to provide an accounting of what she had done with the fee. *Id.* The Board issued a three-year suspension where the Bar proved that the attorney wrote check on his escrow account for office rent, employee compensation, and a personal loan. In *In re* Vincent Napoleon Godwin, Nos. 00-010-1692, 01-010-0068 (VSB Disc. Bd. 2003), the attorney failed to deposit an advance fee for a bankruptcy case in his trust account, kept the money, and closed his office without doing the work or telling his client how to reach him. He failed to issue a refund despite repeated promises to do so. *Id.*

132. *In re* Andrew Ira Becker, Nos. 02-021-1191, 01-021-2730, 01-021-1843,01-021-2656, 03-621-0943, 03-021-1271 (VSB Disc. Bd. 2003) (imposing a four-month suspension where the attorney engaged in various acts of misconduct, including failure to deposit advance fees in trust account); *In re* Charles Everett Malone, Nos. 02-010-4055, 03-010-2298 (VSB Disc. Bd. 2003) (suspending for thirty days for failure to maintain an attorney trust account and account records in accordance with the rules, in addition to other misconduct); *In re* Ann Bridgeforth Tribbey, Nos. 03-031-1562, 03-031-1852, 04-000-0877 (VSB Disc. Bd. 2003) (revoking the attorney's license based on an affidavit indicating that there were three overdrafts on her attorney trust account in less than one year and that her trust ac-

B. *Commission of Crimes and/or Deliberately Wrongful Acts*

A wide range of criminal or deliberately wrongful conduct, including outside personal misconduct reflecting adversely on the lawyer's fitness to practice, also warrants disciplinary action.[133] Offenses which resulted in discipline in the last year included misappropriation of client funds;[134] practicing law while under suspension and making false representations to a court that the attorney was unaware of the suspension;[135] use of violence and criminal means to enforce a debt;[136] eavesdropping;[137] failing to pay income taxes;[138] and immigration fraud.[139]

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count record keeping practices did not comply with applicable rules and regulations); *In re* Kelly Ralston Dennis, No. 02-051-0752 (5th Dist. Comm. 2004) (public reprimanding an attorney who failed to produce an itemized bill and refund of unearned fees demanded by clients); *In re* Christian Jarrell Griffin, Nos. 02-070-1142, 02-070-3507, 63-070-2941 (VSB Disc. Bd. 2004) (finding that for at least two and a half years, Mr. Griffin did not have a separate fiduciary account and commingled operating, personal, and trust funds in one bank account).

133. *See, e.g.*, *In re* James Grafton Gore, Jr., No. 02-053-1838 (VSB Disc. Bd. 2004). Gore consented to revocation of his license to practice law. He collected sales taxes from customers of a restaurant that his corporation operated in the District of Columbia but failed to pay all the taxes he collected to the District of Columbia and to file timely tax returns. *Id.* In December 2001, Gore pled guilty to a related crime. *Id.* In June and July, 2001, twelve checks, totaling over $150,000, that he submitted to pay sales taxes were returned for insufficient funds. *Id.*

134. *In re* George Robert Leach, Nos. 01-060-1322, 02-060-3754 (VSB Disc. Bd. 2003). Mr. Leach continued to pursue a creditor's suit in the client's name, after his client's death. He then engaged in a transaction in which be bought the property at issue, transferred the title to his lender and kept the proceeds. *Id.* After Mr. Leach admitted his misappropriations, the Board ruled that he committed a deliberately wrongful act; engaged in dishonest, deceitful, fraudulent or misrepresentative conduct; charged unreasonable fees; failed to withdraw; advanced an unwarranted claim; failed to disclose that which is required by law; made false statements of law or fact; and violated the trust account requirements. *Id.*

135. *In re* James Frederick Pascal, No. 02-031-4074 (VSB Disc. Bd. 2003).

136. *In re* Eric Chong Yim, No. 04-052-1007 (VSB Disc. Bd. 2004) (revoking the attorney's license).

137. *In re* Edmund A. Matricardi, III, No. 03-000-3058 (Cir. Ct. Sept. 22, 2003) (Fauquier County).

138. *In re* John Ashton Wray, Jr., No. 01-010-2860 (VSB Disc. Bd. 2004) (issuing a public reprimand with terms).

139. *In re* Jordan Nichlos Baker, No. 04-051-0531 (VSB Disc. Bd. 2004) (revoking Baker's license after his guilty plea in federal court); *In re* Steven Yeoul Lee, Nos. 04-051-0530, 04-051-0798 (VSB Disc. Bd. 2003).

C. *Ex Parte Contact With Represented Party*

In the matter of Trey Robert Kelleter,[140] the Disciplinary Board addressed an attorney's ex parte communications under Rule 4.2.

