VIRGINIA 2010 UPDATE:

Preventing Legal Malpractice Claims and Ethics Complaints in Your Law Practice

PRESENTED BY:

Wendy Inge,
Director of Risk Management Programming

AND

Jill Wells Nunnally,
Risk Management Consultant

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Minnesota Lawyers Mutual
333 South Seventh Street, Suite 2200
Minneapolis, MN 55402

www.mlmins.com
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800.305.1510 Fax

2010 VA
# PROGRAM EVALUATION

**Date:** ______________________  **Location:** ____________________________  **City** __________________  **State** ___________________

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<th>I. OVERALL EVALUATION:</th>
<th>YES</th>
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<td>Will the information be useful in working with your clients?</td>
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<td>Was the program of general interest?</td>
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<th>V. Are you in private practice?</th>
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<th>Solo</th>
<th>Small (2-6)</th>
<th>Medium (7-20)</th>
<th>Large (21+)</th>
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Would you like to be put into MLM’s e-mail database for future contact? Yes _____ No _____

Name: ____________________________  Firm: ____________________________

E-Mail Address: ____________________________

Thank you for participating in the evaluation.  

(VA 2010)
CERTIFICATION OF ATTENDANCE (FORM 2)

To ensure proper credit, pursuant to Paragraph 17B, C and D of Section IV, Part Six, Rules of the Supreme Court of Virginia, please list your bar ID number, and print full name and address. The information provided will be available for inspection by the public under the Freedom of Information Act.

Member Name: ____________________________  VSB Member Number: ________

Official Address: __________________________

Of Record:

_________________________________________  Daytime Phone (____)__________________________

_________________________________________  E-Mail Address: ____________________________

City  State  Zip

Course ID Number:   MNX001
Sponsor:   Minnesota Lawyers Mutual Insurance Company
Course/Program Title:   2010 Update: Preventing Legal Malpractice Claims and Ethics Complaints in Your Law Practice
CLE (Ethics) Credits:   3.0 (3.0)

CERTIFICATION

Date(s) Attended: ____________________________  Location(s): ____________________________

By my signature below, I certify that:

___ I attended a total of _____ (hrs/mins) of approved CLE, of which (____) (hrs/mins) were in approved Ethics.

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

___ I participated in this program in a setting physically suitable to the course and a suitable writing surface was available.

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

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

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

NOTE: Credit is awarded for actual time in attendance at approved presentation rounded to the nearest half hour.

_________________________________________  ____________________________

Date     Signature

You may certify your MCLE attendance online at www.vsb.org

MCLE Completion Deadline - October 31
Deadline to Certify MCLE Approved Hours - December 15
A $100 fee will be charged for failure to comply with either deadline.
Fax transmissions are subject to receipt by the MCLE office of complete and legible forms.
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PREVENTING LEGAL MALPRACTICE CLAIMS
AND ETHICS COMPLAINTS IN YOUR LAW PRACTICE

SCHEDULE

8:30 AM – 9:00 AM Check-In
9:00 AM – 10:45 AM Video Vignette I and Panel Discussion
10:45 AM – 10:55 AM Break
10:55 AM – 12:15 PM Video Vignettes II, II and Panel Discussion

SEMINAR LOCATIONS

Monday, March 22 .......................................................... Lynchburg, VA
Holiday Inn Select

Tuesday, March 23 .......................................................... Roanoke, VA
Holiday Inn Select

Wednesday, March 24 ................................................... Richmond, VA
Sheraton Richmond West

Thursday, March 25 ......................................................... Norfolk, VA
Norfolk Waterside Marriott

Monday, April 12 ........................................................... Charlottesville, VA
Omni Charlottesville

Tuesday, April 13 ........................................................... Fredericksburg, VA
Riverside Center

Wednesday, April 14 ..................................................... Annandale, VA
Northern Virginia Community College

Thursday, April 15 .......................................................... Manassas, Virginia
GMU Prince William Campus – Verizon Auditorium
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### II. YOU REMEMBER, I'M SURE

**Facts**

**Questions**

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**B. The 4U’s of Difficult Clients**

**C. Difficult Doesn’t Begin to Describe it**

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- Rule 1.2 Scope of Representation
- Rule 1.3 Diligence
- Rule 3.4(a) and (j) Fairness to Opposing Party and Counsel
I. MERGING ISSUES

Facts:

In this vignette, two firms have been working on a merger and have recently completed the deal forming a new firm. Leading the charge on the merger were two lawyers, Bob Olsen, whose firm was primarily a business transactional practice along with some estates and trusts work, and Mark Ridley, whose group was primarily a litigation practice. A month after the merger, Mark Ridley has a problem brewing in a medical malpractice case he settled five months ago. But before we get to the facts of the medical malpractice case Mark is worried about, Bob raises some questions as to whether and why Mark didn’t report this to his previous legal malpractice carrier. Mark replies that he “didn’t report it because he never saw it coming.” Bob is worried about coverage and whether the new carrier will have questions about their failure to disclose it on the firm’s recent application adding Mark and the other lawyers who merged into the firm.

Mark was associated as litigation counsel on a medical malpractice case which had two potential recoveries, a wrongful death claim and/or a survivorship claim. The case involved a 64-year-old woman, Deborah, who had developed chronic kidney disease over the last several years from having hypertension and type 2 diabetes. She was divorced and lived with her only child, a daughter, Jane, and her granddaughter. Deborah and her daughter shared expenses and helped each other out. One weekend Deborah suddenly became ill with severe abdominal pains and some blood in her urine. Her daughter, Jane, took her to the hospital where she was admitted. While she was there, she developed a staph infection at the IV site. She ended up going into shock and was on a ventilator for four or five weeks before she died. She also developed a large pressure point ulcer on her sacrum that got infected. Her daughter thinks the hospital’s delayed treatment of the staph infection is what killed her mother. A subsequent autopsy has confirmed kidney failure resulting in death; however, it was inconclusive regarding what caused it: existing organ damage from the hypertension and type 2 diabetes; or, infection originating at the IV site or pressure point.

The case was to be filed in a jurisdiction a couple of hours away from where Mark regularly practices. After discussing the facts of the case with Arnie, the originating attorney, one of the first things that needed to be done was qualification of the daughter so that she could sue on behalf of her deceased mother. Since the deceased mother had no significant assets to probate, the two attorneys agreed that they could use a state statute that allowed for a limited qualification for the purpose of bringing suit. The daughter met with the clerk of the court, explaining that she wanted to qualify in a limited capacity for purposes of bringing claims of wrongful death and/or survivorship.

Mark received and reviewed the Clerk’s order appointing the daughter and noticed that while the order mentioned her appointment to bring claims [plural], the description of the claims referenced only wrongful death and the state code section for a wrongful death claim. There was no mention of bringing a survivorship claim or the code section for a survivorship claim. Our lawyer, Mark, called the clerk’s office and spoke to the clerk about the order. The clerk advised that as far as “qualifying in a limited capacity” for purposes of bringing suit, this was their standard order, and she was not inclined to change it or redraft it in any way. At that time Mark was busy with several other cases that were in litigation and was also busy with the merger negotiations. He thinks, but is not sure, that he sent the originating lawyer, Arnie, an e-mail about the order and his conversation with the clerk and asked Arnie to revisit the issue with the clerk. Mark doesn’t think he ever got a reply. However, he cannot find a copy of the e-mail in his file because around this same time period, his e-mail crashed and he lost a lot of his
e-mails. It appears that this loose end was never wrapped up nor was it ever revisited by either one of the lawyers.

Despite the concerns over the order entered by the clerk, the case was moving along. Mark had the case reviewed by experts and had hired a private investigator who he regularly used to help with witness statements. The investigator had come up with some additional evidence by going on Facebook and posing as a nurse potentially interested in transferring to the hospital and the unit where the medical malpractice event occurred. A nurse who worked on the same unit where the alleged incident occurred, but not directly responsible for the patients care, “friended” the investigator and provided information about the working environment at the hospital and particularly commented on how short staffed the unit was, especially on the evening shifts. Her only responsibility to the patient was as a back-up nurse if the two nurses directly assigned to the deceased patient had needed extra help.

Things were going well. There was mediation early on, but the parties weren’t able to resolve anything. Mark had his experts lined up, depositions taken, discovery done, and the parties were scheduled to go to a second mediation about a month before the trial. Prior to the second mediation, the defense filed a motion to strike the plaintiff’s cause of action for survivorship on the basis that the daughter was not properly qualified as Administrator and therefore, did not have standing to bring the survivorship claim. About a week before the second mediation, the Judge granted the defense’s motion striking the survivorship claim. Since the statute had run, the plaintiff could not re-file it. Mark still felt very optimistic about the case and told the daughter that he didn’t agree with the Judge’s ruling on the survivorship claim. He felt there was a basis for appeal and that the issue was not black and white. He reminded her that they still had the wrongful death claim to pursue, and that they, or the jury, would have had to make an election at trial of one remedy or the other anyway. There was no discussion with the daughter of whether causation issues made the wrongful death claim more difficult to prove.

On the day of the mediation, we notice a couple of things: First, our lawyer’s attention is not exclusively focused on the mediation. Rather, he is using some of his “down-time” to discuss with his staff technology plans for the upcoming merger, i.e. using software as a service (SaaS); working on drafting an order for another matter; and, returning phone calls to other clients. Secondly, it appears to the client that his desire to try the case is waning, although the lawyer says not. As the day goes on, and the pressure from the mediator builds, the settlement range the client had discussed with her lawyer does not materialize. Instead, her lawyer encourages her to seriously consider a settlement of $150,000.00, which is well below the anticipated range, because of numerous factors, including: the difficulty of proving causation as it related to the wrongful death claim; the expense of going to trial; the anxiety of being a key witness; and, the general unpredictability of a jury. Feeling like she had been leaned on by the mediator (especially regarding the difficulty of proving causation to support the wrongful death claim) and sold out by her lawyer, the client ultimately agrees to settle the wrongful death case for $150,000, which is significantly less than she expected.

The case was settled five months ago; a few weeks ago, the daughter called the lawyer to complain about the settlement and how she felt that she was forced to settle because of the causation concerns with the wrongful death claim. She now believes that if her lawyer had not messed up the survivorship claim, then she would have gotten a better settlement. He reminds her there were numerous other reasons for her decision to settle, including the expense associated with going to trial, the pressures of her being a key witness, and the unpredictability of a jury. He also reminds her that Arnie is at least partly responsible for the screw-up on the
qualification of the Administrator. But all to no avail, as daughter has now hired a new lawyer who has filed a legal malpractice suit, and Mark needs to call his malpractice carrier.

QUESTIONS

A. Association and Referral: What is the difference between the two, and should Arnie be worried about a claim, too?

B. Qualification of the Administrator: Mark was concerned about the Order provided by the Clerk of Court, qualifying the daughter as administrator; however, he accepted the Clerk’s answer and moved on without completely following up on the issue. What should Mark have done?

C. Communication: Lawyers routinely communicate by e-mail with one another, the court, and the client. What steps should be taken to ensure the communication is received and that it becomes part of the file?

D. Investigators: Did the investigator violate the ethics rules regarding talking to witnesses who are employees of a corporate entity that has legal counsel? Did the investigator violate any ethics rules by falsely posting himself on Facebook as a nurse looking for work at the hospital where the alleged medical negligence took place?

E. Disclosure to Client: What is the lawyer’s duty of disclosure to the client when an underlying error by the lawyer may have been the basis for a successful motion to strike? Does this create a conflict of interest that requires the lawyer to withdraw? What about blaming others for the problem?

F. Malpractice Coverage: Is there a notice and/or coverage problem where a lawyer is aware of a motion to strike that portends a problem, and the lawyer seeks new coverage with the firm with which he merged without reporting the facts or circumstances that may give rise to a claim?

G. Law Practice Management: Software as a Service (SaaS): What is SaaS and what practical and ethical concerns does it raise?

H. Multi-Tasking from the Client’s Perspective: Does it raise client concerns that they are not receiving your exclusive attention? And also, what are the ethical concerns of confidentiality whereas in this vignette the lawyer is talking on a cell phone in a public area?

I. Client Expectations: Based on the initial settlement range that this client discussed with the lawyers, she felt sold-out at the mediation when the settlement offer was much lower than the anticipated range. What should the lawyer do to prevent this situation?

A. Association and Referral: What’s the difference between the two, and should Arnie be worried about a claim, too?

1. Professional Responsibility Considerations: Virginia Rule 1.2 Scope of Representation and Virginia Rule 1.5(e) Fees and Comment [7]
a. **Virginia Rule 1.2 Scope of Representation**

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

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

b. **Virginia Rule 1.5(e) Fees and Comment [7]**

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

1. the client is advised of and consents to the participation of all the lawyers involved;
2. the terms of the division of the fee are disclosed to the client and the client consents thereto;
3. the total fee is reasonable; and
4. the division of fees and the client’s consent is obtained in advance of the rendering of legal services, preferably in writing.

**Comment**

**Division of Fee**

[7] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.
2. **Division of Fees among Lawyers from Different Firms:** Pursuant to Virginia Rule 1.5(e), prior to referring or associating other counsels on a matter:

- the client must be advised of, and consent to, the participation of all lawyers involved;
- the terms of the fee division are disclosed to the client with client consent;
- the total fee is reasonable; and
- the fee division and client consent are obtained in advance of the rendering of legal services, preferably in writing.

3. **Malpractice Consideration: Other Counsel—Referring versus Association of Counsel:** Attorneys increasingly use both referral to and association of counsel. In an age of increasing specialization, many choose to seek assistance from other attorneys for reasons including the attorney is not competent to handle the matter, portions of a matter are outside of the attorney’s expertise, or the matter would overtax the attorney’s resources. In an effort to protect both the client’s interests and the lawyer’s own interests, the originating lawyer should take steps to properly engage other counsel and should explain what the originating lawyer’s role is and whether the originating lawyer will continue to have any duties and responsibilities once other counsel is brought in to the matter. These issues along with any fee the originating lawyer will receive should be discussed in writing and client consent should be obtained in writing.

   a. **Discuss and Obtain Client Consent:**

   (i) **Scope of Representation:** When referring or associating another attorney, will the originating attorney have any ongoing duties of representation as to that client or the matter, and if so, what are they? The scope of representation of the originating lawyer as well as the associated lawyer should be clearly communicated to the client in writing. An absence of information regarding any limitations on the scope of representation will result in the assumption that the originating lawyer continues to bear full responsibility for all aspects of the representation. If the originating lawyer will not have any duties once the matter is referred, then this, too, should be discussed and disclosed in writing.

   (ii) **Fees:** The originating lawyer may still take a fee or participate in the contingency fee, but that fee must be reasonable in light of the services performed by the originating or referring lawyer and the client must consent to it. While Rule 1.5 Fees (e) does not require it, it is best if the fees are communicated to the client in writing.

   (iii) The **Committee Commentary** under Rule 1.5 explains that paragraph (e) eliminates the requirement in the Virginia Code that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer’s continuing participation. The requirement in the Virginia Code was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is
acceptable only if prior to any referral, full disclosure, which must include a delineation of each lawyer’s responsibilities to the client, is made and the client consents. Note that the fee taken by the referring lawyer must continue to be reasonable under the circumstances.

- See Virginia LEO 1739: Confirming that Rule 1.5(e) eliminates the prior requirement that the lawyer must assume full responsibility for the client’s matter if the lawyer receives any fee from it. The opinion notes that the referring lawyer has a duty to assess the client’s legal matter and determine if a referral is appropriate or necessary. Also, the referring lawyer’s fee must continue to be reasonable in light of the circumstances. All prior opinions holding to the contrary are overruled.

4. **Vignette Analysis: Should Arnie be worried about a claim, too?** Yes! In the vignette, we do not know whether, and to what extent, Arnie and/or Mark discussed with the client the duties and responsibilities of the originating lawyer versus litigation counsel. If no delineation of duties was disclosed to the client, then the client is allowed to assume that both lawyers are responsible for all matters of representation unless and to the extent the lawyers can prove otherwise. Thus, the client has grounds for a cause of action for legal malpractice against both Arnie and Mark, who are jointly and severally liable to the client unless they can convince the jury otherwise.

B. **Qualification of the Administrator:** Mark was concerned about the order provided by the Clerk of Court, qualifying the daughter as administrator; however, he accepted the Clerk’s answer and moved on without completely following up on the issue. What should Mark have done?

1. **Professional Responsibility Considerations: Virginia Rule 1.3 Diligence**
   
   a. **Virginia Rule 1.3 Diligence**
      
      (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
      
      (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
      
      (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.
   
   2. **Vignette Analysis:** Our lawyer, Mark, did a thorough job of reviewing the order qualifying the daughter, and he questioned the absence of language in the order regarding a cause of action for survivorship. However, after talking to the clerk about it, he failed to follow up with the originating lawyer, Arnie, who regularly practices in that jurisdiction, and neither of them brought the matter before the court for clarification. This would have resulted in a ruling from the Judge regarding the sufficiency of the language in the order to bring both a survivorship claim and a wrongful death claim. It would have protected the client and the lawyers from the
running of the statute and the defense’s motion to strike the survivorship claim for lack of standing by the administrator.

3. **Getting It Right:** You can’t rely on the Clerk to get it right. If you question the language in an order and the Clerk disagrees with you, then the matter should be set for a hearing with the Judge for clarification. Otherwise, as in this case, the statute of limitations may run and then the defense brings a motion to strike. In plaintiffs’ causes of action, it is particularly important that the plaintiff have proper standing to sue and to be correctly qualified or designated as the appropriate representative in those cases where the original plaintiff is deceased or is a minor, or incompetent. These situations where the lawyer fails to properly identify or qualify the plaintiff are often the source of claims.

C. **Communication:** Lawyers routinely communicate by e-mail with one another, the court, and the client. What steps should be taken to ensure the communication is received and that it becomes part of the file?

1. **Professional Responsibility Considerations:** Virginia Rule 1.4 Communication, and Virginia Rule 1.16(e) Declining or Terminating Representation

   a. **Virginia Rule 1.4 Communication**

      (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests the information.

      (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

      (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

   b. **Virginia Rule 1.16(e) Declining or Terminating Representation…**

      (e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer’s possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client’s new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer’s file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer’s copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official
documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client’s refusal to pay for such materials as a basis to refuse the client’s request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

2. Virginia LEO 1791 (2003): States that a lawyer communicating by e-mail and telephone can still meet his/her duties of competence and communication without meeting face-to-face with the client.

3. Communicating by E-Mail: Things to consider when communicating by e-mail:

   a. Potential for Miscommunication: Communicating by e-mail has an upside and a downside. On the upside, e-mail is a quick, efficient way of communicating and documenting our actions or intentions. On the downside, it is often one-dimensional and does not give the reader an opportunity to discern subtleties, be they factual or tonal. Particularly, when e-mail is used as the sole method of communication and is not supplemented by oral communication, it can increase the potential for errors or misunderstanding.

   b. Potential for Mistakes: Communicating by e-mail is fast and efficient; however, it creates an expectation that the response will be immediate, and therein lies the problem. In order to meet the expectation of a fast response, the lawyer may respond too quickly without allowing adequate time to discern the facts and research and evaluate the problem.

   c. Electronic Retention Policy; Beyond the Paper Files: It is clear that one of the most important issues confronting businesses today is what sort of system should be implemented for managing, storing, and retrieving electronic information, and law firms are struggling with this issue too. Many firms are in transition and maintain documents both electronically and in paper form.

   d. Electronic File Retention: The increased importance and focus on electronic documents and e-mail is requiring that lawyers and firms know how to manage their electronic documents. While the majority of law firms have some sort of policy for closing and storing inactive “paper” files, these policies must also extend to electronic data and documents. The need for an electronic retention policy is critical for law firms. In addition, policies on e-mail retention should be established and effectively communicated to all lawyers and staff.
e. **How Long Should Electronic Documents and E-Mails Be Retained?**

Generally, whatever rule applies to hard documents should also apply to electronic documents as well. *(See Virginia LEO 1305 (1989) Confidentiality–File/Property of a Client: Disposition of a Client’s Closed Files.)* This LEO identifies a lawyer’s obligation to retain closed files. Additionally, *Virginia Rule 1.15(e) Safekeeping Property* requires all trust accounting records be retained for at least five years after the file is closed.* See also Virginia LEO 1818 (2005) Maintaining Paperless Client Files* advising that a client’s file may contain only electronic documents with no paper retention so long as the lack of a physical item is not prejudicial to the client.

4. **Backing-Up Your E-Mail:** In today’s law practice, lawyers and staff rely heavily on e-mail to conduct business. In light of such dependence, it is important that firms create backup copies of their messages to avoid an irreversible loss of this data. Whether you use a desktop e-mail client like Microsoft Outlook or Mozilla Thunderbird, or a browser-based webmail program like Gmail or Yahoo! Mail, either system can be vulnerable to losing the information. To prevent this, consider the following:

- **Desktop E-Mail Client:** If you are using a desktop e-mail client, and your desktop hard drive crashes, it may be difficult to recreate your e-mail, unless the firm is networked and has a back-up server, particularly for e-mail. Consider using an e-mail Exchange server.

- **Web-Based E-Mail Back-Up:** Archiving only with a webmail service may also have disastrous consequences if the service goes down. Backing up your e-mail messages if you use web-based e-mail requires creating at least one other duplicate archive and maintaining at least two sets of messages in case one set is destroyed. To do this, download copies of your messages to a local desktop e-mail client such as Mozilla Thunderbird or Microsoft Outlook. Then download your e-mails to the desktop. In order to do this you will need to sync the e-mails by using IMAP (Internet Message Access Protocol) so that when you change or delete an e-mail in one place, the duplicate will also be changed. For additional detailed information on this subject see, “You’ve got mail!– and lots of it,” ABA Legal Technology Resource Center, (7/2008) <www.abanet.org>.

- **Case Management Tools:** Note that newer case management software allows e-mail to be saved to the client file in the case management program. This is a very helpful feature because it allows the lawyer to maintain an electronic file that stores all of the e-mail relative to that client matter so that everything is in one electronic file. This allows for easier retrieval of information especially if a question comes up after a file is closed. *(For Case Management Information Comparison Chart, go to <www.abanet.org>)*

- **Redundancy, Backing-Up:** It is critical that the lawyer and firm continue to maintain redundancy of back-up. Even with a server in place, the firm should have a back-up protocol that regularly stores the information off-site. Also, if you do not have a server, or to the extent you save only to the hard drive on your desktop or laptop, you need to save to an external storage medium like a CD, a thumb drive or an external hard drive.
Tips for Maintaining a Professional and Streamlined E-mail Account

- Separate your work and home e-mail. There are many reasons this is a good idea: reserving an e-mail address for work only may help you reduce junk e-mail ("spam") at work, it'll make your record keeping easier, you're less likely to miss an important work e-mail, and it lets you avoid handing out your personal e-mail to strangers.

- Get another e-mail address just for all the junk e-mail you don't want coming in to either your personal e-mail or your business e-mail.

- Use your name or the name of your firm. “John.smith@host.com” looks a lot more professional than “bearsfan22@aol.com.”

- Avoid “free” e-mail services if possible. E-mail services such as Gmail, Yahoo, and Hotmail are great choices for personal e-mail, but they tend to look unprofessional – especially if the free e-mail host automatically inserts advertising at the bottom of your e-mails.

- Giving your e-mail address to on-line news sites and blogs to receive their regular updates can generate tons of e-mail notices in your in box. To avoid this problem, rely on Really Simple Solution (RSS). With RSS, you can subscribe to a site via their RSS “feed” and have that content streamed directly to an RSS feed reader of your choice. Open that and browse through it for items of interest rather than having lots of separate e-mails clogging up your in-box.

- Use your own domain name. If you have your own website already, there's a good chance your web host offers e-mail addresses at your domain name (e.g. smithlaw.com) as part of your hosting. If you don't already have a domain name for your organization or firm, consider getting one: they're inexpensive (under $10 per year at many registrars) and some of them offer e-mail free with the domain registration or at a minimal cost (e.g. GoDaddy, which offers fully featured e-mail at your domain name for just $10/month).

- Installing a good spam filter can help keep your e-mail box manageable. However, remember that it must be regularly checked for items that are important that might inadvertently get hung up in the spam filter.

- Manage your in-box by using folders, or labels, or your case manger. Some lawyers sort e-mail by subject matter or date, while others create folders that mirror their firm’s paper filing system. Routinely sorting e-mails into folders keeps your in-box manageable, and makes it much easier to locate specific messages at a later date, which can be very important.

- Think about records retention. Your records management solutions will need to handle e-mail as well as the other electronically documents generated in your practice.

- Keep up with your e-mail! A recent study by Hewlett-Packard and Sun Microsystems found that typical users expect a response to their e-mail within 24 hours. Thus, it's important that you check your e-mail at least daily and try to respond to all incoming e-mails within 24 hours – even if it's just to tell the person that you received the e-mail and will reply more thoroughly soon. If you're going to be out of the office for more than a day, most e-mail providers or software will allow you to activate an "Out of Office" mode that will automatically reply to incoming e-mails and inform the person that you're away from the office.

The source for many of these tips: “FYI: E-Mail For Lawyer,” by the ABA’s Legal Technology Resource Center <www.abanet.org>.
5. **New Coverages:** Advances in information technology have transformed virtually every industry, including the practice of law. While businesses across the economy have embraced this new technology, far fewer have sought to adequately protect themselves financially from the new exposures they face. Any business that has made the Internet and computerized information an essential part of its operations faces significant cyber exposures.

   a. **Risks:** “Many companies have failed to recognize that the threat to their businesses from cyber risks has escalated sharply on several fronts.

   - On the criminal front, organized gangs have adopted new technology and used it to launch more powerful attacks against corporate networks to extort protection payments or to steal confidential information or crucial intellectual property.

   - On the regulatory front, lawmakers have enacted stricter data-privacy standards, requiring businesses to take significant measures—and commit significant resources—to protect personal and financial data and to notify customers of security breaches.

   - On the litigation front, businesses face greater liability and the increased likelihood of class action suits should their data protection measures fail.

   - Finally, businesses face the very real possibility of a fatal loss of clients and customers should a security breach result in the exposure of confidential personal or client information.”


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**A survey of more than 500 large U.S. corporations and government agencies conducted by the FBI and the Computer Security Institute, found that:**

- 90% of respondents had detected computer security breaches within the past 12 months
- 80% acknowledged financial losses due to computer breaches
- 74% of respondents cited their Internet connection as a frequent point of attack
- 33% cited their LAN networks as a frequent point of attack
- 34% reported network intrusions to law enforcement officials
- 40% reported detections of external hackers and denial of service attacks
- 78% detected employee abuse of Internet access privileges
- 85% detected computer viruses
The survey showed a breakdown of dollar amount of e-business losses by type. Unauthorized insider access resulted in roughly $4.5 million. Financial fraud caused about $115.7 million in losses; telecom fraud, $6 million; theft of property information, $170.8 million; virus, almost $50 million; laptop theft, $11.7 million; inside net abuse, $50 million; denial of service, $18.3 million; sabotage, $15 million; systems penetrations, $13 million; and telecom eavesdropping, $345,000. Information from: “Managing Cyber Risk, Rough Notes”, by Phil Zinkewicz of AIG, (8/2003).

b. **Products Are Available:** “In the cyber insurance specialty market, products are available to meet the full range of new exposures. Those products include coverage for the loss or corruption of data caused by hackers, rogue employees, or malicious codes. Insurers also offer business interruption coverage for network attacks, such as denial-of-service attacks, and lost income if a network attack shuts down a corporate Website. Contingent business interruption coverage is available to handle losses caused by network outages due to problems at a service provider, including Web-hosting companies or outsourced e-commerce service providers.

On the liability side, insurers have developed coverage for exposures such as the release of confidential information, retransmission of a computer virus due to inadequate network security, intellectual property disputes, and even costs to restore public confidence after a cyber attack.

Insurers also offer coverage for emerging risks. Cyber extortion coverage, for example, covers the expenses arising from criminal threats to release sensitive information or to bring down a network. Notification coverage provides reimbursement for the cost of notifying customers, as required by law, after a security breach exposes personal information to possible fraud—an exposure that businesses would not have faced until just a few years ago.”


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<th>New Coverage for Data Protection</th>
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<tr>
<td><strong>Network Security Liability:</strong> Provides Liability coverage if an insured’s computer system fails to prevent a security breach or privacy breach.</td>
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<tr>
<td><strong>Privacy Liability:</strong> Provides liability coverage if an insured fails to protect electronic or non-electronic information.</td>
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<tr>
<td><strong>Data Recovery:</strong> Covers first-party expenses to recover data damaged on an insured computer system as a result of a security failure.</td>
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<tr>
<td><strong>Crisis Management:</strong> Covers first-party expenses to hire a public relations firm.</td>
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D. **Investigators:** Did the investigator violate the ethics rules by interviewing a witness who was an employee of a corporate entity that has legal counsel? Did the investigator violate
any ethics rules by falsely posting himself on Facebook as a nurse looking for work at the hospital where the alleged medical negligence took place?

1. **Professional Responsibility Considerations: Virginia Rule 4.1 Truthfulness in Statements to Others; Virginia Rule 4.2 Communication with Persons Represented by Counsel and Comments [7-8]; Virginia Rule 4.3 Dealing with Unrepresented Persons; Virginia Rule 4.4 Respect for Rights of Third Persons; Virginia Rule 5.3 Responsibilities Regarding Nonlawyer Assistants; and Virginia Rule 8.4 Misconduct**

   a. ***Virginia Rule 4.1 Truthfulness in Statements to Others***

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

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

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

   b. ***Virginia Rule 4.2 Communication with Persons Represented By Counsel***

   In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

   **Comments**

   [7] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization’s “control group” as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the ‘alter ego’ of the organization. The “control group” test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization’s counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization’s “control group.” The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization’s “control group.” If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

   [8] This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounseled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.
c. **Virginia Rule 4.3 Dealing with Unrepresented Persons**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

d. **Virginia Rule 4.4 Respect for Rights of Third Persons**

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

e. **Virginia Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

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

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

f. **Virginia Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

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

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

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

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

2. **Use of Investigators, General Rule:** As a general rule, lawyers are professionally responsible for the activities of their investigators, and the lawyers’ rules of professional conduct apply to the actions taken by the investigator on behalf of the lawyer. Consider **Virginia Rule 8.4(a) Misconduct**, which states that a lawyer may not violate or attempt to violate the rules of professional conduct through the acts of another. And **Virginia Rule 5.3 Responsibilities Regarding Nonlawyer Assistants** which establishes a lawyer’s duty of supervision with respect to “a nonlawyer employed or retained by or associated with a lawyer.” And the rule does not distinguish between agent and independent contractor relationships in determining a lawyer’s professional responsibility for the activities of one who is working at the lawyer’s direction. **Comment [1] to Rule 5.3** expressly states that a lawyer’s responsibility with respect to one who assists him/her apply regardless of whether the assistants are employees or independent contractors to the lawyer.

The ethics rules most likely restricting what a lawyer, and therefore, the lawyer’s investigator, can undertake as part of an investigation are those restricting who a lawyer/investigator can talk to under **Rule 4.2 Communication with Persons Represented by Counsel** generally prevents a lawyer/investigator from contacting a person known to be represented by another lawyer without that other lawyer’s consent. The purpose of the rule is to protect the layperson who may be susceptible to manipulation by the opposing counsel. See **ABA Formal Opinion 95-396 (July, 1995) Communications with Represented Persons** stating that the “anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguards the client-lawyer relationship from interference by the adverse counsel, and reduces the likelihood that clients will disclose privileged or other information that might harm their interests.”

3. **Ex parte Contacts: Rule 4.2 Communication with Persons Represented by Counsel** generally prevents a lawyer/investigator from contacting a person known to be represented by another lawyer without that other lawyer’s consent. The purpose of the rule is to protect the layperson who may be susceptible to manipulation by the opposing counsel. See **ABA Formal Opinion 95-396 (July, 1995) Communications with Represented Persons** stating that the “anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguards the client-lawyer relationship from interference by the adverse counsel, and reduces the likelihood that clients will disclose privileged or other information that might harm their interests.”

4. **Ex parte Contacts with Employees of an Organization:** It can be difficult to apply **Rule 4.2** when attempting to communicate with employees of corporate entities and
governments. Who within the organization does the rule apply to, are all employees off limits if the organization has counsel, or are only certain employees off limits, and what about past employees? The Comments to Rule 4.2 attempt to clarify how the rule will be applied to employees within the organization; however, these comments, along with state ethics opinions, case law, and changes in the ABA interpretation of the rule, are often inconsistent or incomplete and have resulted in a variety of different approaches from state to state and among federal courts, resulting in confusion. For a discussion of the various competing approaches and the advantages and disadvantages of those approaches, see Palmer v. Pioneer Inn. Assocs., Ltd., 59 P.3d 1237 (Nev. 2002).

5. ABA Approach: ABA Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

• See ABA Formal Opinion 95-396 (July, 1995) Communications with Represented Persons: This opinion, written prior to the Ethics 2000 revisions to Rule 4.2, barred any ex parte communication with a current employee regarding obtaining information material to a case.

• Impact of Ethics 2000 Revision to ABA Rules: Revisions to the ABA’s Ethics Rules 2000 eliminated an additional category of corporate employees that had formerly been off limits: “or whose statement may constitute an admission on the part of the organization.” Thus, the ABA Ethics 2000 revisions to the rule, by deleting one of the categories of employees that had been off limits, actually expanded the number of employees who are fair game for ex parte contacts by a lawyer/investigator.

• The ABA has not issued an ethics opinion on this issue since it revised Model Rule 4.2 in 2000.

6. Virginia’s Approach: Virginia’s Rule 4.2 and Comment [7] addressing which employees from a corporate organization are off limits to an opposing lawyer states as follows:
[7] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization’s “control group” as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the ‘alter ego’ of the organization. The “control group” test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization’s counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization’s “control group.” The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization’s “control group.” If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

- The *Virginia Rule 4.2* adopts a “control group” approach. The definition of “control group” as set forth in *Virginia Rule 4.2* is defined in *Comment [7]* by adopting the definition out of the *Upjohn* United States Supreme Court case.

- *Comment [7]* does not describe who “may be regarded as the alter ego of the organization.” This term usually comes up in cases involving plaintiffs’ efforts to pierce the corporate veil and hold others responsible for a corporation’s liabilities. It has also become subject to various court interpretations broadening the definition to expand who is off limits. (See Comments below.)

- The *Virginia* version of Rule 4.2 does not include any language similar to *ABA Rule 4.2* that would make off limits communication with those “whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.” However, there is clearly a need to protect those types of employees from *ex parte* communications by their corporate adversaries. To address this hole in *Virginia Rule 4.2*, or despite it, the state and federal courts in Virginia cases have in some, but not all, cases expanded the definition of “alter ego” to include as off limits those employees encompassed by the language found in *ABA Rule 4.2*, i.e., those employees “whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”

7. **Virginia Ethics Opinions:** There are several Virginia ethics opinions stating that a lawyer may contact a corporate adversary unless the employee could “commit the corporation to specific courses of action” or could be characterized as the corporation’s “alter ego.” *See* Virginia *LEO 801* (1986); *LEO 795* (1986); *LEO 530* (1983); *LEO 459* (1982); and *LEO 347* (1979). Other opinions providing guidance on where the line should be drawn include:

- *See* Virginia *LEO 507* (1983) stating a lawyer could not contact his corporate opponents “regional manager.”
• See Virginia LEO 905 (1989) indicating a lawyer initiating ex parte contacts must disclose their adversarial role and then try to “ascertain whether that employee feels that his employment or his situation requires that he first communicate with counsel for the corporate entity.” A lawyer concluding that the employee “feels” this way must presumably end the communication.

• See Virginia LEO 1537 (1993), stating that in a due process hearing with the school board over an Individualized Education Program, a lawyer could contact the school board employees who are not in a position to bind the school board to a course of action.

• See Virginia LEO 777 (1986), indicating that in litigation against a county board of supervisors, an attorney could contact other county employees if such persons are fact witnesses not charged with the responsibility of executing board policy.

8. Virginia Case Law:

State Courts: At least one reported state court decision in Virginia has relied on the Virginia ethics rules for guidance when deciding which corporate employees are protected by the ex parte contact rule. See Schmidt v. Norfolk & W. Ry., 32 Va. Cir. 326 (Va. Cir. Ct. 1994). In this case, the Judge refused to adopt an analysis of Virginia Rule 4.2 that would expand the rule beyond employees who are part of the “control group” or those employees whose actions are considered to be taken on behalf of the company as part of its “alter ego.” Id. at 327-28. In declining to follow the district court’s decision in Queensberry, the Judge stated that “while I have the greatest respect for the district judge who decided Queensberry, I conclude that he was incorrect in his interpretation of the application of Virginia’s Disciplinary Rules in this situation and therefore do not follow his guidance on the point.” Id. at 328. However, in another reported state court decision, the court, in attempting to reconcile both Virginia’s Rule 4.2 and the ABA’s version of 4.2, found that while the hospital’s nurses were not the “alter ego” of the hospital, they would still be off limits under either the Virginia precedent or the ABA approach. Dupont v. Winchester Med. Ctr., Inc., 34 Va. Cir. 105 (Va. Cir. Ct. 1994). “However, the nurses’ negligent acts may make the Medical Center vicariously liable in that the nurses may ‘act on behalf of the corporation or make decisions on behalf of the corporation in the particular area which is the subject matter of the litigation.’ LEO 905, which will control the destiny of the Medical Center vis a vis its potential liability to the Plaintiff. This LEO 905 language, which LEO 1504 characterizes as ‘dispositive,’ is substantially similar to that of the official comment to ABA Model Rule 4.2, and is in fact a functional analysis based upon either the employee’s relationship to the corporation (‘make decisions on behalf’), which is the traditional control group analysis, or the employee’s participation in the events giving rise to the cause of action (‘act on behalf of the corporation’), which is closely akin to the substance of the official comment to ABA Rule 4.2.” Id. at 108. Similarly, in two recent Virginia circuit court cases, Pruett v. Virginia Heath Services, Inc., 69 Va. Cir. 80, 85 (Va. Cir. Ct. 2005), and Yukon Pocahontas Coal Co. v. Consolidated Coal Co., 72 Va. Cir. 75 (Va. Cir. Ct. 2006), the courts have expanded the category of employees who are off limits under Virginia Rule 4.2 by expanding the definition of “alter ego” to include those employees whose actions could be imputed to the entity, seemingly moving toward the language in ABA Rule 4.2. (See Pruett, at 85. The
“alter ego” includes employees who act on behalf of the corporation performing the work to which they are assigned. The rationale is that only through such “hands-on” interaction with residents of the nursing home does the corporation carry out its purposes. The court noted, however, that a lawyer may have ex parte contact with current “control group” or “non-control group” employees on matters which do not relate to the acts or omissions alleged to have caused injury, damage or death. *Id.*

- Currently, under Virginia case law, it appears the two most recent circuit court opinions, *Pruett* and *Yukon*, have followed the analysis in *DuPont* and have expanded the definition of “alter ego” to employees whose actions would be imputed to the entity, thereby expanding the protection of *Virginia Rule 4.2* to include lower level employees. The analysis is still very muddy, and the Virginia Supreme Court has not weighed in on this issue.

9. **Federal Courts:** Federal courts in Virginia have applied a broader limitation than is called for under *Virginia Rule 4.2* on prohibiting ex parte contacts with low-level employees of an adverse corporate party. See *Lewis v. CSX Transp., Inc.*, 202 F.R.D. 464 (W.D. Va. 2001) (holding that Virginia federal courts should look to other federal law and not only the state ethics law in applying the several federal district court cases that were decided before Virginia adopted *Comment [4]* to *Rule 4.2* to clarify its position on permissible contacts with corporate employees. The court held that since any employee’s statement made within the scope of his employment could be used as an admission under Federal Rule of Evidence 801(d)(2)(D), such statements should not be made “ex parte” because the employee does have the power to bind the corporation. As a result, the court did not permit ex parte contacts with the non-managerial employees of CSX that had witnessed an accident or seen the condition of allegedly poorly maintained facilities.) Thus, there is some risk that a federal court in Virginia would restrict communications with present employees. Accord *Garland Gary Queensberry v. Norfolk & Western Railway Co.*, 157 F.R.D. 21 (E.D. Va. 1993) (granting motion in limine to prevent plaintiff’s counsel in FELA case from conducting ex parte interviews of defendant’s employees regarding work conditions and practices in car repair shop, citing Federal Rule of Evidence 801(d)(2) for proposition that such statements could be admissible as admissions and therefore bind the defendant). See also, *Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096 (E.D. Va. 1994), the court followed the analysis of the *Queensberry* case. But see, Restatement of the Law Governing Lawyers § 100 cmt. e & Reporter’s Note thereto (stating that employees or agents are not deemed off-limits “solely on the basis that their statements are admissible evidence”).

- **Note:** All of the federal cases were decided prior to the 2000 revisions to *ABA Rule 4.2* which placed off-limits “corporate employees whose statements were admissible as admissions against their corporate employer’s interest.” In fact, that is the very provision on which all three federal district court decisions rested. Now that the *ABA* has revised its *Rule 4.2* making those employees fair game for ex parte contacts, it is unclear how the courts might decide this issue.

10. **Former Employees and Rule 4.2:** Both the *ABA Rule 4.2 Comment [7]* and the *Virginia Rule 4.2 Comment [4]* indicate the rule’s prohibition does not extend to former employees or agents of the organization. The language of *Virginia’s Rule 4.2* does not explicitly address whether lawyers/investigators can interview an adverse party’s former employees. Instead, the applicable language is in *Comment [4]* to *Rule*
4.2, which states, “[this] prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization’s ‘control group.’” (Comment [4] to Rule 4.2) (emphasis added); see also Virginia LEO 1749 (2001) (permitting contact with former employees and holding that Virginia Rule 4.2 is substantially the same as the previous rule, Disciplinary Rule 7-103(A)(1) that permitted contact with former employees); Virginia LEO 1670 (1996) (stating that restrictions on ex parte contact cease to exist for an ex-employee because former employees can no longer speak for or bind the corporation by their acts or omissions); Virginia LEO 905 (1987) (interpreting DR Rule 7-103 and holding if employee leaves employer, then attorney can contact former employee); Virginia LEO 533 (1983) (permitting contact with former employees under Disciplinary Rule 7-103). But see Armsey v. Medshares Mgt. Servs., Inc., 184 F.R.D. 569 (W.D. Va. 1998) (decided under former DR 7-103, but reasoning that a former employer may be liable based on the statements, acts or omissions of a former employee that occurred during the course of employment and therefore ruling that ex parte communication was not proper).

Limitations:

- Virginia LEO 1749 (2001): On the subject of permitting ex parte contact with former employees, the opinion states: “The Committee believes that the only needed prohibition on contact with former employees is one of content restriction. The Rules of Professional Conduct already limit the content of an attorney’s communication with unrepresented parties; Rule 4.3 requires that the attorney identify his role in the matter and that the attorney provide no legal advice other than to obtain independent counsel. Thus, attorneys are directed by Rule 4.3 to curb their contact with unrepresented parties to prevent overreaching. Similarly, confidentiality protection can survive contact with former employees with a prohibition on seeking any information that may reasonably be foreseen as stemming from attorney-client communications.”

- Pruett v. Virginia Health Services Inc., et al, 69 Va. Cir. 80; 2005 Va. Cir. Lexis 151 (2005): In this case involving a nursing home and its administrators, nurses, and aids, the court found that ex parte contact regarding former employees, whether they be control group or non-control group, was permissible. However, the court noted that to the extent that any current or former employee has retained independent counsel with respect to the matters in issue in the suit, the lawyer may not contact the individual without first obtaining such counsel’s consent to speak to their client. Furthermore, in contacting any such former employees, the lawyer seeking ex parte contact must first advise any such person that he/she represents a party suing another and determine if the former employee has independent counsel, and if so, obtain consent of such counsel before talking to the former employee, and advise such person that he or she is not his client. The lawyer should not give advice to such persons, except to advise that they may wish to obtain a lawyer. Id. at 86.