Following a hearing, the First District Committee issued a dismissal with terms to Mr. Kelleter.[141] Mr. Kelleter, a prosecutor, wrongfully arranged for a police detective to interview an inmate, who was represented by counsel in connection with a murder investigation, without the knowledge or consent of the inmate's counsel, who had requested to attend any interview.[142]

D. *Sexual Misconduct*

The range of sexual misconduct by lawyers resulting in professional discipline has varied considerably in recent cases. Misconduct ranged from the despicable, i.e., aggravated sexual abuse of minors and possession of child pornography,[143] to the relatively more benign, i.e., solicitation of a prostitute.[144] Between these two extremes were cases involving sexual relations with a client, conduct which is not expressly prohibited by the Rules of Professional Conduct, but is often ruled a breach of other conduct rules, specifically, conflict of interest.[145]

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140. *In re* Trey Robert Kelleter, No. 03-010-1051 (VSB Disc. Bd. 2003).

141. *Id.*

142. *Id.*

143. *See, e.g.*, *In re* Jerry Wayne Harris, No. 04-000-2367 (VSB Disc. Bd. 2004). The attorney's license was automatically suspended after pleading guilty to forcible sodomy, aggravated sexual battery, taking indecent liberties with a child in a custodial or supervisory relationship, and unlawful possession of child pornography; the attorney subsequently surrendered his license. *Id.*

144. Virginia State Bar *ex rel* Tenth Dist., Section II Comm. v. Baker, No. 03-102-1834 (Cir. Ct. Nov. 25, 2003) (Scott County). Pursuant to an agreed disposition, a three judge circuit court panel suspended former general district court judge Donald G. Baker's license to practice law for two-and-one-half years. *Id.* The suspension stemmed from Mr. Baker's untruthful responses on two judicial selection questionnaires stating he had never been convicted of a crime. *See id.* In fact, he had been convicted of solicitation for prostitution in 1994. *Id.*; *see also In* re Bradford Clark Jacob, No. 03-032-4018 (VSB Disc. Bd. 2004) (finding that Mr. Jacob had engaged in deliberately wrongful acts and professional conduct involving dishonesty, deceit, and misrepresentation).

145. *In re* Killis Thurman Howard, No. 03-090-0468 (VSB Disc. Bd. 2004). Howard conceded that he violated conflicts of interest rules by engaging in an intimate relationship with a divorce client but, contrary to the complaint's claims, contended that he did not engage in the improper relationship until after the attorney-client relationship had ended. *Id.* The Board nevertheless imposed a public reprimand. *Id.*

E. *Neglect and Failure to Communicate*

Neglect of client matters and failure to communicate are arguably the most frequent violations in the disciplinary process. Neglect, in the misconduct sense, requires a pattern of misconduct,[146] whereas a malpractice claim may arise out of a single act or omission by the attorney.[147] Not infrequently, procrastination and neglect are accompanied by the lawyer misrepresenting to the client work had been done.[148] Severe sanctions may be warranted where the neglect is accompanied by a pattern of other violations of the rules of conduct.[149] In some instances, an attor-

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146. *See* Pickus v. Virginia State Bar, 232 Va. 5, 11, 348 S.E.2d 202, 206 (1986).

> Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

Id. For a pattern of neglect in representing only one client see *In re Bennett Allen Brown*, No. 01-051-0637 (5th Dist. Comm. 2003). By agreed disposition, the committee issued a public reprimand with terms to Mr. Brown for a pattern of neglect and failure to communicate. *Id.* Mr. Brown agreed to represent a client in obtaining coverage under a homeowners' policy but failed to take any action or to respond to the client's inquiries. *Id.* Mr. Brown also agreed to represent the client and his business in dealing with a default on a loan to the business, which the client had personally guaranteed. *Id.* The matter went to mandatory arbitration. Mr. Brown failed to keep the client informed and failed to contest what the client believed to be excessive attorney's fees awarded to the bank. *Id.*

147. An attorney's failure to timely attend to the administration of an estate is grounds for discipline. *See, e.g.*, *In re* Dianne Theresa Carter, Nos. 02-010-2333, 02-010-2654, 03-610-0106 (VSB Disc. Bd. 2004). The attorney consented to the revocation of her license to practice law. *Id.* At the time, disciplinary charges were pending against Ms. Carter for failing to timely attend to fiduciary obligations in an estate matter; failing to deposit client fees into a trust account; failing to attend to two divorce cases, one custody case, and a criminal appeal; and failing to notify her active clients about the September 2003 suspension of her license. *Id.*; *see also In re* David Nicholls Montague, Nos. 02-010-1496, 02-010-2592, 03-010-0643, 03-010-2795, 03-010-2797 (VSB Disc. Bd. 2003). The Virginia State Bar Disciplinary Board suspended David Nicholls Montague's law license for two years. *Id.* In five misconduct cases, it found that Mr. Montague failed to meet his fiduciary obligations as an estate executor, failed to protect the interests of a client who discharged him, failed to deposit advance fees he received in two cases in his trust account, and took a fee but never did any work on the case. *Id.* The Board also found that Mr. Montague negligently endorsed an order terminating his client's joint custody of his child, failed to maintain appropriate trust account records, and improperly withdrew client funds he had deposited in his trust account. *Id.*

148. *See, e.g.*, *In re* Edgar Hampton DeHart, Jr., No. 03-101-0706 (10th Dist. Comm. 2004) (issuing a public reprimand where lawyer consented to draft an agreed equitable distribution for divorce client and lied to client saying draft order had been sent to counsel and the court).