11. **Receipt of Privileged Information:** Rule 4.4 prohibits lawyers/investigators from using methods of obtaining evidence that violate the legal rights of a third person. Thus, when a lawyer/investigator conducts an interview, he or she must take steps to prevent intended or unintended receipt of privileged information or documents. Should the lawyer/investigator receive privileged information then he or she may be required to take steps to...
alert the other side, see ABA F.O. 5-437 (2005), and in Virginia, may also have to follow instructions regarding disposition of the privileged material. See Virginia LEO 1702 (1997). The issue of how the information will be handled by the court, whether it was privileged or not, and whether the lawyer will have to withdraw, are issues for the court to decide. See, Maldonado v. State of New Jersey ex rel. Administrative Office of the Courts – Probation Division, 225 F.R.D. 120 (Dist. N.J. 2004); Camden v. The State of Maryland, 910 F. Supp. 1115 (Dist. Md. 1996); MMR/Wallace Power & Industrial, Inc. v. Thames Associates, 764 F. Supp. 712 (Dist. Conn. 1991).

12. Vignette Analysis: In a Virginia state court, a lawyer/investigator could probably interview a nurse who was not a supervisor and was not responsible for the “hands-on” patient’s care. As indicated in the Pruett case, the lawyer would want to advise the employee whom the lawyer/investigator represents in the ongoing litigation and should confirm that the nurse does not have independent counsel. In addition, the nurse should be made aware that the lawyer/investigator conducting the interview does not represent the nurse. See also Virginia LEO 905 (1989) regarding disclosure of adversarial role by lawyer and attempt to “ascertain whether that employee feels that his employment or his situation requires that he first communicate with counsel for the corporate entity.” A lawyer concluding that the employee “feels” this way must presumably end the communication. Finally, the lawyer/investigator should not pursue questions designed to revel confidential or attorney-client privileged information. See Virginia LEO 1749 (2001).

13. Pretext: Once a lawyer/investigator has determined who can be contacted, the next question may be what restrictions affect how the contact takes place. Covert or deceitful tactics used in interviews and investigations may be highly useful investigative techniques, but they present significant ethical questions when they are used in connection with legal representation. The professional rules most likely to be implicated by such investigative techniques are Virginia Rules 4.1, 4.3, 4.4, and 8.4(c).

<table>
<thead>
<tr>
<th>Professional Guidelines to Consider:</th>
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<tr>
<td>• Rule 4.1: Prohibiting false statement of fact and requiring disclosures as necessary to avoid assisting a criminal or fraudulent act.</td>
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<tr>
<td>• Rule 4.3: Prohibiting statement or implication of disinterest and requiring correction of perception about role.</td>
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<tr>
<td>• Rule 4.4: Prohibiting use of methods of obtaining evidence that violate the legal rights of a person.</td>
</tr>
<tr>
<td>• Rule 8.4(c): Prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation.</td>
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Generally, these rules provide that to avoid sanctions and ethics violations, the interviewer should affirmatively disclose his/her identity, interest and role. This virtually eliminates the ability to conduct an investigation under a “pretext,” although there are some limited circumstances associated with gathering evidence of ongoing conduct, which courts have recognized as outside the purpose of these rules. These circumstances are discussed below in the “Recognized Pretext Investigation Section.”
But see In re Conduct of Gatti, 330 Or. 517; 8 P.3d 966 (2000) (finding lawyer violated prohibition against deceit when posing as doctor in conversation with employees of medical records review company, indicating that any “exception” should await process for amending the applicable professional rules).

14. **Case Law:** In certain limited circumstances, the use of “covert or deceitful” conduct in an investigation does not run afoul of the professional rules or otherwise merit sanctions by the court (such as exclusion of evidence or disqualification of the lawyer). These circumstances where “pretext” investigations are permissible typically include: efforts to detect ongoing wrongful conduct—such as housing or employment discrimination, violation of court orders or agreements, or infringement—while any attempt to “manufacture evidence”—such as eliciting damaging statements about past conduct—will be sanctioned. A lawyer who is planning to use investigative techniques that include “pretext” should research the ethics rules, opinions and case law in his/her jurisdiction to determine the extent to which it is permitted.

- **Cases to Consider:**
  
  
  **Gidatex v. Campaniello Imports, Ltd.**, 82 F. Supp.2d 119 (S.D.N.Y. 1999). The court refused to exclude evidence obtained through use of an investigator posing as a customer to detect trademark infringement.
  
  **Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.**, 144 F. Supp.2d 1147 (S.D.S.D. 2001). The court granted a motion for sanctions arising out of defense counsel’s use of an investigator to pose as a customer of the plaintiff for the purpose of making audiotape recordings of conversation in anticipation of trial.

15. **ABA:** In **ABA F.O. 01-422** (2001) (“Electronic Recordings By Lawyers Without the Knowledge of All Participants”), the ABA Committee specifically abstained from addressing when investigative practice involving misrepresentations of identity and purpose nonetheless may be ethical. **ABA F.O. 01-422**, however, indicated that the “subject is discussed thoughtfully in David B. Isbell & Lucantonia Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791 (Summer 1995).” **ABA F.O. 01-422** at n.4. The opinion also referenced the “ethics of supervising investigators who use ‘pretext’ techniques to gather information” as discussed in *Apple Corps. Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456 (D.N.J. 1998), discussed below.

16. **Virginia LEOs:** **Virginia LEO 1765** (2003) (addressing a request for reconsideration of **Virginia LEOs 1217** and **1738**) addresses the use of covert investigation techniques, “investigative techniques that may involve deceit or misrepresentation, such as the undercover identities used by government investigations supervised by federal attorneys.” **LEO 1765** found that “intelligence and covert activities of attorneys working for the government are an appropriate exception under the new language of **Rule 8.4(c)**, with its additional language limiting prohibition only to such conduct that
‘reflects adversely on the lawyer's fitness to practice law.’” Thus, according to LEO 1765, when an “attorney employed by the federal government uses lawful methods, such as the use of ‘alias identities’ and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).” This LEO does not indicate whether such exceptions should extend beyond government attorney investigations. LEO 1765, however, cites and endorses the closing language of LEO 1738 in which “the committee contemplated there may be additional appropriate exceptions to the strict interpretation of former Rule 8.4(c).”

- See also Virginia LEO 1845 (2009) providing that it is not unethical for an investigator on behalf of the Virginia State Bar to engage in a “covert investigation” in an unauthorized practice of law complaint. The opinion states: It is generally known and very well accepted that law enforcement authorities, including government lawyers, are authorized to conduct or supervise undercover operations using deception to gather information about criminal conduct. This Committee has opined that lawyers involved in undercover activity or who supervise such activity are not acting unethically despite the prohibition against conduct involving fraud, dishonesty, deceit or misrepresentation reflecting adversely on the lawyer’s fitness to practice law. The Committee has also stated that although undercover investigations involve some elements of misrepresentation and deceit, the conduct does not reflect adversely on the fitness or character of the lawyer directing or supervising a lawful criminal investigation. The Supreme Court of Virginia has specifically approved a legal ethics opinion that recognizes a “law enforcement” exception to Rule 8.4(c). This “law enforcement exception” includes civil investigations using “testors” conducted under the supervision of government lawyers charged with investigation and prosecuting cases of housing discrimination. This Committee sees no principled distinction to be drawn between these types of investigations, in which undercover operations have been approved, and the UPL investigation presented in this hypothetical in which lawyers and agents of a governmental agency are charged by law with the investigation of conduct that is criminal or illegal.

- See also Virginia LEO 1738 (2000) which recognized the practical impact of prior Virginia ethics opinions that had prohibited a lawyer’s involvement in tape recording of phone conversations and acknowledged several exceptions. One exception was for lawyers supervising law enforcement investigations that use covert tactics (The committee noted that these tactics involve more deception and fabrication than just phone recording.) The Committee also recognized an exception for certain civil proceedings involving the conduct of undercover investigators and discrimination testers acting under the direction of an attorney in fair-housing discrimination cases. The Committee noted that the conduct about which you have inquired arises in the context where information would not be available by other means and without which an important and judicially-sanctioned social policy would be frustrated. These methods of gathering information in the course of investigating crimes or testing for discrimination are legal, long-established and widely used for socially desirable ends.

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

17. Philadelphia Bar Ass’n Professional Guidance Comm., Op. 2009-2, 3/0: The opinion states that lawyers or another on their behalf cannot mislead witnesses into granting access to Facebook pages. Employing a third party to befriend an adversarial witness through an online social network to obtain access to the witness’s personal pages constitutes deception because the plan involves concealing “the highly material fact” that any information collected from those pages would later be used to impeach the witness. As a secured area with limited access to invitees only, the witness has an expectation of privacy in her Facebook page. Gaining access through another, not the lawyer, even if no misrepresentations are made by the third party would still constitute a violation of Pennsylvania Rules of Professional Conduct 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 4.1(a) (knowingly making a false statements of material fact to a third person) and 8.4(a) (violating rules through acts of another). The lawyer would be accountable for the investigator’s conduct under Rule 5.3(c)(1), which makes lawyers responsible for behavior the lawyer “orders” or “ratifies.” Regarding admissibility into evidence, the committee left that issue to the court declining to opine on it. Finally, the committee indicated that it was not staking out new territory on the general subject of lawyers’ use of deception as a means of investigation.

18. Expectation of Privacy Eroding? Another consideration when determining whether an action by a lawyer/investigator would be considered covert or deceitful is whether it violates a legitimate expectation of privacy of the individual being investigated. Determining when there is “an expectation of privacy” is a matter of law for the court. There is concern among legal experts on this subject that one’s “expectation of privacy” is being significantly eroded by some of the more recent case law. However, development of this issue is beyond the scope of this outline and will have to be left for another seminar.

19. Discovery and Online Social Networking Sites: While these materials discuss the ethical limitations on ex parte communications and use of surreptitious means when investigating, it is important to remember that online social networking sites have become viable discovery resources for developing relevant evidence. A couple of resources on this subject include:


20. Vignette Analysis: It would most likely be unethical in Virginia for the lawyer/investigator to pose as a “nurse” looking for work to gain access to other nurses Facebook page. The facts in this vignette describe a communication between the investigator and the prospective witness that is deceptive because it omits the
material fact that counsel intends to use the information gathered in an ongoing legal case. It also involves gaining access to a protected website page where there is an expectation of privacy. It does not fall within any of the exceptions recognizing the use of covert or deceitful activities under the Virginia ethics opinions.

E. Disclosure to Client: What is the lawyer’s duty of disclosure to the client when an underlying error by the lawyer may have been the basis for a successful motion to strike? Does this create a conflict of interest that requires the lawyer to withdraw? What about blaming others for the problem?

1. Professional Responsibility Considerations: Virginia Rule 1.4 Communication; Virginia Rule 1.7 Conflict of Interest: General Rule and Comment [8]; Virginia Rule 1.16(a) and Comment [1]; and Virginia Rule 8.4 Misconduct

   a. Virginia Rule 1.4 Communication

      (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for the information.

      (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

      (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

   b. Virginia Rule 1.7 Conflict of Interest: General Rule

      (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

         (1) the representation of one client will be directly adverse to another client; or

         (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

      (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and

         (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

         (2) the representation is not prohibited by law;
the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

**Comment**

**Loyalty to a Client**

[8] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation—specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

c. **Virginia Rule 1.16(a) Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged….

**Comment**

[1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

d. **Virginia Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

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

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;

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

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

2. **Duty to Disclose:** To the extent the plaintiff’s lack of standing to bring the survivorship action was caused by the lawyers’ failure to have a proper administrator order entered by the clerk, there is the potential for a malpractice claim against the plaintiff’s lawyers. The lawyers in the vignette have an ethical duty under Virginia Rule 1.4 Communication and Virginia Rule 8.4 Misconduct to be forthcoming with information about the motion to strike and how it affects the plaintiff’s case. This should not be glossed-over. Rather, the client and the lawyers should thoroughly discuss the potential impact of only going forward on one cause of action, and the lawyer should disclose and discuss the facts that might give rise to a malpractice error on the part of the lawyers. This conversation should also be documented in writing.

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**Egg On Your Face? Delivering Bad News**

- Contact your malpractice carrier and the managing partner of your firm to discuss and get input on handling the problem.

- Do not avoid the client or delay the discussion; it only makes a bad situation worse.

- Do not mislead the client regarding what has occurred.

- Do not deliver the news of a potential mistake by voice mail or E-mail, instead schedule a time to meet with the client in person.

- Schedule adequate time to discuss problems, without interruptions.

- Do not gloss over the problem or potential error. Instead, provide the client with the necessary information to understand and appreciate what has occurred and what impact it may have on their case.

- Listen to the client.

- Blaming others for the error may backfire, thus, the lawyer should carefully consider the implications before making the allegation.

- Provide the client with a plan of action for dealing with the problem and clearly identify the client’s options.

3. **Conflict of Interest:** Under Virginia Rule 1.7 Conflict of Interest and Rule 1.16 Declining or Terminating Representation, the lawyer has a duty throughout the representation to continuously evaluate the potential for conflict. Should a conflict arise during the representation, then the lawyer must evaluate whether he or she can continue representation and should disclose the nature of the conflict to the client. In this case, the “potential for a legal malpractice claim” resulting from the failure to
properly qualify the administrator creates a potential conflict of interest. The lawyers need to evaluate this conflict to determine if they can continue to act in the client’s best interest providing competent and diligent representation. If so, the lawyers must fully disclose and discuss, and get the consent of the client. Virginia’s Rule 1.7 requires that the consent be memorialized in writing. While not required by the rules, in circumstances where legal malpractice occurring during the representation may be the basis for a “potential conflict,” it may be best to have the client consult with an independent lawyer before waiving the conflict.

- **Even if You Can Ethically Continue Representation, Should You?** As noted below, this potential malpractice error should be reported to your carrier. The lawyers and their respective carriers should discuss whether representation of this client by the lawyers should continue. This decision is very circumstance specific, and there are times when the lawyer should get out, even if they could resolve the conflict analysis and obtain the client’s consent. Additionally, the decision whether to continue on the case to try to “fix the problem” or to withdraw should always involve a consultation with an objective source such as your malpractice carrier and/or other legal counsel in your firm or legal community.

**F. Malpractice Coverage: Is there a notice and/or coverage problem where a lawyer is aware of a motion to strike that portends a problem, and the lawyer seeks new coverage with the firm with which he merged without reporting the facts or circumstances that may give rise to a claim?**

1. **Providing Notice to Your Legal Malpractice Carrier:** In the vignette, the lawyer should immediately report this situation to his malpractice carrier. Do not take a “wait and see” approach to potential claims situations. While the lawyer has not received a Motion for Judgment or a demand for damages, he has notice of facts or circumstances that could give rise to a claim. In order to protect his coverage under a claims-made policy, he needs to give written notice to the carrier as soon as he becomes aware of facts or circumstances that could give rise to a claim. If he waits, he could run the risk of having his coverage denied for a failure to timely notify the carrier. Additionally, by notifying his carrier early, there may be an opportunity for claim repair or an early involvement that will save costs and reduce any damages. See Chapter 19 entitled “Professional Liability Claims-Made Coverage,” by Timothy J. Gephart and Peter H. Thrane in the *Insurance Law Deskbook* published by Minnesota Continuing Legal Education.

   a. **Reporting: The Sooner, the Better.** Failure to give notice of the claim or potential claim may serve as a basis for the denial of the claim at a later time. If a question arises as to whether notice of a potential claim should be given to the carrier or not, the best course is to notify the carrier to eliminate any questions of compliance with the policy’s notice provisions. Most professional liability insurance policies require notification of any act, error or omission that could reasonably be expected to be the basis of a claim. The notice should be sent in writing. Many carriers will not surcharge for the mere reporting of a potential claim, and such reporting will serve to bind coverage for the claim. Additionally, the carrier can provide helpful insight on how to handle communication with the client once a problem or error has arisen, and the carrier can help provide resources to correct or remedy a situation where necessary.
2. Reporting Potential Claims Incidents on a Malpractice Insurance Application (Renewal or New): When obtaining a new professional liability policy, or even when renewing an existing policy, the application requires disclosure of any facts or circumstances that may reasonably be expected to give rise to a claim. Failure of the individual lawyers within the firm to provide this information at the time of application or the making of a false statement on the application can result in rescission of the policy and a denial of coverage. Most policies require an affirmative statement by the lawyer completing the application on behalf of the firm that all representations by the intended insureds in the application are true and accurate. If this turns out not to be the case, then it can be the basis for rescission of the policy and a denial of coverage.

G. Law Practice Management, Software as a Service (SaaS): What is SaaS and what practical and ethical concerns does it raise?

1. Professional Responsibility Considerations: Virginia Rule 1.6 Confidentiality; and Virginia Rule 1.16(e) Termination of Representation

a. Virginia Rule 1.6 Confidentiality

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is dearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

b. **Virginia Rule 1.16(e) Termination of Representation**

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer’s possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client’s new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer’s file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-
party communications; the lawyer’s copies of client-furnished
documents (unless the originals have been returned to the client
pursuant to this paragraph); transcripts, pleadings and discovery
responses; working and final drafts of legal instruments, official
documents, investigative reports, legal memoranda, and other attorney
work product documents prepared or collected for the client in the
course of the representation; research materials; and bills previously
submitted to the client. Although the lawyer may bill and seek to
collect from the client the costs associated with making a copy of
these materials, the lawyer may not use the client’s refusal to pay for
such materials as a basis to refuse the client’s request. The lawyer,
however, is not required under this Rule to provide the client copies
of billing records and documents intended only for internal use, such
as memoranda prepared by the lawyer discussing conflicts of interest,
staffing considerations, or difficulties arising from the lawyer-client
relationship. The lawyer has met his or her obligation under this
paragraph by furnishing these items one time at client request upon
termination; provision of multiple copies is not required. The lawyer
has not met his or her obligation under this paragraph by the mere
provision of copies of documents on an item-by-item basis during the
course of the representation.

2. **Software as a Service:** Software as a Service (SaaS) or “cloud computing” refers to a
category of software that’s delivered over the Internet to a web browser (like Internet
Explorer) rather than installed directly onto the user’s computer. The resulting data is
held by the third party service provider (or maybe by a data center provider by
companies like Amazon, RackSpace or other host), not on a computer or server
within the law firm. While the terms SaaS and “cloud computing” are relatively new,
the concept is not. Software has been delivered over networks for decades, including
through application service providers (ASPs) that rose to prominence in the 1990s
and then fizzled out with some of the tech companies that went under. You may
already be using some web-based applications in your practice, like online legal
research (Westlaw, LexisNexis, or Fastcase), Web-based email (Gmail, Yahoo, or
Hotmail), document creation or collaboration tools (Google Docs), and data backup
services (Mozy, i365, IBackup, Steel Mountain, and Carbonite). Many firms today,
both traditional and virtual, are considering switching from obtaining and loading
software on their own computers to web-based “software as a service” (SaaS)
platforms to facilitate their practice, particularly in the area of case management and
time and billing platforms. There are arguments both for and against using SaaS, and
taking a look at those issues before you make a decision to switch over is important.

a. **Benefits of SaaS:**

   - **Save Money:** They are more cost effective than designing your own
     program or modifying an existing program. Focus your technology
     budget on competitive advantage rather than infrastructure.

   - **Identified Cost:** Your investment in hardware and software is
     minimized. Costs for the SaaS model can be based on the number of
     users or the amount of data storage volume; either way, it is fairly
     easy to identify and budget for the service on a monthly/annual basis.
However, in order to get the best pricing, the contract terms are often three to five years.

- **Save Time:** There is no install, and the SaaS provider takes care of updates, including security updates, and is also responsible for data storage and retrieval.

- **Intuitive:** SaaS programs are typically more intuitive and easy to use than traditional software. However, because they are newer, they sometimes have more limited features than some of the older software programs.

- **Staying Current:** Gain immediate access to the latest innovations and updates at the provider’s expense.

- **Mobility:** SaaS products allow lawyers to access their software and their data from virtually any location seamlessly and without additional cost (as long as you have an internet connection). Because most SaaS is accessed through a Web browser, system requirements are minimal.

- **Service:** May get better service from vendor because of ongoing relationship. If you are considering SaaS, ask the vendor about a service level agreement (SLA). A good SLA should guarantee both a certain level of uptime, for the product, and a specific response time for technical and support service requests.

**Online Practice Management Software Programs (SaaS):**

b. **Concerns:** While there are benefits to using SaaS, there are also concerns:

- **Financial Stability:** You are entrusting your data to a third party, what if they go bankrupt or lose interest in providing the service?

- **Confidentiality and Security of Data:** If you are using a SaaS provider, make sure there is an appropriate level of security protecting your confidential data and information. Secure portals and secure transmission are key to protecting client confidentiality. Is the transmission of the data encrypted to preserve confidentiality? Are you using a safe password or even biometrics for access?

- **Privacy Protection under the Law:** Data stored online may have less privacy protection, both in practice and under the law. Under the Patriot Act, the federal government has been able to demand some details of your online activities from service providers and not tell you about it. (See case below.)
• **Dependence on Internet Connection:** Your ability to access your data is dependent upon the speed and quality of your internet connection. This may be a problem for lawyers working in a remote or rural location where internet access is less prevalent or reliable. Also, to assure continual internet connectivity, some firms may want to have dual network connections to the internet, but this is an additional cost for the firm.

• **Costs and Time to Migrate Data Back to the Firm or to Another Service Provider:** Realize that there are costs and time lost associated with having to move you data from one SaaS provider to another or back to the firm. Also, in your contract with the SaaS, make sure that you have a nondisclosure clause and indicate that all data is the property of the law firm and can be exported in a readable format upon demand of the firm. Also, reserve the right to delete the data.

• **Data Back-Up:** Make sure to understand and determine the level and frequency of data backup. Also, make sure there is adequate redundancy of data backup.

3. **Confidentiality and Ethical Considerations:** What are the lawyer’s ethical responsibilities when the client’s files will be stored on servers controlled by a third party and the client’s information will be regularly transmitted by the lawyer and the service provider over the internet? We know from existing ethics rules and opinions that lawyers have an obligation to act competently to protect the confidentiality of information relating to the representation of their clients, including protecting both open and closed client files. Also, this obligation of confidentiality survives the death of the client. *See* Virginia LEO 1207 (1989).