149. See, for example, *In re* Peter John LaMarca, IV, No. 02-062-2653 (VSB Disc. Bd. 2004), wherein the attorney's license to practice law was suspended, by agreement, for

ney's neglect of client matters has been the result of the attorney's accepting more work than she and her staff are capable of handling.[150] As part of the terms of a disposition, a committee may order the attorney to reimburse the client's legal fees paid to hire a second attorney to complete the work neglected by the first.[151]

F. *Breach of Duties Following Suspension of License*

After the suspension or revocation of a lawyer's license becomes final and non-appealable, the lawyer must give notice of the suspension or revocation "to all clients for whom he or she is handling matters and to all opposing Attorneys and the presiding Judges in pending litigation."[152] In addition, the respondent attorney must also make arrangements "for the disposition of matters" in conformity with the clients' wishes.[153] The suspended or revoked attorney must also provide the bar with satisfactory evidence of his or her compliance with these duties.[154] A suspended lawyer who fails to demonstrate compliance with these requirements will likely have his or her license revoked.[155]

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four years for his misconduct in handling a wrongful death case. The Board also found violations of disciplinary rules relating to diligence, zealous representation of clients, communication with clients, and termination of the attorney-client relationship. *Id.*; *see also In re* Paul Cornelious Bland, Nos. 03-031-0696, 03-031-1341, 03-031-1993 (VSB Disc. Bd. 2003) (finding an extensive pattern of neglect, a lack of diligence, incompetence and a failure to communicate in numerous client matters which, given substantial prior disciplinary record, warranted revocation).

150. *See, e.g., In re* Edith Charmaine Gray, Nos. 02-052-2811, 02-052-2877 (VSB Disc. Bd. 2004). As an agent for Lender's Services, Inc., Ms. Gray received approximately seventy residential loans closings in a three week period. *Id.* She had no staff and was unable to handle the volume of work. *Id.* She attempted to close thirty-four of the loans but was late in disbursing funds. *Id.* Lender's Services Inc. and the title insurance company retrieved the files and either completed the closings or transferred the files to another attorney. *Id.* By agreed disposition, Ms. Gray was publicly reprimanded. *Id.*

151. *See, e.g., In re* Ronald Albert Robinson, Jr., No. 03-052-1294 (5th Dist. Comm. 2004). The committee reprimanded Mr. Robinson for failing to handle a bankruptcy case competently and diligently and keep his clients informed. *Id.* The clients had to hire another attorney to conclude the bankruptcy, and the committee ordered Mr. Robinson to reimburse them for the expense of hiring the second attorney. *Id.*

152. VA. SUP. CT. R. pt. 6, § IV, para. 13(M) (Repl. Vol .2004).

153. *Id.*

154. *Id.*

155. *See, e.g., In re* Roger Cory Hinde, No. 04-000-2442 (VSB Disc. Bd. 2004); *In re* John Kelly Dixon, III, No. 03-000-3684 (VSB Disc. Bd. 2003).

G. *Miscellaneous Misconduct*

Other misconduct that resulted in discipline included a lawyer continuing to practice law after suspension of his license;[156] failure to protect medical liens on a personal injury settlement; [157] and a conflict of interest arising from the attorney's having advanced funds to pay a criminal client's bail bond.[158]

H. *CRESPA Actions*

The Virginia State Bar Disciplinary Board also hears complaints filed against attorney settlement agents who are alleged to have violated the Consumer Real Estate Settlement Protection Act ("CRESPA").[159] Typical cases involve lawyers who conduct real estate settlements without having registered with the Virginia State Bar or who conduct closings after their CRESPA registration has been revoked.[160] Violations of the rules of professional conduct and CRESPA may arise out of the same cases, and the Disciplinary Board has the authority to suspend or revoke an attorney's law license, as well as their CRESPA registration.[161]

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156. *In re* Lawrence Raymond Morton, Nos. 03-053-0871, 03-000-2094 (VSB Disc. Bd. 2004) (imposing a two-year suspension).

157. *In re* Jeffrey G. Haverson, No. 02-021-2643 (2nd Dist. Comm. 2004).

158. *See In re* Curtis Tyrone Brown, No. 02-021-2337 (VSB Disc. Bd. 2003); *Disciplinary Actions Taken by the Virginia State Bar*, July 2003–Dec. 2003, *at* http://www.vsb.org/profguides/actions_jul03-dec03.html (last visited Sept. 24, 2004).

159. VA. CODE ANN. §§ 6.1-2.19 to -2.29 (Repl. Vol. 2004). The Board's ability to hear cases involving non-compliance with CRESPA by attorney settlement agents is authorized by the Rules of the Supreme Court of Virginia. *See* VA. SUP. CT. R. pt. 6, § IV, para. 13(A) (Repl. Vol. 2004) (defining "misconduct" to include a violation of CRESPA).