Additionally, in most jurisdictions, a lawyer may create and rely on an electronic file for the clients matter so long as it does not create a hardship for the client. *See* Virginia LEO 1818 (2005). Also, when a third party service provider is involved with handling confidential client information, be it a paper file or an electronic file, a lawyer must take reasonable steps to ensure that third parties will not gain access to such documents and will keep the information confidential. *See also* Virginia LEO (1989), disposal of files should be done in a manner that best protects confidentiality of the contents. Of course, these rules of protecting confidentiality continue to apply when considering the use of a third party vendor, like SaaS. Consider the following ethics opinions:

• **ABA Formal Opinion 95-398**, where the Committee recognized that “in this era of rapidly developing technology, lawyers frequently use outside agencies for numerous functions such as accounting, data processing, photocopying, computer servicing, storage and paper disposal and that lawyers retaining such outside service providers are required to make reasonable efforts to prevent unauthorized disclosures of client information.” The outside service providers would be considered to be non-lawyer assistants under Model Rule 5.3 which states that lawyers have an obligation to ensure that the conduct of the non-lawyer employees they employ, retain or become associated with is compatible with the professional obligations of the lawyer.
ABA Formal Opinion 99-413, although not specifically on point, does provide us with insight into the realm transmission of confidential information by use of electronic communications. The ABA committee stated: “A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint.” This is instructive as it recognizes the “reasonable expectation of privacy.”

Arizona: Opinion 05-04 (7/5) by The State Bar of Arizona's Committee on the Rules of Professional Conduct. In response to the following: How do we protect the confidentiality and integrity of client information while continuing to increase reliance on internet for … storage of documents? Ethical Rules 1.6 and 1.1 require that an attorney act competently to safeguard client information and confidences. It is not unethical to store such electronic information on computer systems whether or not those same systems are used to connect to the internet. However, to comply with these ethical rules as they relate to the client's electronic files or communications, an attorney or law firm is obligated to take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence. In addition, an attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed. In order to do that, an attorney must be competent to evaluate the nature of the potential threat to client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end. An attorney who lacks or cannot reasonably obtain that competence is ethically required to retain an expert consultant who does have such competence.

Massachusetts: Opinion 2005-4 (3/3/05) The Massachusetts Bar Association Committee on Professional Ethics issued the ethics opinion that “A law firm may provide a third-party software vendor with access to confidential client information stored on the firm’s computer system for the purpose of allowing the vendor to support and maintain a computer software application utilized by the law firm…”. “However, the law firm must ‘make reasonable efforts to ensure’ that the conduct of the software vendor (or any other independent service provider that the firm utilizes) ‘is compatible with the professional obligations of the lawyer[s],’ including the obligation to protect confidential client information reflected in Rule 1.6(a). The fact that the vendor will provide technical support and updates for its product remotely via the Internet does not alter the Committee’s opinion.”

The State Bar of Nevada’s Standing Committee on Professional Responsibility and Conduct in its Formal Opinion No. 33 (2006) recognized that attorneys are not required to absolutely guarantee that a breach of confidentiality cannot occur when using an outside service provider. Nevada’s opinion addressed the question of whether an outside party could be used to store files in digital format or if this would be considered a breach of confidentiality. In reaching its decision, the Nevada committee analogized storing digital files on an off-site server to storing paper documents in an off-site storage facility operated by a third party. In reviewing prior ABA opinions,
the Nevada Committee reiterated that, in light of those opinions and the changes to Model Rule 1.6, an attorney would not be held liable for a disclosure of confidential information so long as the attorney:

1. Exercises reasonable care in the selection of the third-party contractor, such that the contractor can be reasonably relied upon to keep the information confidential; and

2. Has a reasonable expectation that the information will be kept confidential; and

3. Instructs and requires the third-party contractor to keep the information confidential and inaccessible.

- New Jersey Advisory Committee on Professional Ethics: Opinion 701 (2006), regarding the electronic storage and access of client files, the New Jersey Advisory Committee on Professional Ethics opined that so long as an attorney uses “reasonable care” against unauthorized disclosure, the lawyer has satisfied his or her professional obligations. The standard of exercising “reasonable care” is met if “(1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data.”

- Vermont: Opinion 2003-03 (undated), “The Vermont Bar Association Committee on Professional Responsibility responding to the following question ‘Is the use of outside technical experts to retrieve computer files permissible and not a violation of a lawyer’s duty of confidentiality to the client?’ concluded that ‘It is appropriate for a lawyer to use outside technological support in managing case files when it is done in furtherance of carrying out the representation of the client. It is the expectation of the Rules that the lawyer will actively manage the non-lawyer to protect the confidentiality of the client’s information and should a significant breach occur, the lawyer would need to disclose such a breach to the client.’ Additionally, ‘A lawyer may engage an outside contractor as a computer consultant to recover a lost data-base file, which contains confidential client information so long as: The lawyer clearly communicates the confidentiality rules to the outside contractor; the contractor fully understands the confidentiality rules and embraces the obligation to maintain the confidentiality of any information obtained in the course of assisting the lawyer; and the lawyer determines that the contractor has instituted adequate safeguards to preserve and protect confidential information.’”

4. Case Law, Expectation of Privacy May be Eroded where Documents Stored with a Third Party who has Audit or Monitoring Authorization: The recent case of Warshak v. United States, 490 F.3d 455 (6th Cir 2007), although not dealing directly with the storage of documents on a third-party server, addressed the question of whether attachment to a network diluted or eliminated a person’s expectation of privacy. According to the Warshak court, “individuals maintain a reasonable expectation of privacy in e-mails that are stored with, or sent or received through, a
commercial ISP” (Warshak at 473). This court also recognized that a party can waive the expectation to privacy depending on the terms of the user or other agreement with the outside provider. Reviewing other cases that had considered this question, the court stated “in instances where a user agreement explicitly provides that e-mails and other files will be monitored or audited as in Simons, the user’s knowledge of this fact may well extinguish his reasonable expectation of privacy. Without such a statement, however, the service provider’s control over the files and ability to access them under certain limited circumstances will not be enough to overcome an expectation of privacy, as in Heckerkamp. “(Warshak at 473.) Thus, the exception to the expectation of privacy occurs where the third party clearly provides in its user agreement or other license that the information will be monitored and audited.

5. **You be the Judge: The Debate over Protecting Confidentiality.** There has been much discussion in the legal field over whether lawyers should convert to using SaaS. Those against it argue that lawyers should not be the first ones to test the water. Rather, let the kinks and problems rise to the surface and be resolved by other businesses. At the heart of the debate is the fact that lawyers need to be very protective of their data and that of their clients’, and putting it in the hands of a third party is a loss of control that should not be risked. And this may be sage advice. On the other hand, proponents of SaaS say that a strong case can be made that data stored in the “cloud” is at least as safe and secure, if not more so, than data stored locally. Proponents argue that most SaaS vendors use sophisticated data centers to house their customer’s data. These data centers feature elaborate, redundant security and backup systems to ensure that data is protected from both accidental loss and unauthorized access. The technology and the expertise typically employed by SaaS vendors are considerably greater that one would find at most law firms. So educate yourself and carefully consider the pros and cons before you decide what’s right for your firm and your clients.

6. **Reasonable Steps to Protect Confidentiality:** The ethics opinions and court cases indicate that attorneys must exercise their professional judgment in taking reasonable steps to protect the confidentiality of their client’s information. When a lawyer selects any SaaS provider, the terms of the user or license agreement will be critical in protecting the confidentiality of the data and determining whether or not there is a reasonable expectation of privacy while using the service. It is very important that the lawyer diligently explore the steps that will be taken to prevent loss of the data and to protect the confidentiality and security of the data. In any agreement with a SaaS provider, the steps to prevent the loss of data and to protect confidentiality should be identified and included in writing.

<table>
<thead>
<tr>
<th>Questions to Ask Before Using Any SaaS Vendor:</th>
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<tbody>
<tr>
<td>1. How many lawyers are currently using your product?</td>
</tr>
<tr>
<td>2. Do you offer a trial period for your product?</td>
</tr>
<tr>
<td>3. What sort of training is available for customers?</td>
</tr>
<tr>
<td>4. How often are new features added to the product?</td>
</tr>
<tr>
<td>5. What hours is your tech support available?</td>
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</tbody>
</table>
6. Do you offer a Service Level Agreement?

7. What types of guarantees and disclaimers of liability do you include in your terms of service?

8. Who owns the data once it is transferred to the service provider?

9. Can I remove or copy my data from your servers in a non-proprietary format?

10. Who has access to your data and under what circumstances? (Restricting access is critical to preserving expectation of privacy.)

11. If you terminate the service, how is your data returned to you?

12. If you terminate the service, what happens to your data on the provider’s servers?

13. Can you also maintain a copy of your data locally?

14. Where does the data reside and who owns those servers, the vendor or another third party? Is it inside or outside of the U.S.?

15. What happens to the firm’s data if the company fails?

16. What steps does the provider take to protect against unauthorized access to the data it stores? These terms should be in writing.

17. Has there ever been a security breach?

18. Does the provider have a policy to ensure confidentiality? These terms should be in writing.

19. How is your data backed up?

20. Do you require a contractual agreement for a certain length of service?

21. What is the pricing history of the product, how often have rates been increased?

22. Are there any incidental costs I should be aware of?

If you obtain satisfactory answers to these questions, then it is likely that you have satisfied your professional obligations and responsibilities in selecting a service provider to comply with the requirements of the applicable rules of professional conduct. The above questions are from two sources: “The Ethical Implications of Online Software,” by Nerino J. Petro Jr., ABA’s General Practice Magazine, 2008 <http://www.abanet.org/genpractice/magazine/2008/jun/onlinesoftware.html> and “The ABCs of Cloud-Based Practice Tools,” by Joshua Poje, ABA’s Law Practice Today, (January 2010) <www.abanet.org>.

7. **Additional Information:** For more information on this subject see the following articles:


“WebComputing – I want to Believe but.,” from Grant Griffiths’ Home Office Lawyer blog.

“Software Promises No Longer a Pipe Dream,” written by Wayne Smith and Mark Manoukian and published on Law.com’s Legal Technology.


H. Multi-Tasking from the Client’s Perspective: Does it raise client concerns that they are not receiving your exclusive attention and also ethical concerns of confidentiality where as in this vignette the lawyer is talking on a cell phone in a public area?

1. Professional Responsibility Considerations: Virginia Rule 1.1 Competence; Virginia Rule 1.3 Diligence; and Virginia Rule 1.6 Confidentiality (a)

   a. Virginia Rule 1.1 Competence

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

   b. Virginia Rule 1.3 Diligence

      (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

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

c. Virginia Rule 1.6 Confidentiality (a)...

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)....

2. Multi-Tasking: It’s here to stay as a way of life; however, lawyers and staff have to be careful about what tasks can safely be completed in a multi-tasking environment and what tasks require single-minded focus and concentration. A failure to appreciate this can easily result in a mistake or error. Much of the work performed by lawyers and their staff requires uninterrupted focus. Numerous claims have resulted from court orders that were not carefully and thoughtfully reviewed or contracts that were substantively deficient because of interruptions.

a. Less Efficient: Numerous studies have confirmed that multi-tasking is a less efficient use of time when working on complex tasks that require in-depth thought. Each time you shift away from and back to the project, it takes additional time for the brain to shift back into the “rules” that apply to that project. In order to avoid the tendency to continuously multi-task, create blocks of time for substantive projects and eliminate interruptions like the phone and e-mail.

Reducing the Risks of Multitasking

Tips for controlling technology and reducing multitasking mistakes: Thomas Shumate in his article “Computers, Tequila and Hand Guns: Controlling Technology So It Doesn't Control You”, suggests the following:

• **Double-Check Everything.** Wise carpenters follow the adage, “measure twice, cut once.” In today’s world, that adage would more aptly state: “check twice, click once.” Check to make sure that your email is directed to the proper recipient. Check to make sure that you are saving your document in the correct place. Think long and hard about hitting the delete button. If more of us followed this simple advice, the manufacturers of heartburn medication would be put out of business.

• **Slow Down.** If it is true that thinking is the source of all power, then not taking time to think must be the source of that powerless feeling you get when you make a technology-related blunder. Just because technology allows you to do some things faster does not mean that you should do so. Remember, whether you are traveling on the interstate or on the information superhighway, speed kills.

• **Set boundaries.** While your particular situation may not allow you to remove the “electronic leash” at night, on weekends, or even while on vacation, you have to carve out some time for yourself. It will allow you to recharge which will make you a happier and more productive worker. Even if you do not do it for yourself, do it for your family. They deserve it.
• **Schedule it.** Rather than checking your email or voice mail in Pavlovian fashion every time your email alert chimes or your telephone light starts flashing, schedule times throughout the day to check them. This will allow you to focus your entire effort on the task at hand rather than wasting time constantly “cycling back” or reorienting to the previous task.

• **Monotask.** Dr. Renee Marois from the Marois Laboratory on Human Information Processing at Vanderbilt studied brain activity and found that when participants were given two demanding tasks at the same time, the second task was postponed or “queued” until the first was completed. This is particularly true when the tasks involved the same part of the brain or complex tasks. This processing delay results in “inattention blindness” which can cause us to miss critical information when multi-tasking. As a result, some of the most productive attorneys are professed “monotaskers.” They realize that it is better to do one thing well than to do many things poorly. And if the science is not convincing enough, consider the ethics involved. If your client is paying for your time, shouldn’t it get the benefit of your undivided attention?


3. **Traveling Office:** Your traveling office shouldn’t be a circus for others around you who might be watching and listening. Lawyers and staff must always be mindful of protecting confidentiality under **Virginia Rule 1.6.**

a. **Working Remotely:** In today’s world, with the capacity to electronically access everything from e-mail to files and documents, lawyers have tremendous flexibility in choosing where and when to work. However, just as in a traditional office, lawyers must be careful when working remotely to maintain and safeguard client information and confidentiality. Before using remote access and wireless access, appropriate security should be in place on your laptop or PDA. Firewalls, passwords, and antivirus software should be part of the set-up when working outside a traditional office. If you will be working remotely on a regular basis, additional security can be achieved by using a virtual private network (VPN). A VPN helps create a secure private network for your information. Thus, if you will be regularly working outside the office, it may be best to dedicate a laptop to for that purpose and use a VPN. For resources on this subject, see: “Keep Your Data Cool in Wi-Fi Hot Spots,” by Brett Burney, *Legal Technology*, <www.law.com> (July 18, 2006).

b. **Use of Cell Phones: Being Caught in Public.** The use of cell phones for conducting business has become commonplace, but lawyers need to safeguard against having conversations in public places where they can be overheard (the courthouse, the elevator, the lobby, the airport, the grocery store, the gym, etc.), thereby risking client confidentiality. Similarly, for clients taking calls on a cell phone in a public place where they may be overheard, they need to be reminded about the possibility of compromising confidentiality and/or waiving the attorney/client privilege. With such prolific cell phone use, it becomes easy for lawyers and clients to forget where they are and who may be listening.

c. **Mobile Technology:** Mobile technology, like your laptop and your Smartphone, should make you more efficient but not a slave to technology. Use it wisely and set appropriate boundaries. As seen in this vignette, nothing
signals your inattention and disrespect to an individual or group more than interruptions from your SmartPhone or being glued to your laptop when you should be engaging with those present.

What Clients Find Annoying

- Not Returning Phone Calls
- Not Replying to E-mails
- Making Clients Wait in Reception
- Ignoring Client/Staff Incivility
- Dropping Names to Impress Others
- Not Clarifying for the Client
- Not Delivering on Promise of Performance or Outcome
- Not Communicating During Periods of Long Inactivity
- Failing to be Prepared
- Sending a Very Large Bill without Warning or Explanation


I. Client Expectations: Based on the initial settlement range that this client discussed with the lawyers, she felt sold out at the mediation when the settlement offer was much lower than the anticipated range. What should the lawyer do to prevent this situation?

1. Professional Responsibility Considerations: Virginia Rule 1.1 Competence and Comments [2a] and [5]; and Virginia Rule 1.3 Diligence and Comments [1-2]
   a. Virginia Rule 1.1 Competence

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

   Comments

   Legal Knowledge and Skill

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

   Thoroughness and Preparation

   [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.
b. **Virginia Rule 1.3 Diligence**

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

**Comments**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer’s workload should be controlled so that each matter can be handled adequately.


Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client’s needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client’s interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

2. **Managing Client Expectations:** Fundamental to practicing law and representing clients is the ability to effectively manage client expectations. Regular communication with the client is key to this process, and it should occur throughout the representation.

- **Just Say No:** The first opportunity you have to access this issue is when screening a new client. Always determine what the client wants to achieve from the representation. Specifically ask them the question and listen to the answer. If their goals are unrealistic and not likely to change, even with education from the lawyer regarding what would be a realistic outcome, then decline the case. If you and the client are able to agree on the goals of the case, then write it down because you may need it later as documentation of what the expected outcome was and as a reminder for the client who has lost focus.

- **Under Promise, Over Deliver:** Also, whenever you inform the client of the possible outcome, it is important not to overpromise on the potential results. No one has ever been sued for getting the client better results than promised.

- **Lost Focus:** Sometimes during the representation, the client gets caught up in the battle and loses focus regarding what they want to achieve. When this
happens, and the settlement offer is on the table, remind your client of their original goals and how the current settlement or deal accomplishes those original goals.

- **The Sell Out:** As the case develops, it is often necessary to adjust the original expectations. If the lawyer has not been regularly communicating with the client about developments in the case, an abrupt change in outcome can feel like their lawyer has sold them out to the other side. Regular communication on the development of the case can help avoid this problem.

3. **Vignette Analysis:** The client in the vignette felt “sold out” by the lawyer in the mediation. It appears that the lawyer did not do a good job of communicating the developments in the case, how those developments could affect the outcome at trial, and what the risks of going to trial could be on the case. Further upsetting the client was her feeling that she did not have the lawyer’s undivided attention at the mediation. The mediation may have been just another day on the job for the lawyer; however, for the client, it was an extremely important event that deserved the lawyer’s undivided attention. Frankly, from the client’s perspective, this may be more of the reason for pursuing a malpractice claim or an ethics complaint than the actual “alleged error.”

II. **“YOU REMEMBER, I’M SURE”**

**Facts:**

Our lawyer is disappointed in how frustrating it is to be a solo practitioner. She distinctly remembers that other solos told her that it would be so rewarding to run her own law practice, to be her own boss and to not have to answer to anyone. Well, now she’s not so sure about the so-called “rewards.”

She thought the year was going really well. She was working hard to build her new practice and increase her client base by focusing on some new marketing strategies and specific improvements. Realistically, she knew from the beginning that she wasn’t going to win “Super Lawyer of the Year” or anything, but she was definitely going to give it her best shot.

For instance, in January, she joined a lead-sharing networking organization where a group of professionals meet once a month to share leads on potential clients. It’s a national organization, and the “lead exchange” concept seemed like an efficient way to market her practice. She is the only lawyer in the group, and during the meetings, the members take turns describing who they are and what they do. She is looking forward to generating some new clients from the referrals, and she also has some clients who might find the services of the other professionals in her group very helpful, particularly the financial planning services.

Then, in March, one of her Rotary contacts asked her to join the board of directors of a local non-profit hospice foundation. He’s the Executive Director of the hospice foundation, and she recently did some estate planning for him. She is very excited about the opportunity. She fully realizes that the board may ask her to do a little pro bono legal work for them here and there, but it just seems like an offer she can’t turn down. It’s a great charitable cause, she can get her name out in the community, and she can make some new potential client contacts as well.
But then she had some issues with her secretary. She had agreed to help her with her pending divorce. There were no kids, so no custody or support issues, so she didn’t think it was a big deal. But she later found out that the secretary was using law firm letterhead—with her permission—to send out official-looking and harassing letters to her soon-to-be-ex-husband’s employer. And THEN she learned in some of the discovery that her secretary had previously been convicted of forging and uttering in another state. Needless to say, she is now her FORMER secretary. She has since hired a new type of legal assistant, a “virtual assistant.” She is a wonderful paralegal who is willing to work from home as an independent contractor. It saves significant overhead, it’s less of a personnel hassle, and her work hours can be adjusted depending on the work load. Seems like a win-win for both of them!

But now some other problems have come up. About two weeks ago, she got a call from Mrs. Talbot, the administrator of one of the estates that she’s handling. Mrs. Talbot told her that the settlement of her mother’s estate was taking too long and that her services as the lawyer were no longer needed. The lawyer thought that things were going along as scheduled with no unreasonable delays. And that it was really ironic because the mother had been dead for more than 10 years before the administrator had even attempted to qualify. And the lawyer thinks something suspicious is going on because she also got a call from one of the beneficiaries who wondered why three of her mother’s bank accounts were closed after her death but ultimately unaccounted for in the estate’s inventory. The accounts total about $35,000. The records are really old and outdated, so it’s taken our lawyer a while to figure it all out with the banks. And she’s not 100% certain, but it looks like the administrator may have been the one who withdrew the money. There are four beneficiaries, including the administrator, and they’re all siblings. The money’s gone no matter what, and these accounts weren’t included in the inventory. Should she tell the other beneficiaries about the missing funds? Or should she first confront the administrator about her suspicions? And does it even matter now that she’s been “fired” by the administrator? And does she have a duty to update the inventory?

And yesterday, she got a call from another client. This client is really upset because her ex-husband recently passed away and she was supposed to be the beneficiary of his life insurance policy. Our lawyer had negotiated that for her three years ago in her divorce settlement. The ex-wife found out that her ex named his new wife as the beneficiary before he died and now she’s left with nothing. No spousal support and no insurance proceeds. And she’s blaming her lawyer for not following up on it. Once the representation ended, how was our lawyer supposed to keep track of that? And the client is also upset because she just tried to refinance a vacant warehouse that she thought she received in the divorce settlement, and the bank told her she doesn’t own it! As our lawyer recalls, the divorce negotiations were pretty complicated with numerous pieces of property including some rental property, several warehouses, lots of mutual funds and stocks and various accounts and assets going back and forth. Most of the negotiating was done by email, and it took a while to nail it all down. When the husband finally agreed to her client’s spousal support amount, they were excited and anxious to get the property settlement agreement finalized and signed by everyone as quickly as possible. Our lawyer had her assistant prepare the PSA, and after some minor revisions, our lawyer reviewed the final draft with her client, and they all signed off on it. But somewhere between the negotiations and the final document, one of the warehouses the client was supposed to get ended up on the husband’s schedule. Our lawyer is not sure how the mistake occurred. Our lawyer thought the wife was getting it, the wife thought she was getting it, but it actually ended up as his. And it even looks like all this time, the ex-wife has been paying the real estate taxes and insurance. And now the ex-husband is dead, so this may be a real mess to straighten out.
All of this makes her wonder why she ever wanted to be a solo practitioner in the first place! Can you see why she is so frustrated?

QUESTIONS

A. Lead-Sharing Networking Organization: In order to jump-start the marketing efforts of our lawyer’s new solo practice, she joined a national lead-sharing networking organization where referrals are traded among the member professionals. Can our lawyer ethically participate in this type of organization? What issues should be considered?

B. Non-profit Board Work: In another attempt to market her new practice, our lawyer has agreed to serve on the board of directors of a local non-profit hospice foundation. What issues should our lawyer consider before assuming this role, especially in light of her comment that, “Now I fully realize the board may ask me to do a little pro bono legal work for them here and there, but it just seems like an offer I can’t turn down. It’s a great charitable cause, and I can get my name out in the community, and make some new potential client contacts as well!”?

C. Law Firm Staff Issues: Our lawyer uncovers some questionable information, specifically a past criminal conviction, about her assistant while she is helping her with her divorce. How can you prevent this from happening in your own office? And what are the challenges of working with a virtual assistant, particularly in light of the ethical considerations involved in outsourcing legal work in general?

D. Missing Funds: After being fired by her client, our lawyer finds that approximately $35,000 is missing from the inventory of one of her estate files. She suspects that the administrator may have improperly taken the money. What are her duties to the administrator? To the estate? Does it matter now that she has been “fired” by the administrator? Does she have a duty to update the inventory?

E. Domestic Issues, Specifically Post-Divorce Wrap-Up Issues: Our lawyer is being blamed for not following up on ex-husband’s obligation to maintain a life insurance policy for his ex-wife and for failing to include a vacant warehouse on the wife’s schedule of divided marital property. How can the lawyer be responsible for the maintenance of the life insurance policy for the ex-wife? And how could our lawyer have avoided the drafting mistake in the property settlement agreement regarding the vacant warehouse?

F. Solo Practitioner Issues and Challenges: Being a solo in the practice of law brings its own unique challenges, rewards, and as seen in the vignette, its own set of frustrations. What challenges are unique to solos and how can you avoid being “alone” in the practice of law?

A. Lead-Sharing Networking Organization: In order to jump-start the marketing efforts of our lawyer’s new solo practice, she joined a national lead-sharing networking organization where referrals are traded among the member professionals. Can our lawyer ethically participate in one of these organizations? What issues should she consider?
1. **Professional Responsibility Considerations: Virginia Rule 1.6(a); Virginia Rule 1.7(a); Virginia Rule 5.4(c); Virginia Rule 7.2(c); and Virginia Rule 7.3(d) and Comments [6-7]**

   a. **Virginia Rule 1.6(a) Confidentiality of Information**

   (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)….

   b. **Virginia Rule 1.7(a) Conflict of Interest: General Rule**

   (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

   (1) the representation of one client will be directly adverse to another client; or

   (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer….

   c. **Virginia Rule 5.4(c) Professional Independence of a Lawyer**

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

   d. **Virginia Rule 7.2(c) Advertising**

   (c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may:

   (1) pay the reasonable costs of advertisements or communications permitted by this Rule;

   (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

   (3) pay for a law practice in accordance with Rule 1.17….

   e. **Virginia Rule 7.3(d) Direct Contact with Prospective Clients and Recommendation of Professional Employment**
(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate….

Comments

Lawyer Recommendations

[6] Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and publicity and personal communications from lawyers may help to make this possible. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations except that the lawyer may pay for advertisements and other public communications, for participation in legal referral services, or for lawful prepaid legal services plans or legal services insurance. A lawyer may accept compensation from a nonprofit organization furnishing legal services without charge to laypersons in furtherance of political or associational expression.

[7] The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

2. Virginia LEO 1846 (“Is it Ethical for a Lawyer to Become a Member of a Lead-Sharing Organization?”) reviewed a similar issue based on the following set of facts: An attorney wishes to become a member of a lead-sharing organization which can be either a for-profit or not-for-profit association in which members pay a $500 membership fee and meet once a week. The membership fee is not distributed, in whole or in part, back to any member, but rather pays the administrative costs of the organization and goes towards the profit of the association. Part of the oath associated with membership is that each member will maintain a high degree of professionalism in dealing with their leads, including, inter alia, timeliness and quality of services. Membership is often dependent on the number of leads a member passes. During the meetings, the members take turns giving a 30-second promotional, stating any of the following: their name, professional title, industry, place of employment and who would represent a “good lead” for them. On an alternating basis, one member per meeting gets to present a fifteen-minute presentation in which they can discuss any aspect of their industry they deem appropriate. The presentation may be educational, a plea for business, etc. The meeting then involves members passing leads to other members. These leads represent potential clients and may have been actively solicited by the lead-passing member whether they know of a particular professional in the lead-receiving member’s industry. The lead-receiving member has no control over
how the lead was generated, but the lead-receiving member retains full control over their representation of the client, and need not disclose any details of that relationship to any other person or entity. At the end of the meeting, the 30-second promotional process is usually repeated.

The Committee’s Analysis in VA LEO 1846 is as follows:

(a) Not a Lawyer Referral Service: The committee begins the opinion by stating that this arrangement does not fall within the parameters of a lawyer referral service as described in Virginia LEO 1348 (“Lawyer Referral Service: Propriety of Nonlawyer Screening Calls and Referring Potential Claims to Attorney Members”). And the Committee does not want to discourage the use of lawyer referral services. However, the arrangement as described in the facts given above may “create undisclosed conflicts of interest, compromise a lawyer’s professional independence and risk violation of the solicitation rules.”

(b) Reciprocal Referrals are “quid pro quo” payment for services: The analysis of this issue begins with a review of Virginia Rule 7.3(d) and Virginia Rule 7.2(c) and the basic prohibition against a lawyer giving anything of value to a person or organization for securing employment by a client or as a reward for having made a recommendation resulting in employment by a client. This prohibition is designed to prohibit lawyers from compensating another for recommendations or as a reward for influencing a prospective client to employ the lawyer. The Committee considers the “leads” or referrals exchanged among the members of this group to be things of value. The Committee finds that this practice of reciprocal referrals amounts to quid pro quo payment for services, in violation of Virginia Rules 7.3(d) and 7.2(c). The lawyer, in this hypothetical, would be giving something of value to another organizational member in the form of return referrals as a term of membership. When membership in a lead-sharing organization is dependent on the number of leads a member passes, the Committee finds that this type of membership requires the lawyer to exchange something of value for the referrals.

(c) Potential Compromise of Lawyer’s Professional Judgment: The rationale against permitting a lawyer to make such exclusive or quid pro quo referrals is that this activity may compromise the professional judgment of the lawyer. Virginia Rule 5.4 precludes the lawyer from allowing another person who recommends the lawyer from directing or regulating the lawyer’s judgment. A lawyer who is beholden to an organization may be obligated to accept a case he is not competent to handle, or conversely, a lawyer may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client’s needs. Either of these situations may put the client’s interests at risk.

(d) Passing of Leads also Creates Potential Conflicts of Interest: The prior analysis deals with a lawyer’s acceptance of leads, however, there are additional concerns raised by a lawyer passing leads. The passing of leads creates potential conflicts of interest for the lawyer pursuant to Virginia Rule 1.7(a)(2). This rule specifically cautions the lawyer regarding potential conflicts stemming from the lawyer’s personal interests. Participation in a lead-sharing organization potentially creates such a conflict when the lawyer’s membership is dependent on the number of leads the lawyer passes, thereby impacting the lawyer’s freedom to choose the most appropriate specialty provider for a client.
(e) **Confidentiality Issues Can Also Arise:** Other issues triggered by this hypothetical are the confidentiality provisions that protect the client, even to the level of client identity in some representations. A lawyer may not participate in a plan that requires the lawyer to disclose information relating to the representation of a client except in compliance with **Virginia Rule 1.6.** The mere disclosure of a client’s name and specific need in certain circumstances may be enough to violate the Rule without consent to the client.

(f) **Committee’s Conclusion:** Based on the facts presented, the Committee finds that it is unethical for a lawyer to participate in a lead-sharing organization such as the one described in the hypothetical, for all the afore-mentioned reasons. And the Committee finds that there would be nothing unethical in a lawyer owning an interest in a company that is a lead-sharing organization as long as the lawyer is not a member. The Committee finds there to be no ethical violation when a lawyer participates in a lead sharing organization as a title insurance agent or in some other professional capacity, operating through an ancillary business as long as the lawyer does not violate any of the Rules of Professional Conduct.

3. **Bottom Line: Is the membership in the lead-sharing networking organization contingent upon reciprocal referrals?** Applying the analysis to our vignette, it is unclear from our particular facts whether the lawyer’s membership in the lead-sharing networking organization would be contingent upon the number of leads the lawyer passes. However, according to the analysis presented in **Virginia LEO 1846,** IF THE MEMBERSHIP REQUIRES THE LAWYER TO EXCHANGE LEADS, then it would be improper under the Virginia ethics rules for the lawyer to participate. However, if membership is not dependent upon passing leads, then participation in the lead sharing networking organization would be ethically permissible, assuming it does not violate any of the other professional guidelines mentioned above (like **Rule 1.6** on confidentiality, **Rule 5.4** regarding compromise of the lawyer’s independent professional judgment and **7.2** and **7.3** of the solicitation rules). It is very important to thoroughly understand the specific structure and particular membership requirements of these types of organizations as each one has its own set of rules. Carefully evaluate each one individually, and do not assume that “one size fits all” when it comes to the ethical analysis.


B. **Non-Profit Board Work:** In another attempt to market her new practice, our lawyer has agreed to serve on the board of directors of a local non-profit hospice foundation. What issues should our lawyer consider before assuming this role, especially in light of her comment that, “Now I fully realize the board may ask me to do a little pro bono legal work for them here and there, but it just seems like an offer I can’t turn down. It’s a
great charitable cause, and I can get my name out in the community, and make some new potential client contacts as well!?”

1. **Professional Responsibility Considerations: Virginia Rule 1.6; Virginia Rule 1.7 and Comments [8], [10], [35]; Virginia Rule 1.3; and Virginia Rule 5.4**

   a. **Virginia Rule 1.6 Confidentiality of Information**

      (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

      (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

         (1) such information to comply with law or a court order;

         (2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

         (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

         (4) such information reasonably necessary to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence;

         (5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

         (6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

   c. A lawyer shall promptly reveal:
(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud.

For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

b. **Virginia Rule 1.7 Conflict of Interest: General Rule**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

Comments

Loyalty to a Client

[8] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation.

The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation — specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

Lawyer’s Interests

[10] A lawyer may not allow business or personal interests to affect representation of a client. For example, a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer’s romantic or other intimate personal relationship can also adversely affect representation of a client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer’s resignation from the board and the possibility of the corporation’s obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer’s independence of professional judgment, the lawyer should not serve as a director. [Emphasis added.]

c. Virginia Rule 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

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

d. **Virginia Rule 5.4 Professional Independence of a Lawyer**

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

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

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

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

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

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

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

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except as provided in (a)(3) above, or except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

2. **A Common Request:** Why does this scenario often occur between lawyers and their corporate (for profit or not-for-profit) clients? Because it’s a great opportunity to both serve the community and market your law practice. Our lawyer justifies her decision
to serve on a non-profit’s board of directors by stating, “It just seems like an offer I can’t turn down. It’s a great charitable cause, and I get my name out in the community, and make some new potential client contacts as well!”

a. **Why are Lawyers Often Asked to Serve On a Non-Profit’s Board?**
   Basically, it’s a potential “win-win” for both the non-profit entity and the lawyer. “From a non-profit corporation’s perspective, lawyers are often seen as preferable board candidates. Lawyers tend to be savvy not just in terms of their knowledge of the law, but often for their business acumen. Lawyers tend to be well-connected leaders in the community, and their professional reputation lends credibility to the board of a nonprofit corporation. From a lawyer’s perspective, sitting on the board of a non-profit satisfies civic pro bono responsibilities and offers an opportunity to make meaningful public contributions, as well as valuable business contacts.” (“Can You Ever Take Off Your Lawyer Hat?” By Lawrence A. Wojcik, Esq., Raj N. Shah, Esq., and Erin E. Krejci, Esq., DLA Piper Rudnick Gray Cary US LLP, Original Publication October 26, 2004, Revised as of February 22, 2005)

b. **So Why Is It Risky?**

   (i) **In General, for Directors and Officers: Fewer Resources = Greater Exposure.** “In fact, in some respects directors and officers may be at a greater risk of liability in a non-profit than they would be in a for-profit corporation given that many non-profits have smaller budgets, fewer personnel performing more functions, and less defined policies and procedures (particularly with respect to employment practices). Moreover, for financial reasons, non-profits may be unable to retain or consult with professionals such as accountants and lawyers on as frequent a basis as for-profit companies. All of these factors and others may increase the likelihood of supervisory lapses or other errors. The potential for liability may be of particular concern for directors, who very often serve on boards of non-profits without compensation.” (“Be Prepared: Non-Profit Organizations’ Legal Risks and Protections” by Elizabeth Sarah Gere, Esq., Paul C. Vitrano, Esq., and Stephanie T. Schmelz, Esq., December 2005)

   (ii) **Especially Risky for Lawyers Who Act in Dual Capacity:** “Serving on a non-profit board subjects lawyers to certain potential hazards. The hazards may be particularly acute in situations where the lawyer also represents the nonprofit corporation. Ethical issues include possible loss of independence, conflicts of interest for the lawyer and lawyer’s firm, and potential loss of the attorney-client privilege. While these issues apply to all attorney-directors, whether the boards they serve on are nonprofit corporations or public corporations, these principles are often overlooked or considered less seriously because of the more informal nature of service on a nonprofit board. It is a mistake to take these duties lightly. This is especially true because a lawyer on a nonprofit board is often looked to for ‘free’ legal services. Moreover, a number of unarticulated issues may be in play. Other non-lawyer board members may be inclined to give a lawyer’s opinion greater weight, especially on a nonprofit board that lacks a
general counsel or retained outside counsel. Regardless of whether the lawyer actually represents the nonprofit, the lawyer may still be viewed as serving the nonprofit in a dual role. Furthermore, even if the lawyer truly views his or her role as being limited to that of director, it may not be clear to his or her fellow board members, who may believe the attorney-director always is wearing both a lawyer’s and director’s hat. Indeed, because of this often unarticulated perception, it is almost impossible for a lawyer to avoid being a lawyer while sitting on the board of a nonprofit corporation. A lawyer making the decision to sit on the board of a nonprofit corporation should do so fully informed about all of these issues.” (“Can You Ever Take Off Your Lawyer Hat?” By Lawrence A. Wojcik, Esq., Raj N. Shah, Esq., and Erin E. Krejci, Esq., DLA Piper Rudnick Gray Cary US LLP, Original Publication October 26, 2004, Revised as of February 22, 2005)

(iii) And Sometimes Lawyers are Held to an Even Higher Standard of Care Than Their Nonlawyer Counterparts: “One court laid out the dangers quite clearly when it held that lawyer/directors may be so deeply involved in a company that they are required to undertake the strict investigatory duties of an ‘inside’ director whose standard of care approaches that of a ‘guarantor of accuracy.’” (See Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 575-76, 578 (E.D.N.Y. 1971).

3. What Ethical Issues are Associated with Dual Service?

a. Generally: Ethical Issues Associated with Dual Service: “…attorneys must always be conscious of the ethical rules of their profession, which subject them to discipline by the responsible state agency. Put another way, it is not likely that an attorney could avoid discipline as an attorney by asserting that he was really only acting as a director for the conduct at issue. It is true that, generally, ‘[t]here is no ethical prohibition against a lawyer serving as director of a client.’ Nonetheless, loss of independence, conflicts of interest, and/or loss of the attorney-client privilege should be evaluated before a lawyer agrees to serve as a director.” (“Can You Ever Take Off Your Lawyer Hat?” By Lawrence A. Wojcik, Esq., Raj N. Shah, Esq., and Erin E. Krejci, Esq., DLA Piper Rudnick Gray Cary US LLP, Original Publication October 26, 2004, Revised as of February 22, 2005.)

(i) Loss of Independence: Comment [35] to Virginia Rule 1.7 admonishes against assuming a dual role if “…there is material risk that the dual role will compromise the lawyer’s independence of professional judgment.” The issue of loss of independence revolves around the idea that “what is good for business and what the law requires may be very different things.” For example, consider the following:

- What if the lawyer is asked to represent her client for an action of the board that the lawyer actually opposed while wearing her “director’s” hat? Should the attorney-director
keep silent during board deliberations on actions she opposes out of apprehension that her vocal opposition will later impair her ability to represent the nonprofit corporation?

- What if the “lawyer” is asked to evaluate whether a board of directors’ action was legal, for a board action in which the lawyer was purportedly wearing only her “director’s” hat?

- Can the attorney-director really maintain independence and voice objections while serving on the board of her nonprofit client? Does the client expect the attorney-director to be a rubber stamp?

(ii) Conflicts of Interest

a. Examples of Conflict Issues:

- “What if, while on the board, the attorney-director is asked to decide whom to use as legal counsel or how much to pay in fees? What about a fee dispute between the nonprofit and the attorney-director’s law firm? What about claims of malpractice against her law firm? What about claims of malpractice regarding pro bono service by the attorney-director’s law firm?

- What happens when an attorney-director is faced with making a decision to settle a case which generates substantial fees for the attorney’s law firm?

- What if the law firm makes charitable donations to the nonprofit and then shortly thereafter is hired by the board?

- What if the board of a nonprofit on which the lawyer sits is deciding whether to sue another client of the law firm? What if the client is one of the lawyer’s most significant clients?


b. Procedures to Cure these types of conflicts include having a clear conflict-of-interest policy in place and following it and by abstaining from voting on board motions where there is a conflict. But the lawyer-director must consider whether abstaining from voting does a disservice to the not-for-profit entity if it means the lawyer is routinely abstaining from
voting on precisely the types of issues where a lawyer’s guidance would be most helpful.

c.  See also ABA Formal Opinion 98-410 identifying four possible conflict situations, and while the focus of the opinion is primarily on for-profit organizations, the rationale can just as easily apply to nonprofit organizations as well. The four possible types of conflict include:

- “When the lawyer is asked to pursue objectives of the organization that as a director the lawyer opposed. According to the formal ethics opinion, a lawyer needs to determine whether his or her representation of the organization may be materially limited by the lawyer’s opposition to the action the organization has decided to undertake such that Model Rule 1.7 precludes the representation.”

- “The second situation occurs when a lawyer is asked to opine on board actions in which the lawyer participated.”

- “The third situation described in the formal ethics opinion is when the board is taking action affecting the lawyer’s law firm, such as when the board is determining whether to retain the law firm. In such a situation, it would be important to comply with the applicable conflict-of-interest procedures and make sure the lawyer-director is not part of the decision-making process.”

- “The fourth situation is when the lawyer or lawyer’s law firm represents the organization in litigation that includes the organization and directors as defendants. Among other things, it notes the need for the organization and directors to have independent representation in any controversy between the organization and its lawyers (including the lawyer-director).”


(iii) Potential Loss of the Attorney/Client Privilege: Virginia Rule 1.6 mandates that a lawyer “shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship…” “A well-informed attorney-director may specifically delineate on the record that he is speaking solely as a lawyer and giving advice solely in that capacity in an attempt to cloak a communication with the privilege. The other side of the equation is to make sure fellow board members are also clear that
solely legal advice is being rendered by the lawyer. Similarly, board minutes should reflect the confidential nature of the discussion. Practically, however, communications do not fit quite so nicely into one bag or the other—good legal advice in board meetings often blends with business advice, or the two are so inextricably intertwined that no distinction is possible. Someone wishing to challenge the privilege will seize on these blurred roles and assert that no such attorney-client privilege attached to the communication because a required element of the privilege—namely, ‘legal advice’—is missing. Business advice, of course, is not privileged and thus, courts faced with the communications which contain both legal and business advice may order production of the entire communication. Similarly, confidentiality issues may destroy the attorney-client privilege. For example, minutes of board meetings often are made available to shareholders. In the context of nonprofit corporations, outside donors may have certain rights of inspection or review of such minutes. To the extent that legal advice is reflected in board minutes, disclosure to non-control group shareholders renders the information public and not confidential. Waiver of the privilege is also possible if the other board members disclose the communication because they think it relates to business advice as opposed to legal advice. It is important to remember that a director of the client has authority to waive the privilege because he or she is actually the client. Ultimately, before assuming such a dual role, a lawyer must fully inform the client of the potential risks relating to loss of privilege.” (“Can You Ever Take Off Your Lawyer Hat?” By Lawrence A. Wojcik, Esq., Raj N. Shah, Esq., and Erin E. Krejci, Esq., DLA Piper Rudnick Gray Cary US LLP, Original Publication October 26, 2004, Revised as of February 22, 2005) See Harrison v. Keystone Coca-Cola Bottling Co., 428 F. Supp. 149 (M.D. Pa. 1977)

See U.S. v. Vehicular Parking Ltd., 52 F.Supp. 749 (D. Del. 1949) (attorney-director’s voluntary disclosure of memos to government in antitrust matter waived privilege because lawyer produced documents while performing business role.)