160. *See, e.g.*, *In re* Roger Jeffrey McDonald, No. 01-000-0634 (VSB Disc. Bd. 2004) (ordering a $5,000 penalty because the attorney acted as the settlement agent in 158 residential real estate closings during a six-month period in which his registration as a settlement agent previously had been closed by the Virginia State Bar because of the cancellation of his surety bond); *In re* Troy Aurelius Titus, No. 04-000-0128 (VSB Disc. Bd. 2003) (imposing a $5,000 penalty where an attorney obtained the bonds necessary to register under CRESPA, but due to an administrative problem in his office failed to register for several years).

161. *In re* Ellen Frances Ericsson, Nos. 02-053-0134, 02-053-0916, 02-053-4208, 03-053-0618, 04-000-0458 (VSB Disc. Bd. 2003) (suspending an attorney settlement agent's license to practice law and her registration as a settlement agent under CRESPA).

VII. SIGNIFICANT AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

The Supreme Court of Virginia adopted revisions to the Rules of Professional Conduct on September 24, 2003, with an effective date of January 1, 2004.[162] The amendments had been proposed by the Virginia State Bar's Standing Committee on Legal Ethics ("the Committee"), which reviewed the current rules in light of two primary issues. First, the Committee considered the American Bar Association's Ethics 2000 initiative, which involved revising the Model Rules of Professional Conduct.[163] Second, the Committee reviewed Virginia's then-current rules[164] to determine whether any changes were indicated since the rules underwent a major revision, effective January 1, 2000.[165]

While a number of the changes merely provide improved clarity, a number of substantive changes were also adopted.

One significant substantive change is the addition of new Comment 7b to Rule 1.6, which governs the duty to maintain confidentiality.[166] Comment 7b clarifies the responsibilities triggered in representing a client under an impairment,[167] and the new language indicates that an attorney is not violating Rule 1.6 when taking action to protect impaired clients under Rule 1.14.[168] For example, it may be appropriate, and now permissible under this change, for an attorney to reveal confidential client information in order to consult with the client's medical provider to determine the extent of the client's impairment.

Another significant amendment to the rules is that Rule 3.4, governing fairness to the opposing party and counsel, now con-

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162. VA. SUP. CT. R. pt. 6, § II (Repl. Vol. 2004).

163. *See* Charlotte Stretch, *Overview of Ethics 2000 Commission and Report, at* http://www.abanet.org/cpr/e2k-ov_mar02.doc (last visited Sept. 24, 2004). The American Bar Association's Ethics 2000 Commission was formed in 1997 to develop revisions to the Model Rules of Professional Conduct. *Id.* Changes resulting from the Commission's reports were final as of the end of the American Bar Association's February 2002 mid-year meeting. *Id.*

164. *See* VA. RULES OF PROF'L CONDUCT (2002).

165. *See Virginia State Bar, Virginia Supreme Court to Review a Proposed Amendment to Rule 1.7 of the Rules of Professional Conduct, at* http://www.vsb.org/profguides/proposed/rule1.7.html (last visited Sept. 24, 2004).

166. VA. SUP. CT. R. pt. 6, § II, R. 1.6 cmt. 7b (Repl. Vol. 2004).

167. *Id.*

168. *Id.* pt. 6, § II, R.1.14(c) (Repl. Vol. 2004).

tains a provision prohibiting the intentional or habitual violation of rules of procedure or evidence, where such conduct is disruptive.[169] This amendment restores important language that had been in the previous Code of Professional Responsibility,[170] but had not carried over into the Rules of Professional Conduct[171] since they were made effective in 2000.

A third significant amendment to the rules is new Rule 6.5, entitled "Nonprofit and Court-annexed Limited Legal Services Programs."[172] Rule 6.5 removes imputed conflicts of interest rules for lawyers providing services in the context of limited legal services programs, in recognition of the unique nature of such services and of the benefit of a potential increase in the public's access to legal services.[173]

VIII. LEGAL ETHICS OPINIONS

The Committee has issued close to one hundred opinions since 1997.[174] Below is a description of the more noteworthy of those opinions.

A. *Receipt of Inadvertently Transmitted Confidential Information*

The inadvertent receipt of a facsimile transmission from opposing counsel reflecting client confidences, including trial strategy, gives rise to obvious questions of ethical obligation. According to the Committee, the receiving lawyer may not keep and use confidential information mistakenly transmitted to him by opposing counsel.[175] "Safeguarding client confidences and secrets is a cate-

169. *Id.* pt. 6, § II, R. 3.4(g) (Repl. Vol. 2004).

170. VA. CODE OF PROF'L RESPONSIBILITY, DR 7-105(c)(5) (1999).

171. VA. SUP. CT. R. pt. 6, § II (Repl. Vol. 2004).

172. *Id.* pt. 6, § II, R. 6.5 (Repl. Vol. 2004).