4. What are the Duties of an Attorney-Director? The Model Non-Profit Corporation Act § 8.30(a) (1987) provides that an attorney-director owes the nonprofit corporation duties of care, loyalty and obedience. These duties are codified in some states and arise from the common law obligations in others. The duties of care and loyalty are similar to those faced by directors in public corporations. Nonprofit directors also have a unique obligation, a duty of obedience. (“Can You Ever Take Off Your Lawyer Hat?” By Lawrence A. Wojcik, Esq., Raj N. Shah, Esq., and Erin E. Krejci, Esq., DLA Piper Rudnick Gray Cary US LLP, Original Publication October 26, 2004, Revised as of February 22, 2005.)

a. Duty of Care: “Requires that a director is informed and discharges all duties in good faith. The standard of care for a nonprofit director is equivalent to what an ordinarily prudent person in a like position would reasonably believe appropriate under similar circumstances…[A] lawyer’s specialized legal training and greater familiarity with the corporation’s affairs through his or her
role as outside legal counsel could provide the basis for imposing upon him or her a higher standard of care than that placed upon other directors on the board. In other words, the attorney-director will not be held to the standard of an ordinary director but to a heightened standard, that of an ordinary attorney. The attorney-director should consider whether his or her legal training makes the lawyer more responsible than non-lawyers for ensuring the non-profit corporation complies with local, state, and federal regulations. Simply put, an attorney-director should take on the responsibility of sitting on the board of a nonprofit corporation only if he or she is willing to devote enough time and attention to the matters of the nonprofit corporation.” (See Escott v. Barchrist Construction Corp., 283 F.Supp. 643, 689-92 (S.D.N.Y. 1968) (rejecting lawyer-director’s due diligence defense and holding him to more exacting standard than normal directors, noting that his dual role “cannot be disregarded.”) and Feit v. Leasco Data Processing Equipment Corp., 332 F.Supp. 544, 576 (E.D.N.Y. 1971) (lawyer-director’s responsibility approached that of “guarantor of accuracy” of registration statement.)

b. **Duty of Loyalty:** “Requires a director to act in the best interests of the nonprofit corporation. This means the director should avoid conflicts of interest and usurping corporate opportunities and should maintain confidentiality. These principles often run coextensive with a lawyer’s ethical requirements.”

c. **Duty of Obedience:** “Unique to the directors of a nonprofit. Requires the director’s obedience to an organization’s founding principles as embodied in its corporate articles and bylaws. Put another way, directors of nonprofits can be sued by donors because they failed to hold true to the nonprofit corporation’s mission.”


4. **Practice Pointers:** Specific measures that can be taken to minimize perceived risks of attorney-director if undertaking “dual role” include the following:

<table>
<thead>
<tr>
<th>General Duties Applicable To Any Director of a Nonprofit Corporation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Reviewing by-laws and articles of incorporation, minutes and the mission statement;</td>
</tr>
<tr>
<td>2. Understanding the duties of care, loyalty and obedience and adhering to those standards;</td>
</tr>
<tr>
<td>3. Being aware of state statutes limiting liability and being aware that such statutes provide only limited qualified immunity, not wholesale protection;</td>
</tr>
<tr>
<td>4. Being aware of the guidance provided by the state, such as attorney generals’ pronouncements;</td>
</tr>
<tr>
<td>5. Understanding the internal controls of the nonprofit;</td>
</tr>
</tbody>
</table>
6. Reviewing such documents as financial statements, budgets, expenditures, and fundraising reports;

7. Preparing for and attending board meetings and otherwise being active;

8. Exercising and informed vote on all issues; and

9. Reserving sufficient time and energy for the board.


Additional Considerations for Dual Role of Attorney-Director Include:

1. Recognizing that it is very difficult for a lawyer to stop being a lawyer and to put on a “director only” hat;

2. Clearly identifying on the record, whenever possible, whether the attorney-director is wearing a lawyer hat or a director hat and clarifying explaining to fellow directors the difference between legal and business advice;

3. Informing the board that, when acting as an attorney, the attorney represents only the corporation and not the board or the individual directors and officers;

4. Keeping in mind the ethical issues related to dual service and warning the nonprofit corporation about possible issues relating to loss of independence, conflicts of interest, and loss of the attorney-client privilege;

5. Being cognizant of the possible heightened standard of care applied to attorneys;

6. Gaining an understanding of local, state, and federal laws related to nonprofit corporations (such as laws related to charities and fundraising);

7. Disclosing to the lawyer’s law firm management the proposed representation prior to accepting the directorship. This also entails disclosing to the law firm the potential risks of disqualification, conflicts of interest, loss of independence, or “necessary witness” testimony;

8. Deciding whether to select other lawyers from the law firm to perform any legal services;

9. Evaluating the lawyer’s professional malpractice insurance and any risks from dual service;

10. If performing pro bono services, opening up a pro bono matter; and

11. Being aware of the existence of D & O and E & O insurance polices as well as the breadth of coverage and existence of exclusions related to dual service.

6. **Insurance Coverage Issues:** Consider how this dual role as attorney-director may impact coverage under professional liability policies and director’s and officer’s policies.

   a. **Legal Malpractice Policy Considerations:** Under Exclusions, MLM’s policy states “This policy does not afford coverage for the following:…(6) any CLAIM arising out of an INSURED’s activities as an officer or director of an employee trust, charitable organization, corporation, company or business other than that of the NAMED INSURED.”

   - **Legal Advice, Yes, Business Advice, No:** A legal malpractice policy does not typically cover “business” advice; it only covers legal advice. Thus, while there is coverage for the legal services a lawyer may provide to a nonprofit entity, there is no coverage for claims arising out of business advice the lawyer may have given while sitting on the board. Note that under some malpractice policies, functioning in a dual role may have the effect of canceling out coverage for even the legal advice. Check your policy carefully to determine how sitting on any type of board affects coverage.

   b. **Directors and Officers Coverage Considerations:** Directors and Officers policies usually limit coverage to acts solely in the insured’s capacity as a director and specifically exclude coverage for professional acts and omissions. (*See FSLC v. Mmahat*, 97 B.R. 293 (E.D. La. 1988), aff’d, 907 F.2d 546 (5th Cir. 1990) where jury found that neither lawyer-director of failed savings and loan association nor his firm was covered by malpractice insurance or D&O policy.)

C. **Law Firm Staff Issues:** Our lawyer uncovers some questionable information, specifically a past criminal conviction, about her assistant while she is helping her with her divorce. How can you prevent this from happening in your own office? And what are the challenges of working with a virtual assistant, particularly in light of the ethical considerations involved in outsourcing legal work in general?

   1. **Professional Responsibility Considerations:** Virginia Rule 5.3 Responsibilities Regarding Nonlawyer Assistants and Comment [1]; and Virginia Rule 1.6

      a. **Virginia Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

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

         (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

         (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one’s role in a law enforcement investigation or a housing discrimination “test”.

b. Virginia Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
(3) such information which clearly establishes that the client has, in
the course of the representation, perpetrated upon a third party a
fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client’s
interests in the event of the representing lawyer’s death,
disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office
management assistance program approved by the Virginia
State Bar or other similar private program;

(6) information to an outside agency necessary for statistical,
bookkeeping, accounting, data processing, printing, or other
similar office management purposes, provided the lawyer
exercises due care in the selection of the agency, advises the
agency that the information must be kept confidential and
reasonably believes that the information will be kept
confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and
the information necessary to prevent the crime, but before revealing
such information, the attorney shall, where feasible, advise the client
of the possible legal consequences of the action, urge the client not to
commit the crime, and advise the client that the attorney must reveal
the client’s criminal intention unless thereupon abandoned, and, if the
crime involves perjury by the client, that the attorney shall seek to
withdraw as counsel;

(2) information which clearly establishes that the client has, in the course
of the representation, perpetrated a fraud related to the subject matter
of the representation upon a tribunal. Before revealing such
information, however, the lawyer shall request that the client advise
the tribunal of the fraud.

For the purposes of this paragraph and paragraph (b)(3), information
is clearly established when the client acknowledges to the attorney
that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the
appropriate professional authority under Rule 8.3. When the information
necessary to report the misconduct is protected under this Rule, the
attorney, after consultation, must obtain client consent. Consultation
should include full disclosure of all reasonably foreseeable consequences
of both disclosure and non-disclosure to the client.

2. “Helping” Secretary with Her Divorce: This is eerily similar to issues involved in
representing “friends or family” or giving “free” legal advice. And similarly, in the
beginning, the lawyer has good intentions to help. The legal work, too, at first, seems
“simple, easy and quick,” and the lawyer usually does it at no or low cost. Ultimately, just as in helping out “friends and family,” “no good deed goes unpunished.” Below are several suggestions to protect yourself in this situation:

a. **Practice Pointer: Maintaining Formalities.** When an attorney is representing a staff person, it is common for the working relationship to be more casual. When this occurs, the typical office procedures and formalities that would normally be applied to handling the “client’s” (aka the staff person’s) matter are often not maintained or are omitted altogether. If you decide to represent a staff person, it is best to formally acknowledge the representation with the steps that follow:

   - Conduct Conflicts Check
   - Complete New Client Intake Form
   - Open a File for Each New Matter (i.e., prepare file folder, assign new file number)
   - Identify Client, Prepare Engagement Letter, and Focus on Scope of Representation
   - Create Time/Billing Information for Client

b. **Other Challenges when Representing Staff:** In addition to the issues of informality in the relationship, the lawyer must also be concerned about confidentiality and unauthorized staff actions.

   - **Confidentiality:** Once files are created, your staff person (now the client) and, assuming this is not a solo practice as shown in our vignette, other staff people in the office now have access to confidential information involving a co-worker—perhaps personal financial information such as annual salary, spousal/child support, retirement account information, and social security numbers. Within the parameters of your own firm, you should consider protecting this “sensitive” information (as with a hard copy file or within your computer network as with an electronic file) from other staff. Consider segregating it and limiting access to it.

   - **Unauthorized Staff Actions:** Staff has unfettered access to law firm supplies (for example, law firm letterhead), e-mail, and phone and can easily send out communications without the lawyer authorizing or reviewing it. Without the staff person actually admitting to her own employer/attorney that she sent out letters under the law firm letterhead to her soon-to-be ex-husband’s employer, the lawyer may not realize that this is happening until it is brought to the her attention by a third-party, perhaps even by opposing counsel.

   - **How to Prevent It:** Having a policy in place that explicitly prohibits the use of law office supplies for personal use or without the lawyer’s knowledge and consent is one way to prevent this from happening. The lawyer should be clear in discussing and enforcing this written policy. Violations will result in termination. An employee handbook is a good idea, and making sure that everyone gets a copy when first employed is
essential. The handbook should include other potential common staff issues such as confidentiality, use of law firm computers, use of social networking sites, other personnel matters, etc.

3. **Past Criminal Conviction? You’d be Surprised.** In this vignette, our lawyer discovers that her assistant has a prior criminal conviction for forging and uttering. What should the lawyer have done to discover this information before hiring the assistant?

a. **Refine Your Screening Process for Hiring Staff:** Productive and honest staff is a critical part of every law firm. From an internal control and fraud prevention point of view, you want to make sure from the very start of the hiring process that you avoid hiring anyone that has skeletons in their closet. Dan Pinnington, Director of LawPRO’s practicePro program, wrote an article entitled, “Avoiding the Bad Apple: Screening New Staff during the Hiring Process” and suggests the following:

- **Use the Internet:** To help you arrive at your shortlist, consider searching the Internet via Google and other search tools for information on job candidates that look promising. Don’t overlook checking MySpace, Facebook, LinkedIn, or other similar Web 2.0 social networking type sites for information.

- **Contact All References:** Ask everyone you interview for multiple and appropriate references that will allow you to make all necessary inquiries into the candidate’s background, both in respect to skills and experience but also with respect to any issues that may be of concern. And don’t stop at just reading over the list of references—no matter how impressive it may be. Contact all references and make appropriate enquires of them.

- **Other Background Checks:** In addition to reference checks, other background checks to be considered are:
  - Education verification
  - Employment verification
  - Proof of eligibility to work in Canada (sic: USA)…

- **Criminal Background Check and Verify Identification:** For employees who will have access to financial or other sensitive information, consider doing a criminal background check and a Credit Bureau and identification verification. This task is far easier if you use a background checking service such as BackCheck, ADP, or ISB Corporate Services. Note that these background checks will require the consent of the job candidate (get a duly signed consent form). The information you obtain must be used only for employment related purposes compliant with human rights, labor, and privacy laws, as applicable.
• Address Concerns Immediately: Follow up with the candidate on anything that raises any concerns, and do not hire the person unless any concerns you have are explained to your complete satisfaction.

(The above pointers are from an article by Dan Pinnington, Director of LawPRO’s practicePro program, entitled, “Avoiding the Bad Apple: Screening New Staff during the Hiring Process” which originally appeared in LAWPRO Magazine “practicePRO: Helping Lawyers for 10 Years,” Summer 2008 (Vol. 7 no. 2) available at <www.lawpro.ca/magazinearchives>)

b. Potential Notary Public Implications: If this staff person is also a notary, there may be implications beyond your firm.

• Application Question: The Commonwealth of Virginia, Secretary of the Commonwealth’s “Application for Appointment as Notary Public” asks, “Have you ever been convicted of a felony? Failure to answer this correctly will subject you to criminal penalties and automatic revocation of your commission. Provide Date(s), Court(s), and Offense(s) for each felony conviction.” In Virginia, forging and uttering (under Virginia Code Sec. 18.2-172) is a Class 5 felony.

• Post-Designation, Possible Revocation: Likewise, if the conviction occurred AFTER the notary designation, the Secretary of the Commonwealth’s “A Handbook for Virginia Notaries Public” states, “Secretary my revoke the commission of any notary who:… 2) Is convicted or has been convicted of any felony under the laws of the United States or this Commonwealth, or the laws of any other state, unless the notary has been pardoned for such offense, has had his conviction vacated by granting of a writ of actual innocence, or has had his rights restored.” (Section 47.1-23 Grounds for Removal of Office.)

4. Virtual Assistant

a. Define This New Staffing Concept: Virtual assistants (VAs) are paralegals or other administrative specialists who do not come into a traditional office to work; instead, they provide the requested work product via the internet. Most often, they are independent contractors who own their own business and are willing to enter into an hourly arrangement for services. They are interested in long term relationships and strive to become familiar with your practice and attuned to your business needs. They maybe working for other lawyers in the legal community, so a thorough conflicts checking system is imperative. Also, because the VA is communicating with the lawyer electronically, secure and compatible electronic integration is crucial to this type of set-up. Confidentiality, of course is, still a must.
Benefits of a Virtual Assistant (VA)

- **Assist per project or on hourly basis:** Some practices are not yet to the point where they need assistance every day. Even if a single attorney does not have enough work to keep a part or full time employee busy, a VA can provide experienced assistance on a project by project or hourly basis.

- **No hidden costs:** There are no hidden costs associated with becoming an employer or increasing the firm’s staff—no taxes, FICA, worker’s comp, unemployment insurance or retirement benefits to worry about.

- **No sick, holidays or vacation days**

- **No extra space, extra equipment or extra training needed, among other things:** No need to supply space, equipment, supervision, training or software licenses

- **Streamline costs:** No overtime costs nor do you have to pay for idle time.


b. **Issues to Consider when Hiring a Virtual Assistant:** While working with a VA is not for everyone, some lawyers have found it to be an effective and efficient way to meet support services needs without hiring additional full-time staff, especially in this economic environment when work flow is unpredictable.

   (i) **Consider These Issues when Selecting a VA:**

   - **Check Website:** Is there an informative, well-constructed website, as evidence the VA has the professional sophistication to conduct an effective online business relationship?

   - **Conduct a Personal Consultation:** While a phone interview is appropriate for initial screening, it is best if possible to meet with the VA face-to-face before contracting.

   - **Relevant Skills and Background:** The VA’s relevant skills and legal experience should be no different than if you were hiring a legal assistant to work in your office. Request a resume that is up-to-date and complete. If one is not available, then scratch the VA off your list.

   - **Request a Business Track Record:** Look for a VA who has been successfully in business for at least three years, and one who is actually IN business (not just working part-time or providing an incomplete service package.)
• **Does the VA Provide a Realistic Cost Structure?**
  Inappropriately low rates can signal a lack of business sense and indicate a practice that is not profitable (and won’t be around long.) Because you want to rely on the VA long-term, you want assurance that their business is viable. Proper VA rates will average between $30 and $65 per hour.

• **Check References:** Consider whether or not the VA has any current clients who are willing to provide a reference.

• **Virtual Assistant Industry Associations:** Check to see if the VA is a member of the established VA industry associations—the IVAA, VANA, etc.

• **Professional Liability Coverage:** Does the VA you are considering have professional liability coverage? While any work the VA does for the lawyer would likely be covered under the lawyer’s own malpractice policy because the lawyer is supervising and reviewing the work, it is still wise to consider the issue of coverage.

(Many of above tips are from Edward Poll, “Virtual Help: An Outsourcing Relationship with a Virtual Assistant Can Complete Your Team,” ABA Law Practice Today, April 2006.)

(ii) **Additional Factors:** If you hire a VA, there are several important operational and ethical issues that will have to be addressed by the lawyer.

• **Safeguard Client Confidentiality:** Make sure the VA has a thorough understanding of the requirements of confidentiality and how it applies in a law practice. What safeguards are in place in the VA’s work environment to protect your firm and client information? Does anyone have access to it other than the VA you are hiring?

• **Well-Prepared to Work Effectively and Virtually:** Does the VA come to the relationship with the proper software, and electronic technology in place? Will it integrate with your software and technology? Is it secure to protect confidentiality?

• **Feel Comfortable with Virtual Communication:** The lawyer needs to feel comfortable communicating with the VA in a virtual environment. Since this is a new type of relationship, the lawyer and the VA need to discuss how they will communicate effectively. Miscommunication can easily result in mistakes, so a good plan is important.
• **Accountability:** Who will be responsible at the firm for receiving and finalizing completed projects?

• **Discuss How to Transfer Information:** Will you allow a VA direct access to the firm’s computer/network or what manner will be used to securely transfer the files and information?

• **Conflicts Checking:** It is very important to discuss and design a system that includes the VA in checking for conflicts, especially if the VA is doing work for other lawyers.

• **Contact Information:** How do you get in touch with your VA should you encounter a problem or have an emergency?

• **Then Put It All In Writing:** All of a VA’s processes and procedures, including turnaround times, costs and invoicing, should be clearly outlined the contract you sign before starting any work. Do not work with a VA without a signed contract—this is to ensure that at the outset the relationship is established as one of a contract worker and not employer/employee.

• **Completed Projects:** Consider and decide whether the VA will retain any file information on the project when services are completed. It may be appropriate to have the VA provide a copy of the complete electronic file to the lawyer and destroy all copies. You may also want to consider limiting the VA’s ability to reproduce your work product as formatting for any other job the VA might receive now or in the future. This can be written into the contract.

(Many of the above tips are from Edward Poll, “Virtual Help: An Outsourcing Relationship with a Virtual Assistant Can Complete Your Team,” ABA Law Practice Today, April 2006.)

c. **The Big Picture, a Larger Shift:** “The use of VA’s is also part of a larger shift in subcontracting and piecing together teams of providers virtually. This free-agent nation, as it were, allows for different providers with varying areas of expertise—and service classes—to come together for each specific engagement. The innovative aspect will ultimately reside in who uses this capability to best meet the matter’s needs and how these groups come together. Collaborative spaces that help maintain conflicts checks and adequately lock down security at a matter level would seem to be key.” (Steve Matthews, “Virtual Assistance,” ABA Law Practice Magazine, April/May 2009, page 38).

d. **See ABA Formal Opinion 08-451** (Lawyer’s Obligations when Outsourcing Legal and Nonlegal Support Services): In ABA F.O. 08-451, the Standing Committee on Ethics and Professional Responsibility states, “A lawyer may outsource legal or nonlegal support services provided the lawyer remains
ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with ‘direct supervisory authority’ over them.”

- **Disclosure to Client and Consent needed if Confidential Information is Received:** In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside the lawyer’s firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. (ABA F.O. 08-451)

- **Fees Must Be Reasonable and No UPL:** “The fees charged must be reasonable and otherwise in compliance with Rule 1.5 and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.” (ABA F.O. 08-451) With regard the fees, the committee compares the analysis of hiring outsourced staff to that of hiring contract lawyers, “In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract. The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for the services.” (ABA F.O. 08-451) [Emphasis added.]

e. **Virginia:** Virginia has no opinion that directly addresses the issue of outsourcing non-lawyer legal staff, but it has addressed a related issue of outsourcing lawyer temps in VA LEO 1712 (Temporary lawyers working through a temporary placement service). The opinion concludes that a law firm using a legal temp is not required to disclose to, and get consent from, the client to use the legal temp so long as the lawyer temp reports to and is under the direct supervision of the lawyer associated with the firm. See also LEO 1735 (Attorney rendering professional services for clients of a law firm when attorney is an independent contractor rather than an employee or partner of the firm).

- **But what about billing? Distinguish between Fees and Expenses:** It depends on how the services are billed to the client. If the cost of the lawyer temp is billed as a part of the legal fees, then it is okay to mark it up to include overhead costs. However, if billed to the client as an expense, the lawyer cannot, absent a prior agreement with the client, then mark it up, pocket the savings, and attribute it to the
overhead costs. See VA LEO 1712 (cited above) which states, “If the law firm’s payment to the staffing agency is billed to the client as a disbursement, or as a cost advanced by the law firm on behalf of the client, the disbursement shown must be the amount actually paid to the staffing agency. Upon disclosure to and consent from the client, the disbursement shown may be marked-up above the actual payment to the staffing agency. The law firm is not obligated, however, to bill the payment to the client as a disbursement. The law firm, in its statement for services rendered, may bill for the services of a lawyer temp at a rate or in the manner that it bills the time of salaried associates for services rendered, without disclosure of the amount paid the staffing agency.”

f. List of Virtual Assistant (VA) Resources and Organizations:

- ABA SoloSez ListServ: <http://legaltypist.com/solosez>
- Technolawyer: <http://www.legaltypist.com/technolawyer.htm>
- The Legal VA: <http://www.thelegalVA.blogspot.com>

D. Missing Funds: After being fired by her client, our lawyer finds that approximately $35,000 is missing from the inventory of one of her estate files. She suspects that the administrator may have improperly taken this money. What are her duties to the administrator? To the estate? Does it matter now that she has been “fired” by the administrator? Does she have a duty to update the inventory?

1. Professional Responsibility Considerations: Virginia Rule 1.2(c) and Comments [9-12]; Virginia Rule 1.6(c)(1-2) and Comments [6b], [7], [7a], [7b], [7c], [8], [9], and [9a]; Virginia Rule 1.16 Declining or Terminating Representation and Comments [4], [9]; and Virginia Rule 3.3 Candor Towards the Tribunal and Comments [6] and [11]

a. Virginia Rule 1.2(c) Scope of Representation…

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law….