173. *See id.*

174. The Standing Committee on Legal Ethics (the "Committee") is authorized to issue written advisory opinions, upon requests made by a member of the bar. VA. SUP. CT. R. pt. 6, § IV, para. 10 (Repl. Vol. 2004). Legal Ethics Opinions are informal and not binding unless approved and adopted by the Supreme Court of Virginia. *See id.* para. 10(c)(vi). For a discussion of significant opinions issued prior to 1997, see James M. McCauley & Michael L. Rigsby, *Annual Survey of Virginia Law: Professional Responsibility*, 31 U. RICH. L. REV. 1115, 1125–35 (1997).

175. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1702 (1997).

gorical imperative that should not hinge on someone pushing the wrong number on a facsimile machine, or putting documents in the wrong envelope."[176] The Opinion concludes that the receiving attorney should contact the sending party and follow that party's instructions regarding use of the materials.[177] The Opinion extends that conclusion to an attorney who receives confidential information from an unidentified source where such information was taken without authority from the file of the opposing lawyer or the opposing party.[178]

B. *Insurance Company Communication with Insured's Attorney*

In Legal Ethics Opinion 1723, the Committee addressed an insurance company's issuance of a directive to an insured's attorney regarding details of his representation of his client, the insured.[179] The directive requires the attorney, without client consent, to follow procedures that would restrict discovery and restrict the use of third party vendors and experts.[180] The directive further asked the attorney to provide detailed client information to an outside auditor.[181] The Opinion concludes that an attorney may not agree to the carrier's restrictions absent client consent in writing, after full disclosure and only if the restrictions would not materially impair the client's rights.[182] This conclusion rests on the importance of an attorney remaining free from the influence of a third party, such as the insurer.[183] Legal Ethics Opinion 1723 further concludes that the provision of detailed client information was ethically impermissible because the attorney had failed first to provide the client with full and adequate disclosure and also failed to obtain client consent for the disclosure.[184] A final point made in the Opinion is that the insured's attorney should not en-

176. *Id.*
177. *Id.* (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 368 (1992)).
178. *Id.*
179. VSB Comm. on Legal Ethics, Legal Ethics Op. 1723 (1998).
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

courage such consent from the client if disclosure to the auditors would prejudice the client's interests.[185]

C. *Client Arrested Under False Name*

Legal Ethics Opinion 1731 concerns an attorney representing a client at the sentencing stage of his prosecution for drug-related charges.[186] The client then tells the attorney that she was just arrested for drunk driving.[187] The client further explains that, at the time of the arrest, she was using a friend's driver's license and was, therefore, arrested under the friend's name.[188] The ethical issue raised in the Opinion was whether the attorney must disclose this arrest to the court.[189] Legal Ethics Opinion 1731 holds that, as the driving charge is not the subject matter of the representation, the attorney may not reveal this fraud unless the client consents.[190] Further, the attorney cannot accept representation of both the client and the friend; the conflict of interest present in such joint representation would be too direct and inherent, thus precluding consent which would effectively "cure" the conflict of interest.[191]

Another issue raised by the Opinion is whether the attorney could acquiesce to the client's desire not to appear at the hearing for the driving offense?[192] Legal Ethics Opinion 1731 explains that the attorney should discuss with the client the legal ramifications of a failure to appear, and should attempt to persuade her to attend.[193] Nevertheless, if the client refuses to appear, the attorney must abide by that decision.[194]

The Opinion also discussed whether the attorney must disclose the arrest to the sentencing court, as that charge would not appear on the pre-sentence report.[195] The Committee carefully bal-

185. *Id.*
186. VSB Comm. on Legal Ethics, Legal Ethics Op. 1731 (1989).
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*

anced the competing duties of the attorney to be candid with the court, while at the same time protecting the client.[196] The attorney may not make any affirmative statements to the court that misrepresent the client's record; however, if no such affirmation would be involved in the sentencing hearing, the attorney should not voluntarily offer the information to the court.[197]

A final question is whether the attorney may withdraw from representing this client.[198] As the Opinion found, withdrawal is not an available option for this attorney in resolving this situation.[199] The sentencing hearing in this case was less than a month away. Legal Ethics Opinion 1731 therefore concludes that the attorney would not be able to withdraw without prejudicing the client.[200]

D. *The Client's Desire to Present No Mitigating Facts at Sentencing*

In Legal Ethics Opinion 1737, the Committee addressed whether, in a capital murder case, the defense counsel must abide by the directions of the defendant to withhold the presentation of mitigating evidence in the penalty phase of the proceeding.[201] A psychiatrist had evaluated the defendant and found him to be competent.[202] Legal Ethics Opinion 1737 concludes that the attorney should abide by the client's wishes on this point.[203] The Committee stated that "where the attorney has a reasonable basis to believe that the client's preference for the death penalty is rational and stable, the client's decision controls, even if it is contrary to the lawyers' [sic] professional judgment and advice."[204] "[T]he severe and irreversible consequences of failing to make a case of mitigation in the penalty phase" require the attorney to "try to discern whether the defendant has expressed a rational and stable preference for a death sentence. The responsibilities of

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. VSB Comm. on Legal Ethics, Legal Ethics Op. 1737 (1999).
202. *Id.*
203. *Id.*
204. *Id.*

a lawyer may vary according to the intelligence, experience, mental condition or age of the client."[205] The Committee believed that "attorneys in capital cases are ethically required to advise such clients of the adverse legal consequences of failing to produce mitigating evidence during the penalty phase and of how much more difficult it will be to attack the death sentence on direct appeal, or collaterally, if the client insists on that direction."[206] For that reason, "the attorney must counsel the client carefully regarding the risks and benefits of presenting mitigating evidence."[207]

E. *Investigative Techniques*

The Committee has issued two related opinions in recent years regarding what investigative techniques are generally impermissible for attorneys and what exceptions to that prohibition are appropriate.[208] In Legal Ethics Opinion 1738, the Committee addressed the specific question of whether an attorney may tape record a conversation, or direct a client to tape record a conversation, without the knowledge of the other party to the conversation.[209] A critical point in this Opinion is the Committee's distinction between what is legal versus what is ethical.[210] Citing *Gunter v. Virginia State Bar*,[211] the Opinion explains that a lawyer may be held to a higher ethical standard than merely what is legal.[212] The ethics rules for lawyers may properly impose a higher duty or prohibition on lawyers.[213] Following that principle, the Committee applied Rule 8.4 to find that lawyers are not ethically permitted to tape record a conversation without the knowledge of the other party.[214] Such an act is a violation of Rule 8.4's

205. *Id.*
206. *Id.*
207. *Id.*
208. VSB Comm. on Legal Ethics, Legal Ethics Op. 1738 (2000); VSB Comm. on Legal Ethics, Legal Ethics Op. 1765 (2003).
209. Legal Ethics Op. 1738.
210. *Id.*
211. 238 Va. 617, 385 S.E.2d 597 (1989).
212. Legal Ethics Op. 1738.
213. *Id.*
214. *Id.*

prohibition against "dishonesty, fraud, deceit or misrepresentation."[215]

While establishing a general prohibition on attorneys tape recording conversations, Legal Ethics Opinion 1738 carves out three exceptions in which Rule 8.4 is not violated.[216] The first is for attorneys working in law enforcement.[217] The second is for housing discrimination testers.[218] The third exception applies where an attorney is the victim of either a threat or actual commission of criminal activity.[219] The Opinion leaves open the possibility for other appropriate exceptions, but only those three were the subject of inquiry in Legal Ethics Opinion 1738.[220]

The Committee later reconsidered Legal Ethics Opinion 1738 with relation to lawyers working, not in law enforcement, but in federal intelligence work, and looked both at non-consensual tape recording, specifically, and to undercover intelligence work in general.[221] The request noted that, while Rule 8.4 prohibits any conduct involving dishonesty, fraud, deceit or misrepresentation, attorneys working for federal intelligence agencies routinely need to misrepresent their identity or purpose as part of standard undercover work.[222] The Opinion concludes that where an attorney is performing his lawful job as a staff member of a federal intelligence agency, that lawful performance does not reflect adversely on the lawyer's fitness to practice law, even where dishonesty, fraud, deceit, or misrepresentation may be involved.[223]

F. *Information Provided for a Departing Attorney*

The departure of an attorney—or attorneys—from a firm is not always an amicable event. The Committee in Legal Ethics Opinion 1757 addressed whether, with reference to Rules 1.3 and 1.16, the remaining attorneys could refuse to provide the departing at-

215. *Id.*; VA. SUP. CT. R. pt. 6, § II, R. 8.4 (Repl. Vol. 2004).
216. Legal Ethics Op. 1738.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. VSB Comm. on Legal Ethics, Legal Ethics Op. 1765 (2003).
222. *Id.*
223. *Id.*

torney with client contact information.[224] Rule 1.3(c) establishes that an attorney may do nothing to prejudice a client during the course of the representation.[225] Rule 1.16(d) requires an attorney, upon termination of a client relationship, to take steps to protect the client's interests.[226] Legal Ethics Opinion 1757 finds that, to fulfill those duties to all current and former clients of the law office, the attorneys remaining in that office should provide client contact information to departing attorneys to enable those attorneys to perform conflicts checks in their new office,[227] as conflicts checks are protective of the clients' interests.[228]

G. *Conflict of Interest for Attorney Appearing Before a Public Body*

In recent years, the Committee has twice visited the issue of whether an attorney may represent a client before a public body on which a partner of that attorney sits.[229] In 1998, the Committee issued Legal Ethics Opinion 1718, which addresses a situation wherein one attorney represents a client before a board of zoning appeals on which another member of the attorney's law firm sits.[230] As in Legal Ethics Opinion 1738, discussed above, the Committee relied on a principle from *Gunter v. Virginia State Bar*.[231] Specifically, the Opinion notes that "[c]onduct that is permissible as a matter of law is not necessarily permissible as a matter of ethics."[232] Accordingly, the Committee found that the fact that the conduct of the two attorneys in the hypothetical may be *legal* under the applicable conflict of interest laws does not answer the question of whether the conduct is *permissible* under the ethics rules.[233] The Committee applied former Disciplinary Rules

224. VSB Comm. on Legal Ethics, Legal Ethics Op. 1757 (2001); *see also* VA. SUP. CT. R. pt. 6, § II, R. 1.3, 1.16 (Repl. Vol. 2004).