Comments

Criminal, Fraudulent and Prohibited Transactions

[9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There
is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is not permitted to reveal the client’s wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. See also Rule 3.4(d).

b. Virginia Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
(4) such information reasonably necessary to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud.

Comments

Disclosure Adverse to Client

[6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client’s confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[7] Several situations must be distinguished.

[7a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(c).
Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

[7b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent.

In such a situation the lawyer has not violated Rule 1.2(c), because to “counsel or assist” criminal or fraudulent conduct requires knowing that the conduct is of that character.

[7c] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph (c)(1), the lawyer is obligated to reveal such information. Some discretion is involved as it is very difficult for a lawyer to “know” when proposed criminal conduct will actually be carried out, for the client may have a change of mind.

[8] The lawyer’s exercise of discretion requires consideration of such factors as the nature of the lawyer’s relationship with the client, the nature of the client’s intended conduct, the lawyer’s own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

[9] If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[9a] After withdrawal the lawyer is required to refrain from making disclosure of the client’s confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

c. Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
(1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(3) client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer’s possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client’s new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer’s file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer’s copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously
submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client’s refusal to pay for such materials as a basis to refuse the client’s request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

Comments

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization’s highest authority is beyond the scope of these Rules.

d. Virginia Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

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

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

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

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

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Comments

False Evidence

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer’s duty to keep the client’s revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Remedial Measures

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client’s deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c).

Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

a. Analysis: Who exactly is the client in this situation? The administrator or the estate (including the beneficiaries)? The answer determines to whom the lawyer owes his or her duties in the lawyer/client relationship.

i. Majority View: The client is only the administrator or the executor. See Footnote 1 of ABA Formal Opinion 94-380 (“Counseling a Fiduciary” May 9, 1994) which states:

“The majority of jurisdictions consider that a lawyer who represents a fiduciary does not also represent the beneficiaries, see Succession of Wallace, 574 So.2d 348 (La. 1991) (citing cases), and we understand the Model Rules to reflect this majority view. The law varies somewhat among jurisdictions, however, as is recognized in the following comment to Rule 1.7.

In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view, the client is the estate or trust,
including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

Thus, in some jurisdictions, a lawyer representing a fiduciary also owes fiduciary obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary such as the obligation of confidentiality. See Charleston v. Hardesty, 839 P.2d 1303 (Nev. 1992). There is also some authority for the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but rather the trust estate. See, e.g., Steinway v. Bolden, 460 N.W. 2d 306 (Michigan App. 1990). In a jurisdiction where that is the prevailing law, the trust or estate would presumably be the “entity as client” that is contemplated by Rule 1.13.”

(Footnote 1 from ABA Formal Opinion 94-380 “Counseling a Fiduciary” May 9, 1994).

ii. Virginia: Agrees with the majority view. See Virginia LEO 1452 (“Attorney-Client Relationship; Estate Settlement,” March 1992) where the committee opined “that the attorney/client relationship arises between the attorney and the personal representative, albeit for the ultimate benefit of the estate.” See also Virginia LEO 1599 which stated that a lawyer representing an estate must make appropriate disclosure of his role if he/she has reason to believe that the beneficiaries look on him as “their lawyer.”

iii. And similarly, ABA Formal Opinion 94-380 stated “the fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer’s [ethical] responsibilities.”

b. What should our attorney do in light of the fact that there is a suspicion that the administrator is responsible for the missing $35,000? It would be best, at this point, to confront the administrator and initiate a frank discussion about the attorney’s concerns regarding the missing money.

And, depending on what that particular conversation reveals, our attorney should be aware of the ethical responsibilities if the client admits to committing a crime or perpetuating a fraud upon a tribunal. Virginia Rule 1.6(c) (2) Confidentiality of Information states that “A lawyer shall promptly reveal…

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;
(2) information which clearly establishes that the client has, in the course of representation, perpetuated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud…"

- See also Virginia Rule 1.2(c) Scope of Representation, “(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent…” and Virginia Rule 3.3(a) Candor Towards the Tribunal states, “A lawyer shall not knowingly: (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.” And, Comment [11] to Virginia Rule 3.3 Candor Towards the Tribunal discusses remedial measures by stating, “the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client’s deception to the court or to the other party.”

- See also Virginia LEO 287 (Disclosure of Confidential Information, Actions of Administrator, Conflicts of Interest, Permissive Withdrawal by Attorney)(1978) which stated, “an attorney is not required to disclose to the court that his client, the administrator of an estate, misappropriated estate proceeds for personal use as long as the client makes prompt and full restitution to the estate…If the client refuses to file an accounting of the estate, the attorney should withdraw as counsel” [Emphasis added.]

  i. Analysis: Under Virginia Ethics Rules and Opinions, the administrator is the attorney’s client, not the estate and not the beneficiaries (although the lawyer may have fiduciary duties to these parties). And if this conversation with the administrator about the missing $35,000 reveals “the intention to commit a crime” or “information which clearly establishes that the client has, in the course of representation, perpetuated a fraud related to the subject matter of the representation upon the tribunal,” she should advise the administrator that she will be taking action and give him/her a reasonable opportunity to rectify his/her actions. If the administrator refuses to rectify his actions by “making prompt and full restitution to the estate” (from LEO 287 quoted above), the lawyer “must disclose the existences of the client’s deception to the court…” under Virginia Rule 3.3.

c. Is there a “Derivative” Duty to the Beneficiaries to Disclose the Administrator’s Conduct? No. See Virginia LEO 1452, which states, “The estate’s personal representative assumes legal and fiduciary responsibilities which may include obtaining the services of an attorney. Although the attorney, in providing those services, may benefit the beneficiaries of the estate, the committee is of the further opinion that there is no contractual privity with the beneficiaries which can give rise to an attorney-client relationship.”
relationship with those beneficiaries. Goldberg v. Frye, 266 Cal. Rptr. 483 (Cal. App. 4 Dist. 1990) Given that the attorney enjoys an attorney/client relationship with the personal representative, the committee cautions that the prohibitions contained in the Code of Professional Responsibility as to multiple clients’ conflicting interests and client confidentiality apply to that relationship irrespective of the potential benefit that the representation may hold for estate beneficiaries.” [Emphasis added.]

E. Domestic Issues, Specifically Post-Divorce Wrap-Up Issues: Our lawyer is being blamed for not following up on ex-husband’s obligation to maintain a life insurance policy for his ex-wife and for failing to include a vacant warehouse on the wife’s schedule of divided marital property. How can the lawyer be responsible for the maintenance of the life insurance policy for the ex-wife? And, how could our lawyer have avoided the drafting mistake in the property settlement agreement regarding the vacant warehouse?

1. Professional Responsibility Considerations: Virginia Rule 1.1 Competence and Comment [5]; Virginia Rule 1.2 Scope of Representation and Comments [6-7]; and Virginia Rule 1.3 Diligence and Comment [3]

a. Virginia Rule 1.1 Competence

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

Comment

Thoroughness and Preparation

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

b. Virginia Rule 1.2 Scope of Representation

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

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of
conduct with a client and may counsel or assist a client to make a
good faith effort to determine the validity, scope, meaning, or
application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly
authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by
the Rules of Professional Conduct or other law, the lawyer shall
consult with the client regarding the relevant limitations on the
lawyer’s conduct.

Comments

Services Limited in Objectives or Means

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with
the client or by the terms under which the lawyer’s services are made available to the client. For
example, a retainer may be for a specifically defined purpose. Representation provided through
a legal aid agency may be subject to limitations on the types of cases the agency handles. When
a lawyer has been retained by an insurer to represent an insured, the representation may be
limited to matters related to the insurance coverage. The terms upon which representation is
undertaken may exclude specific objectives or means. Such limitations may exclude objectives
or means that the lawyer regards as repugnant or imprudent.

[7] An agreement concerning the scope of representation must accord with the Rules of
Professional Conduct and other law. Thus, the client may not be asked to agree to
representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate
the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.

c. Virginia Rule 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in
representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of
employment entered into with a client for professional services, but
may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during
the course of the professional relationship, except as required or
permitted under Rule 1.6 and Rule 3.3.

Comment

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A
client’s interests often can be adversely affected by the passage of time or the change of
conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the
client’s legal position may be destroyed. Even when the client’s interests are not affected in
substance, however, unreasonable delay can cause a client needless anxiety and undermine
confidence in the lawyer’s trustworthiness.

a. Post-Divorce Matters in General: Be very careful with post-divorce matters, particularly if there are loose ends that need attention. This is a common mistake because there is often a false assumption that the representation and also the duties to the client end with the entry of the final decree. “If your oral contract of employment or written fee agreement requires that you simply ‘handle all matters in my divorce,’ or general words to the same effect, then your legal obligation to your client does not end with the entry of a final order of divorce. The prevailing standard of care will require that you continue to take certain actions, post-divorce, that are necessary to protect your client’s rights. For instance if the final order grants your client a portion of a defined contribution plan (401-K, SEP, IRA, etc.) or a defined benefit plan (pension) owned by the other spouse, then the standard of care will require that you obtain the entry of any Qualified Domestic Relations Order (QDRO), and the implementation of such QDRO by the Plan Administrator or other appropriate individual. Similarly, if your client desires a continuation of healthcare coverage under the Consolidated Omnibus Budget Recovery Act (COBRA), then you are required to serve a certified copy of the final divorce order upon the appropriate person at the other spouse’s place of employment, with a demand for continued healthcare coverage, within 60 days after the entry of the final order.

Clearly, an attorney’s failure to obtain a client’s retirement benefits, or to obtain the continuation of a client’s healthcare coverage, could cause significant financial loss to the client—and will probably result in a malpractice suit. Just as clearly, though, attorneys can avoid any obligation for post-divorce responsibility by clearly limiting his/her scope of services in a written fee agreement; and, by sending the client a final letter at the end of the case which identifies any remaining actions and the fact that it is the client’s responsibility to take such action.” (The two paragraphs above are quotes from an article by David Duff, Esq., “Malpractice Traps for the Family Law Attorney,” Virginia State Bar’s Family Law News, Volume 29, Number 4, Winter 2009, pp. 11-12.)

b. Practice Pointer to Prevent Post-Divorce Mistakes from Happening: Be sure to document the remaining issues in writing to the client and remind them of the specific actions that will need to be taken on their part. This will protect the lawyer if the client attempts to allege it was the lawyer’s fault that something post-divorce was not accomplished. Regarding the life insurance beneficiary issue, the best way to effect this would be to make the wife the “owner” of the ex-husband’s life insurance policy, so that the beneficiary cannot then be changed without her knowledge and consent.

3. Analysis: Attorney’s Failure to Include Vacant Warehouse for Wife

a. The Devil is in the Details: The pace of practicing law in this age of modern technology is faster than ever. While technology has significantly reduced the amount of time it takes to draft complex documents, it is still easy to make an error when dealing with large property settlement agreements involving lots of
assets. And the devil is still in the details; drafting mistakes can easily occur through inattention or rushing the preparation and review of a document.

- As our attorney recalls the facts surround this client, she remembers that “the divorce negotiations were pretty complicated with numerous pieces of property including some rental property, several warehouses, lots of mutual funds and stocks and various accounts and assets going back and forth. Most of the negotiating was done by email and it took a while to nail it all down. When the husband finally agreed to her client’s spousal support amount, they were anxious to get the property settlement agreement finalized and signed by everyone as quickly as possible. Our lawyer had her assistant prepare the PSA, and after some minor revisions, our lawyer reviewed the final draft with her client, and they all signed off on it. But somewhere between the negotiations and the final document, one of the warehouses she was supposed to get ended up on the husband’s schedule.”

In this instance, given the fact that the clients’ assets were voluminous and that the information was traveling rapidly back and forth via email among the parties and their respective attorneys, it is highly likely that a mistake would be made. Numerous claims arising from drafting errors can be traced to poor document management where the wrong draft or version of a document is mistakenly finalized. This is when the attorney needs to make sure there is a reliable system for naming and identifying drafts of documents as they go back and forth. Both attorneys and their staff need to know and understand the system and use it to help prevent the possibility of errors. Additionally, the lawyer needs a reliable system for reviewing all final documents for errors. While this task may seem tedious, it’s time well spent.

b. Pointers for Avoiding Drafting Errors:

- **Review All Documents Carefully for Revisions and Keep Copies of Relevant Drafts:** These steps can be critical to tracking the history of a developing document and providing the institutional memory of why various changes were made and items were omitted and added. Without the written drafts, no one will remember exactly what happened months or years later. The drafts become a roadmap of how the parties reached their final agreement.

- **Agree Ahead of Time:** When swapping draft documents electronically and editing them, agree ahead of time on the method that will be used to identify any edits or changes to the document.

F. Solo Practitioner Issues and Challenges: Being a solo in the practice of law brings its own unique challenges, rewards, and as seen in the vignette, its own set of frustrations. What challenges are unique to solos and how can you avoid being “alone” in the practice of law? The two articles that follow were written by solo attorneys, and they describe some of the traits necessary to be a solo lawyer and some of the lessons learned along the way.
1. “Lessons from the Rearview Mirror:” In Edna R.S. Alvarez’s article entitled, “Lessons from the Rearview Mirror,” (a chapter from the book entitled Flying Solo, edited by Mark Robertson, republished for ABA’s Law Practice Today, June 2009), the author looks back on twenty-five years as a solo practitioner with some answers to the frequently asked questions. The first of which is “should I be a solo?” Alvarez believes that being a solo requires a high energy level, an entrepreneurial spirit and a risk-taking disposition:

a. **High Energy Level:** A solo is responsible for all aspects of the practice including site selection, client development and maintenance, equipment acquisition, personnel and finances. You must be excellent at juggling, prioritizing, and delegating. Doing all these tasks competently, especially while having an outside life, requires a high energy level.

b. **Entrepreneurial Spirit:** A solo must be a person who (1) craves creating a new structure that reflects the solo’s unique persona, rather than working within a preexisting “corporate” structure, (2) has a vision and wants to see that vision become a reality, and (3) is willing to put enormous personal resources in converting the vision into reality.

c. **Risk-Taking Disposition:** In a solo practice, there are no third-party safety nets. As a solo, you must have the personal constitution to be able, metaphorically at least, to fly all alone, while surrounded by constant risks (personnel, technological, client and financial) as well as the potential for tremendous rewards.

2. “Being Solo Does Not Mean Being Lonely:” In Carolyn Elefant’s article entitled, “Being Solo Does Not Mean Being Lonely” (ABA Law Practice Today, August 2009), the author comments how “oddly enough, my days of being lonely as a lawyer ended when I started my solo practice.” Her new-found connections began with the following tips:

a. **Forget the “Old Rules:”** “When working for an organization or even socializing in law school, it’s our nature to gravitate toward those in our age group, professional level, or practice area—a propensity that limits the scope of our social contacts. But solo lawyers, regardless of their ages or practice areas, function at partners and entrepreneurs always looking for ways to improve their business and expertise. Suddenly the range of social possibilities magically expands…Breaking the confines of the tight social circles impressed upon our profession holds the greatest promise for meeting others as a solo.”

b. **Reaching Outside the Law:** “Some of the most enjoyable contacts I’ve made as a solo practitioner have been with the nonlegal professionals and personnel with whom I work. As an energy regulatory lawyer, I frequently team with engineers, inventors, and project developers; some are clients and others are consultants. I enjoy sharing my legal knowledge and learning about their respective areas of expertise. Consequently, I join trade association meetings and attend lunches for professional societies where I can meet nonlegal professionals. Of course, attending these functions makes for good client development, but it also allows solos to expand their circles of friends and colleagues beyond lawyers.”
c. **Joining Groups:** “Take advantage of bar association activities in your area…the smaller local groups tend to be more collegial, not to mention less expensive, than the larger ones…You can also become active in your community and meet others at the same time.”

d. **Getting Out of the House or Office:** “When I handled court-appointed criminal work, I’d always make it a point to arrive at the lawyers’ lounge an hour before any cases were called, just to chat and joke with the other lawyers. I rarely saw any of those lawyers outside the courthouse, but not every interaction has to end in lunch or a longstanding friendship. In many ways, the lawyer’s lounge was like a neighborhood bar—a place to hang around and socialize simply for the sake of doing just that. Solos can also go to other places to work, just for a change of scenery and to feel more connected. I cherish my trips to the Library of Congress and local law school libraries, where working alongside students and scholars makes me feel connected. These days, you can even take your laptop or Blackberry to the local coffee shop, just for a change of scenery.”

e. **Online Possibilities:** “One final option for finding camaraderie and support as a solo—and one that did not exist ten years ago when I started my practice—is the internet. Many state and local bar associations, as well as “specialty bars” such as ATLA and others, offer listservs where members can exchange jokes and advice….Perhaps the largest and most well known of the lot is the ABA’s seven-year-old listserv, solosez. With membership hovering around one thousand lawyers from all over the country, the list generates a heap of mail daily; really, the only way to manage it is to segregate it into a separate mailbox.” “Another online hobby that’s brought me introductions to others is my Web log, <www.MyShingle.com>, a site I run for solos, small-firm lawyers, and those who dream of starting firms. There are probably another three hundred lawyers who operate web logs (blogs) on topics as varied as ethics, appellate law, employment, legal technology, and even what it’s like to be a new bankruptcy associate at a law firm.”

f. **Tips and Resources:**

- **Solosez Listserv:** The ABA listserv is open to ABA members and nonmembers alike, at no cost. In addition to serving as a great resource for practice tips and substantive advice, the list offers several opportunities to socialize. Many solos in some of the larger cities hold monthly solosez lunches, and when solos travel to different cities, they often can get together with others on the list. There is also an annual group swearing-in to the U.S. Supreme Court, so lawyers can get admitted to the Court along with a group of solo colleagues. To sign up for the list, visit <www.solosez.com>.

- **Bar Associations:** Find the bar associations in your area and try to select the membership based on the groups cost and activities. In some locations, the county or city bars may prove the most active, while in other locations, the state bar may be preferable. Most bars have sections, and that’s where the real opportunities lie for getting active in planning events.
• **Local Groups and Meetings:** Read your local newspapers and local business journals. You may learn about meetings that might not be advertised in larger newspapers. In addition, may counties have citizen committees or ethics advisory boards, most of which are eager to have the assistant of lawyers.


### III. THE GOOD, THE BAD, AND THE UGLY: DEALING WITH DIFFICULT CLIENT’S

**A. Difficult Clients Generally:** Difficult clients are part of every practice, and as the saying goes, you can’t live with ‘em and you can’t live without ‘em. Lawyers are in the business of conflict resolution and along with that comes resolving problems for our clients. Difficult clients are the bane of every lawyer. We can all recognize “the difficult client;” the ones that send up a red flag because they display such traits as: they are obsessive and needy, they are easily angered and adopt hostile and aggressive behaviors, they are secretive and paranoid, they are a know-it-all and a smart aleck, they have moved from lawyer to lawyer. Law school doesn’t usually prepare a lawyer for dealing with these difficult clients, but hopefully experience does, and how you handle yourself during certain, crucial client interactions can make the difference between a successful client matter and a possible malpractice claim. While the point of such discussions is often to encourage client screening and declination or firing the client when necessary, a lawyer cannot possible develop a successful practice without representing some difficult clients.

**B. The 4 U’s of Difficult Clients: Unhappy, Unreasonable, Unpredictable, Unpleasant:** “If I’d known it was going to be this much fun.....” The difficult client is a very tough customer to satisfy. They can be unreasonable, they may be unpleasant with you and your staff, and they may ignore your advice or take unpredictable actions. There is a good possibility that the difficult client: will not pay the lawyer, will be unhappy no matter what the results, will make an ethics complaint and/or sue you for legal malpractice. Thus, knowing you will have to represent some difficult clients, it is important to focus on how to protect yourself while still serving the client. Following are some suggestions for managing difficult clients:

1. **Define Expectations:** It is important from the outset of the representation to determine what the client expects to achieve. The client should be specifically asked what their goals and objectives are (consider Virginia Rule 1.2 Scope of Representation), and they should also be asked to put this information in writing. Once you know what the client’s expectations are, you can then access whether these expectations are reasonable or need to be adjusted. It is the lawyer’s job to access and then educate the client about what is a reasonable or likely outcome. The lawyer and the client need to agree on the goals of the representation; if they don’t, the client will probably never be satisfied with the result. It is also possible for the client to lose sight of or change direction regarding their expectations during the representation. When this happens, the lawyer needs to revisit the issue and refocus the client on what the goals are. This is when it is often helpful to review the original goals and objectives that were discussed at the outset of the representation. While it is possible for goals to change during the representation,
such changes should be acknowledged by both the lawyer and the client. If the change in the client’s goal is unreasonable, then the lawyer needs to make a decision about whether to continue the representation. It is important to note that a client’s unrealistic expectations can also include:

- Expectations about service;
- Expectations about length or duration of representation;
- Expectations about cost (consider Virginia Rule 1.5 Fees).

Client expectations in these areas should be discussed at the outset of the representation, explained to the client and made part of the engagement agreement. (See Appendix I Engagement Agreement)

2. Avoid Arguments, Hear Your Client Out: It is important to practice good communication skills (consider Virginia Rule 1.4 Communication), and that includes a good dose of active listening without judgment. If a person feels “heard,” they are far more likely to be satisfied with the relationship. Often in a legal situation, the client feels unsettled which can express itself in many ways: anger, anxiety, and impatience. The simple act of hearing them out and acknowledging whatever emotion they are feeling can have a tremendously positive impact on calming these underlying emotions and avoiding conflict in the relationship between the lawyer and the client. Many times, we maybe tired and short of time ourselves, but by truly listening to the client, the lawyer can understand their concerns and develop trust with the client. It is human nature to place your trust in people whom you feel are listening to you and working for your cause.

3. Define a “Plan of Action” or a “Successful Outcome for the Interaction”: Often clients who are anxious, angry, or upset need to feel like they have some control over the legal matter. Define in a clear and straightforward manner the things the client needs to be responsible for in the representation. This should begin with fees and costs (consider Virginia Rule 1.5 Fees) but should also include documents and information they will need to provide, will they need to testify, etc. What is their role in the representation, and what is your role? Additionally, the lawyer should lay out the game plan for the client, what steps will be taken to achieve the client’s legal goals, etc. Of course, this may be a moving target and will likely change throughout the representation, but the more often you can reinforce what the game plan is, and who is doing what in the representation, the more likely the client is to feel reassured and informed. Clear communication (consider Virginia Rule 1.4 Communication) with clear goals and actions for the team (lawyer, client, staff, expert etc.) at regular intervals throughout the representation can help manage difficult client issues.