225. VA. SUP. CT. R. pt. 6, § II, R. 1.3(c) (Repl. Vol. 2004).

226. *Id.* pt. 6, § II, R. 1.16(d) (Repl. Vol. 2004).

227. VSB Comm. on Legal Ethics, Legal Ethics Op. 1757 (2001).

228. *Id.*

229. VSB Comm. on Legal Ethics, Legal Ethics Op. 1718 (1998); VSB Comm. on Legal Ethics, Legal Ethics Op. 1763 (1999).

230. Legal Ethics Op. 1718 (1998).

231. *Id.* (citing Gunter v. Virginia State Bar, 238 Va. 617, 621, 385 S.E.2d 597, 599–600 (1989)).

232. VSB Comm. on Legal Ethics, Legal Ethics Op. 1718 (1998).

233. *Id.*

8-101(A) and 9-101(C) from the Virginia Code of Professional Responsibility to conclude that the attorney may not represent a client before a board on which a member of his firm sits because of both the appearance of, and the actual risk of, the improper influence the attorneys may have with the board on behalf of the client.[234]

After the adoption of the Rules of Professional Conduct in 1999,[235] the Committee received a request to reconsider the conclusion drawn in Legal Ethics Opinion 1718 new rules.[236] The Committee issued Legal Ethics Opinion 1763 in 2002, reaffirming the conclusion in Legal Ethics Opinion 1718.[237] The Committee noted that nothing regarding the public policy issues behind the Opinion had changed since the issuance of Legal Ethics Opinion 1718.[238] The Committee continued that the new Rules of Professional Conduct do contain support for the conclusion that representing a client before a partner's board triggers a conflict of interest that cannot be cured.[239] Specifically, the Opinion looked to Rule 1.11's clarification that an attorney who is a public officer should not allow his other professional activities to impinge on his duties as a public officer.[240] Recusing himself from hearing matters brought by members of his firm would be just such an impingement.[241] The Opinion therefore concludes that the situation outlined does give rise to a conflict of interest that cannot be cured simply by the board member's recusal.[242]

H. *Seeking a Guardian for a Client*

May a lawyer be hired by a client's daughter to petition for the daughter to be appointed as guardian for the mother? The hypothetical before the Committee in Legal Ethics Opinion 1769[243] involved an attorney representing a mother in an unrelated legal

234. *Id.* (applying VA. CODE OF PROF'L RESPONSIBILITY DR 8-101(A), 9-101(C) (1999)).
235. *See* VA. SUP. CT. R. pt. 6, § II (Repl. Vol. 2004).
236. VSB Comm. on Legal Ethics, Legal Ethics Op. 1763 (2002).
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1769 (2003).

matter.[244] During the course of the representation, the adult daughter of the client approached the attorney seeking representation to petition to be appointed as guardian for the mother.[245] In resolving this question, the Committee made a distinction based on interpretations of both Rule 1.7, regarding conflicts of interest, and Rule 1.14, regarding clients with a disability.[246] That distinction is between representing a third party, here the daughter, in declaring a client incompetent and filing the petition with the attorney himself as petitioner.[247] In representing a third party, the attorney would have a conflict of interest under Rule 1.7 in pursuing the differing goals of the two clients.[248] In contrast, Rule 1.14 permits an attorney to take protective action where a client cannot adequately act in his or her own interest.[249] Filing a petition seeking a guardian for a client is just the sort of protective action contemplated by Rule 1.14.[250] The Opinion notes that, in deciding whether to take that step, the attorney could speak with the *daughter* to obtain further information about the mother.[251] Such a conversation would be a permissible protective action under Rule 1.14 and, therefore, would not be precluded by the general duty of confidentiality.[252]

I. *Providing a File to a Client*

Since the adoption of Rule 1.16(e), governing the duty to provide the client's file upon request at the termination of the representation, the Committee has issued two opinions applying that rule to specific file contents.[253] In Legal Ethics Opinion 1789, the

244. *Id.*

245. *Id.*

246. *Id.; see also* VA. SUP. CT. R. pt. 6, § II, R. 1.7, 1.14 (Repl. Vol. 2004).

247. Legal Ethics Op. 1769 (2003).

248. *See id; see also* VA. SUP. CT. R. pt. 6, § II, R. 1.7 (Repl. Vol. 2004).

249. Legal Ethics Op. 1769 (2003); VA. SUP. CT. R. pt. 6, § II, R. 1.14 (Repl. Vol. 2004); *see also supra* notes 166–68 and accompanying text (discussing recent amendments to Rule 1.6 which allow attorneys greater freedom in taking protective action on behalf of impaired clients).

250. *See* Legal Ethics Op. 1769.

251. *Id.*

252. *Id.; see also supra* notes 166–68 and accompanying text.

253. *See* VSB Comm. on Legal Ethics, Legal Ethics Op. 1789 (2004); VSB Comm. on Legal Ethics, Legal Ethics Op. 1790 (2004); *see also* VA. SUP. CT. R., pt. 6, § II, R. 1.16(e) (Repl. Vol. 2004).

inquiry involved a medical report.[254] The Opinion addressed the dilemma faced by an attorney whose client asks for his file, where the file contains a psychological evaluation and the evaluator tells the attorney not to provide the report to the client.[255] The Opinion distinguishes between a request for the file during the course of the representation and one made at the end of the representation.[256] During the representation, Rule 1.4's duty of communication may or may not require provision of a particular document or of the whole file.[257] The determination would be fact-specific as to what information an attorney needed to provide and by what means.[258] In contrast, at the end of the representation, Rule 1.16(e) outlines very specific directives regarding the provision of the client's file.[259] The Opinion notes that, in either instance, if the client is disabled, Rule 1.14 may be considered as to whether the client is able to act in his own interest in making the request.[260]

In Legal Ethics Opinion 1790, the inquiry involved a pre-sentence report.[261] The request asked whether an attorney can or must refuse a former client's demand for a copy of the defendant's pre-sentence report.[262] The Opinion notes that Comment 11 to Rule 1.16 establishes that the rule "should not be interpreted to require disclosure of materials where the disclosure is prohibited by law."[263] The request identified a 2003 Opinion of the Virginia Attorney General, which interprets Virginia Code section 19.2-299 as addressing the legal issue of whether the disclosure of pre-sentence reports by attorneys to their clients is prohibited by law.[264] The Opinion concludes that it would be outside the purview of the Committee to analyze legal authority outside of the

254. *See* Legal Ethics Op. 1789.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.; see also* VA. SUP. CT. R. pt. 6, § II, R. 1.4 (Repl. Vol. 2004).

259. Legal Ethics Op. 1789; *see also* VA. SUP. CT. R. pt. 6, § II, R. 1.16(e) (Repl. Vol. 2004).

260. *See* Legal Ethics Op. 1789 (2004); *see also* VA. SUP. CT. R. pt. 6, § II, R. 1.14 (Repl. Vol. 2004).

261. VSB Comm. on Legal Ethics, Legal Ethics Op. 1790 (2004).

262. *Id.*

263. *Id.* (quoting VA. SUP. CT. R. pt. 6, § II, R. 1.16(e) cmt. 11 (Repl. Vol. 2004)).

264. *Id.* (citing Op. to Hon. Thomas B. Hoover (Mar. 31, 2003)); *see also* VA. CODE ANN. § 19.2-299 (Repl. Vol. 2000).

Rules of Professional Conduct regarding the disclosure of presentence reports and declines to opine on that question.[265]

J. *Meeting with a Client*

The Committee considered whether an attorney must always have a face-to-face meeting with a client in Legal Ethics Opinion 1791.[266] The Committee concludes that electronic communication, without in-person meetings, can be sufficient to fulfill an attorney's duty of communication and competence.[267] In determining whether a particular attorney has met this obligation with respect to a particular client, the critical issue is *what* information was transmitted, not *how*.[268] The Committee opined that there is no *per se* requirement in the Rules that information be provided to a client in person.[269] Accordingly, the Opinion concludes that the procedures outlined in this hypothetical do not on their face create an ethics violation for an attorney.[270]

K. *Conflict of Interest for Criminal Defense Attorney*

In a hypothetical presented to the Committee in Legal Ethics Opinion 1796, a criminal defense attorney represented two clients who were not co-defendants in the same case.[271] One client was charged with possession of a firearm by a felon.[272] The best defense for that client would have been to show that he needed self-protection from a very substantial threat of harm posed by the second client.[273] The second client faced various charges relating to the murder of a family member of the first client and for a contract held on the life of the first client.[274] The defense attorney never told either client about the other and did not put on the de-

265. Legal Ethics Op. 1790.
266. VSB Comm. on Legal Ethics, Legal Ethics Op. 1791 (2003).
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. VSB Comm. on Legal Ethics, Legal Ethics Op. 1796 (2004).
272. *Id.*
273. *Id.*
274. *Id.*

fense of self-protection in the first client's case.[275] Both clients were convicted and sentenced.[276] The Opinion concludes that the lawyer had a clear conflict of interest in violation of Rule 1.7.[277]

IX. CONCLUSION

Ethical dilemmas face Virginia lawyers every day. While lawyers can be disciplined by the Virginia State Bar for ethical breaches, they can also reduce the risk of bar complaints and discipline by contacting the Office of Ethics Counsel for informal advice when confronted with an ethics problem. Like other practice areas, professional regulation has evolved into a specialized and complex body of law. Lawyers can no longer rely on what "feels right" to resolve ethical issues.

275. *Id.*
276. *Id.*
277. *Id.; see also* VA. SUP. CT. R. pt. 6, § II, R. 1.7 (Repl. Vol. 2004).