4. Set Boundaries: As in all relationships, both personal and professional, there should be standards of interaction that are established from the outset. When providing legal services, it is the lawyer’s job to set the boundaries of the professional relationship with the client. Issues such as: when will you be available to the client, when is the client available, when will the staff be available, how quickly will the lawyer return calls, how prompt should the client be in responding to requests from the lawyer or staff, do you give out your cell number, what is a true emergency, can you talk to the client at work, does the client want you to use a cell number, when is the best time to reach the client. Setting these boundaries should involve both the lawyer’s preferences and the client’s preferences. This information should be shared and exchanged at the outset of the representation. It is often wise to also include discussion about the staff’s role too.
a client is rude, abusive, or otherwise refuses to respect the professional boundaries you have outlined, the issue should be promptly addressed and the client given a warning. If the behavior continues, then the lawyer should make a conscious decision whether to continue the representation or not and under what conditions. In all cases, these sorts of issues should be discussed with the client, not ignored by the lawyer, because once tolerated, it will only get worse. It is also important to note that difficult clients are often even worse or more demanding with staff than with the lawyer. This too should not be tolerated; the lawyer should discuss any problems with the client and let the staff know that the situation has been addressed. Another important area of boundaries involves the lawyer’s role as a legal counselor, not a mental health counselor. While every lawyer must provide a sympathetic ear and the opportunity for the client to be heard and sometimes express their emotions, clients who have more serious psychological issues need to be encouraged to seek professional psychological help. If you work in a practice area where this is often the case, consider making it a routine part of your discussion with clients. There may even be situations when working with a specific client who is having a serious psychological problem where you may want to make the continuation of your representation contingent on the client getting help from a mental health counselor.

5. **Protect Yourself:** In every representation, documentation of the file is important. However, particular care needs to be taken with difficult clients to make sure it is clear how problems and issues were dealt with and what advice the lawyer gave. If things don’t work out for the difficult client, they are likely to file a bar complaint or a malpractice suit. And their recollection of the actions taken and their role in those actions will usually be very different than the way the lawyer and staff remember it. When it is clear that there are issues with the client, both lawyer and staff should be aware of taking extra precautions in documenting actions, conversations, and billing. You may be very glad that you wrote that extra letter or saved that phone message or e-mail.

6. **Know When to Get Out:** As Carole Curtis said in her article on *Dealing with Difficult Clients*: “[d]o not let the difficult client turn you into the difficult lawyer, or the unhappy lawyer, or the depressed lawyer (or worse, the yelling lawyer, the drinking lawyer or the swearing lawyer).” Dealing with a difficult client takes more patience than usual; however, if you find you are becoming the difficult lawyer, it may be time to end the representation. If the relationship has deteriorated to a point where the lawyer and client cannot agree on the objective(s) or course of action and the client does not trust the lawyer’s judgment, then it is usually wise to end the representation. The lawyer needs to be aware of his or her ethical requirements as well as the Rules of Court when terminating a representation. **Virginia Rule 1.16 Declining or Terminating Representation** provides guidance for proper withdrawal and has as an underlying premise that the withdrawal should not prejudice or harm the client in their representation going forward. **Virginia Rule 1.16** covers reasons for withdrawal, return of the client’s file, and states that withdrawal should only occur where leave of court has been granted (see **Virginia Rule 1.16 Declining or Terminating Representation**).

C. **Difficult Doesn’t Begin to Describe It: A Few of our Favorites.** From MLM’s vault of vignettes we’ve dusted off a few of our favorite difficult clients and the lessons to be learned from them.
1. **The Always and Forever Client:** How should lawyers handle the clients that think they have a lawyer for life? This vignette involving Jack, the lawyer, and Al, his “client,” is a good example of how “open-ended” legal representations can cause many subsequent problems for both the lawyer and the client. There is no clear delineation of when Jack’s representation of Al ended, and it is quite possible to argue about whether Jack is a former client or a current client. Jack argues that it had been eight months since he had done any work for Al and he had filed a motion to withdraw. The eight months means virtually nothing to Al, and he’s never seen the motion to withdraw. Is Jack’s file well documented with notes from the phone calls and a copy of a letter advising Al he would withdraw if his fees weren’t paid? Did the court enter the order of withdrawal? Did Al have notice? If yes, then Jack will be able to prove he no longer represented Al. Ending the relationship correctly with a termination letter and/or motion to withdraw is just as important as beginning it correctly.

   a. **Virginia Rule 1.3 Diligence and Comment [4]; and Virginia Rule 1.5 Fees and Comment [9]**

   (i) **Virginia Rule 1.3 Diligence**

   (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

   (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

   (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

   **Comment**

   [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter. [Emphasis added.]

   (ii) **Virginia Rule 1.5 Fees**

   (a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

   (1) the time and labor required, the novelty and difficulty
of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer’s fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in a domestic relations matter, except in rare instances; or

(2) or representing a defendant in a criminal case.
(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and consents to the participation of all the lawyers involved;

(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;

(3) the total fee is reasonable; and

(4) the division of fees and the client’s consent is obtained in advance of the rendering of legal services, preferably in writing.

(f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously dated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

Comment

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

b. “Always and Forever Clients”: Open Ended Relationships Cause Problems. Below are some suggestions to prevent the problems that this misunderstanding between the lawyer and the client can cause:

- **Clarify, Clarify, Clarify**: The lawyer needs to take on the responsibility of making it clear to the client through notes in the file, documenting phone calls, e-mails and written communication to the client and/or a motion to withdraw that the representation is ending. The lawyer should have used a termination letter and provided the client with a copy of a consent order allowing counsel’s withdrawal. If the client does not agree to the withdrawal, then the lawyer needs to follow-up on the motion to withdraw by scheduling a hearing and serving the client with a copy of it.

- **“But, You Are My Lawyer”**: Al sees Jack as “his” lawyer and assumes that Jack will handle anything and everything that comes up and requires legal advice. Al’s argument is strengthened by the fact that Jack has been his counsel for his various other legal problems, including his bankruptcy, his debt collection and his child’s speeding ticket. Unfortunately, Al’s perception is that Jack is “his” lawyer for anything that subsequently comes up.
c. Communication and Client Relations: Key to a successful lawyer-client relationship is communication. Client relations errors are common and include things like: failure to obtain consent/inform client, failure to follow client’s instructions, and improper withdrawal of representation. Malpractice claims and ethics complaints share very common ground when it comes to problems that arise from poor communication with the client. This vignette clearly indicates there were communication problems.

- **Virginia Rule 1.4 Communication:**
  
  (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests the information.
  
  (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
  
  (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

- **Other Ethics Rules** that may involve a failure to communicate include Virginia’s Rule 1.2 Scope of Representation, Virginia Rule 1.3 Diligence, Virginia Rule 1.5 Fees, and Virginia Rule 1.16 Declining or Terminating Representation.

- **Lawyers, The Great Communicators:** Chalk it up to greater awareness, or maybe the increased use of e-mail, texting and cell phones, but whatever the reason, the good news is that recent ABA Malpractice Claims data indicates that client communication errors have gone down slightly, 3.35% (communication errors represent 11.22% of all claims errors) over the last several years. Lawyers seem to be making strides in this area of claims exposure. The only other
concerns are making sure lawyers document both communications to the client and the client’s response.

- **Ethics Complaints**: Failure to communicate continues to be one of the most common ethics complaints received by the Virginia State Bar.

### PRACTICE MANAGEMENT POINTERS

The following is a list of items, which if regularly used in practice, will improve communication with the client:

- **Engagement Letter** with fee arrangement and other terms and conditions of employment. *Appendix I.*

- **Conflicts Disclosure Letter** whether the ethics rules require written disclosure or not, disclosure of any potential conflict should always be done in writing.

- **Detailed Billing** should be used to help identify action taken by lawyer and staff regarding client’s representation.

- **Regular and Follow-Up Communication** by letter or e-mail should be used to regularly update client on the status of a matter.

- **Returning Phone Calls**, lawyer and staff should promptly respond to client phone calls and e-mails.

- **Non-Engagement Letter** should be regularly used to decline business the lawyer/firm will not take. *Appendix II.*

- **Termination Letter** should be used whenever the client is fired and or to acknowledge when the lawyer is fired. *Appendix III.*

- **Closing Letter** should be used when lawyer has completed the tasks for which he or she was hired. *Appendix IV.*

d. **Clients’ Addresses: Keeping Track.** It can be difficult to deal with a client who has disappeared. Here, the contact information on the client was for a mailing address at the fiancée’s. When they broke up, the address was no longer reliable, and the lawyer was unable to contact the client about paying his bills and ultimately terminating the representation. Emphasize to your clients the importance of keeping you updated on their contact information. The engagement letter can help address this in three ways:

- **Regular Contact**: Stress to the client the need for them to stay in regular contact with you so that case critical decisions can be made in a timely manner.

- **Update Frequently**: Ask the client to provide a current phone number, address (and perhaps even an email address) and update any changes with either as the representation continues.
• **Phone a Friend:** Ask the client for the address and phone number of someone (close friend or relative) that will, presumably, always know how to contact the client.

• **Office Visits:** Beyond the engagement letter, whenever the client visits the office, ask them to verify and or update their contact information. Also, updated contact information should always be requested on the billing invoice or as part of the transmittal letter.

• **But What Should an Attorney Do about a Missing Client and their Soon-to-Expire Statute of Limitations?** “An attorney should never prejudice a client. Thus, where a client is missing, and reasonable efforts to locate him have proved fruitless, an upcoming statute of limitations deadline must not be ignored by the attorney. The attorney should file the lawsuit needed to prevent the statute of limitations from running; the attorney may also at that time, if he wishes, file a contemporaneous motion to withdraw. **Virginia LEOs 841, 872, 1088 and 1173.**” Anne Michie, “Answering Your Questions About Legal Ethics,” *Virginia Lawyer Register*, p. 1 (March 2003).

c. **Fee Disputes:** Practice Pointers and Suggestions for Avoiding Fee Disputes (proactive, instead of reactive) include requiring and replenishing an advance, regular billing, follow-up phone calls, withdrawal from the case and suing the client for fees or arbitration. Frequently, disputes over a lawyer’s fees trigger subsequent ethics and malpractice complaints. **DO NOT IGNORE BILLING COMPLAINTS.** Preventative measures from the outset of the relationship include the following:

• **Written Engagement Agreement** – Use a written engagement agreement that explains the fees, expenses, and the client’s obligations to pay both promptly. Inform clients of what the expenses will be and cost and what the legal fees will be. You are far more likely to be paid if, from the beginning, the client has a good understanding of the fees and expenses the case will generate. *(See Appendix I Engagement Letter)*

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<th>CONSIDER INCLUDING THE FOLLOWING IN YOUR ENGAGEMENT LETTER (See Appendix I)</th>
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<td>☑ An arbitration clause for fee disputes; it should be fair and reasonable and the client must be informed of its meaning.</td>
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<tr>
<td>☑ A provision for late fees or interest on any unpaid balance over thirty days. In the majority of jurisdictions, it is ethically permissible to charge interest on past due accounts (fees and expenses) provided the client has notice of it and agrees to the fees and interest charges before any such charge is assessed. The client must continue to have the option of prepayment without penalty. Consult your state’s ethics opinions for specific guidance. Additionally, the rate and past due time period must comply with your state’s statutory provisions controlling the terms and conditions of charging interest rates. Pursuant to <strong>Virginia LEOs 1247 and 1595</strong> and so long as it is disclosed and agreed upon at the outset of the representation, an attorney may charge a client interest on fees and costs.</td>
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The client must be allowed to retain the right of prepayment without penalty, and the interest charged must comply with Virginia Code Section 47-11-103 and 104.

- A provision for withdrawal and work stoppage if the client continues to be delinquent. (Note a lawyer must still comply with Virginia Rule 1.16 and if suit is filed, an order of withdrawal from the court must still be obtained.)

- A provision for replenishing the advance throughout the representation.

• **Requiring an Advance:** Unless the matter is a contingent fee case, require that the client pay an advance before beginning any work. Consider requiring the client to replenish the advance periodically throughout the representation.

• **Regular Billing:** Use detailed billing, and send the bills out every thirty days. Detailed billing statements are an excellent way to communicate and keep the client informed of what actions you have taken. Detailed billing also creates an important timeline of what actions were taken when in the case, and the timeline can be very beneficial if there is ever a bar complaint or malpractice suit.

• **Follow-Up Call:** If the client does not pay within thirty days, a follow-up call should be made as soon as possible on accounts that have become past due. Do not ignore the client’s failure to pay your bill. Talk to your client; find out if there is a problem with your services or a complaint about your bill. See if a payment plan can be agreed upon. A study by the ABA found that once your fees are sixty days past due, your chances of being paid in full drop dramatically.

• **Silence May Be Your Worst Enemy:** When it comes to collecting fees, lawyers who do not call to ask why they haven’t been paid may be their own worst enemy. An ABA study indicated that clients who have not paid their legal fees interpreted silence on the part of the lawyer as acquiescence of their failure to pay. These clients figured they hadn’t heard from the lawyer about the failure to pay because the lawyer could afford to “carry” them for a while. Don’t end up on the bottom of the client’s “bills to pay” list.

**FOLLOW-UP CALL**

- Always speak with the person named in the billing statement.

- Make an inquiry to ensure the bill was received. Determine if there are any additional questions or information needed in order to be paid.

- Find out the reason the bill has not been paid, and be prepared with a follow-up question to resolve the problem and/or find out when the bill will be paid.

- While making such calls can initially be difficult, they are necessary relationship builders that let the client know the lawyer needs to be paid for the work.
VA 2010 Update: Preventing Legal Malpractice Claims and Ethics Complaints in Your Law Practice

- **Withdrawal from the Case:** If the client persists in failing to pay the bill, promptly evaluate the situation and make a decision about how you are going to handle it. Will you follow through on the withdrawal provision in your engagement agreement, or can you and the client work out payment terms that are satisfactory to the firm? Do not just continue to work on the file without addressing the fee problem; it will likely only get worse. Delaying a decision and/or failing to take action usually only makes these situations worse regarding the amount owed and whether you will be allowed to withdraw if the matter is pending before a court. Any withdrawal must comply with the Rules of Professional Conduct, particularly Virginia Rule 1.16, and if suit is filed, an order from the court allowing withdrawal must be obtained.

- **Suing the Client for Fees:** Serious consideration should be given before taking steps to file a lawsuit against a client for non-payment of fees. The firm needs to ascertain the probability that a counterclaim for malpractice would be forthcoming and address the possible ramifications of it. Review the engagement agreement and the results of the representation with a critical eye to make sure that your own “house is in order” before proceeding. Consequences of a suit for fees often include a malpractice counter-claim, having to report the claim to your carrier for coverage and expenditure of your deductible. Arbitration or mediation of the fee dispute is a better way to pursue fees than filing suit.

2. **The You Better Fix It Client: Angry or Violent Clients: How should lawyers and staff handle angry clients?** In this vignette, the Underwood’s were very upset when they showed up at the attorney’s office. The staff wisely and discreetly alerted the lawyer that the client was upset before showing them to the lawyer’s office. The lawyer was smart to make time to meet with the client, and he made an effort to listen and to limit his comments until he had a chance to review the file. However, it would have been appropriate and wise to have shown the client to a conference room rather than the lawyer’s office, and staff should have stayed on alert in case the situation escalated and the lawyer needed help. The bigger question here is does this firm have a security plan and is everyone up to date on it?

a. **Work Place Violence:** The number of Americans murdered on the job has grown steadily over the last ten years, and no office, including a law practice, is immune to it. Many experts agree that the current recession only increases the likelihood of violence in the work place. There has always been a concern about third parties, such as angry clients or opponents acting out in violence, particularly in certain practice areas, like domestic and criminal law. But added to that risk should be employees who may act out violently, especially in this economy. Downsizing, lay-offs, and restructuring produce stress and increasingly harsh workplace environments. The other potential for violence in the work place is domestic violence coming from an employee’s home life into the office.

b. **Steps for Reducing the Risk of Violence:** To provide protection from workplace violence:
• **Identify the Risks:** clients, opponents, past employees, current employees, etc.

• **Create a Plan for Providing Protection and Safety:** See additional comments below at e. and d.

• **Educate:** Educate lawyers and staff regarding procedures and safety.

### TIPS FOR AVOIDING WORKPLACE VIOLENCE

1. **Assess Your Work Environment:** Critically examine all areas of your work environment, including parking lots, entryways, reception areas, work areas, and offices. Is the lighting adequate? Are there convenient escape routes? Do you have a method to summon assistance? Determine when doors be locked (in some areas, it is appropriate to lock the front door and have a bell/intercom for clients to announce their arrival), security for personal items such as purses, and after hours procedures for employees’ safety, etc.

2. **Pay Attention to the Warning Signs:** Many people who become violent communicate their intentions in advance or have a history of violence. Threats from clients, coworkers, or third parties should be immediately reported to the managing partner who can then report to local authorities if appropriate. Policies should encourage employees to report domestic violence occurring in an employee’s home that could escalate into the office or stalking behavior. Also routinely contact references and conduct background checks on prospective employees (lawyers and staff); if there a history of violence or aggressive behavior then you may not want to hire them.

3. **Promote Respect:** The best way to prevent violence in the workplace is to foster a day-to-day attitude of respect and consideration by everyone in your work environment; this includes clients, staff, lawyers and all other third parties like opponents and their counsel.

4. **Eliminate Potential Weapons:** Take a mental inventory of objects available in your immediate work area that could be potential weapons. Remove or secure objects that could be used in a violent act.

5. **Know Your Violence Response Procedures:** Violence Response Procedures are simple plans designed to minimize injury during a violent incident. These procedures should include a plan to summon assistance and move people to a safe area. All employees should be educated on these safety procedures. Consider **ePanic Button**, an affordable means to summon support discreetly. ePanic Button is a software program that sends emails, text messages and pop up alerts through a worker’s computer. It can instantly and discreetly summon support, and it also provides report generation for tracking purposes.

6. **Trust Your Instincts:** Don’t ignore your internal warning system. If you sense impending danger, react accordingly. If someone comes into your office in a trench coat in the summer….trust your instincts.

7. **Zero Tolerance Policy:** The firm should develop as part of its safety policy, a “zero tolerance policy” for violent behavior or threats of violent behavior by employees. As well as potential liability for negligent hiring, employers are increasingly held liable for negligent retention and negligent supervision of violence-prone employees. Firm policy should clearly state that inappropriate behavior in the workplace, such as violence or threatening behavior, is grounds...
for immediate termination. Policies should formalize employee access to management, and employees should be encouraged to report questionable behavior immediately. All complaints should be thoroughly investigated. Performance and behavior standards should discourage violent behavior and provide avenues for treatment or discipline, including immediate termination of potentially violent employees.

c. **Security Issues:** The lawyers and the staff need to be prepared to deal with upset clients, employees or other third parties who may create a security concern in the office. Employee manuals and training for staff and lawyers should include instruction on:

- How to handle abusive or rude individuals, on the phone or in person.
- Discussions/examples identifying at what point rudeness becomes dangerous.
- At what point should an individual be asked to leave the office?
- What action does staff take once the individual has been told to leave and refuses to do so?
- When to notify a lawyer and or the managing partner about a problem client or situation and exactly who within the law firm should be notified if there is an on-site emergency.
- Procedure for handling a client, or even a non-client, who shows up at the firm upset and/or irate. For example, that person should be shown to a waiting area removed from the rest of the firm; the concerns about the client should be immediately explained to the attorney out of the hearing of the client; a decision should be made regarding whether or not to contact authorities and to circulate an emergency e-mail to the rest of the staff to leave the building. An angry or hostile person should not be invited into the lawyer’s office within the interior of the firm but is better kept waiting in a conference room where the staff and attorney can converse without further aggravating the situation.
- Have a Contact list with important emergency numbers and information for lawyers and staff. If your building has security officers, know how to alert and summon them in the event of an emergency.

**TIPS FOR PROTECTING YOUR OFFICE FROM VIOLENT ACTS**

- Evaluate the "open front door" to your office. Consider having a panic button and emergency telephone numbers available in your reception area.
- Establish clear lanes of exit from all areas of your office in the event that an avenger is on the loose.
- Have a plan for your receptionist to implement if a suspicious individual enters the office, including a special code that puts your crisis response team on alert.

- Whenever an emotionally charged event occurs within or outside of your organization, be certain the entire crisis response team is informed.

- Consider obtaining restraining orders against dangerous individuals, but recognize their limitations.

- Notify your building's security supervisor and provide security with pictures of any menacing individuals.

- Consider temporarily removing your office suite number and firm name from the building's directory.

- Employ temporary security services for your office, if the situation warrants.

- Notify your local police department of your concerns. If you, your employees, or your clients are the victims of violence, set up violence-aftermath debriefing services for all affected individuals and their families within 12 hours of the incident. Have sample press releases prepared for the eventuality that violence may strike your organization, since you will have other pressing matters to occupy you after the incident has occurred. Don't forget your clients. Plan ahead how you will communicate with them in the event of an incident. Finally, prepare contingency plans if your organization cannot physically continue in its current location, if only temporarily.

The above tips were quoted from in the ABA article: “Violence in the Workplace Protecting Your Law Office,” by Karen Mathis, General Practice, Solo & Small Firm Division (Winter 1996), <www.abanet.org>

3. **The “Second Guessing” Client—How should the lawyer handle a client who now regrets their settlement decision and blames their lawyer?** Ruth Miller, a divorce lawyer, fields questions from her client, Beth. As a part of her divorce settlement, Beth was to receive one-half of her spouse’s 401K benefits and also one-half of his pension when he retired. Her spouse’s retirement plan allows for the amount of the pension from the employer to the employee to be reduced by an amount equal to half of any amount the employee receives from Social Security. Ruth took Beth’s divorce case as a favor to Beth because Beth works with Ruth’s husband. Ruth also reminds Beth that she and her (Beth’s) ex-husband had already agreed to split the benefits 50/50 before Ruth got involved. Ruth also recalls that Beth did not want Ruth to generate a lot of fees on her case. Beth inquires about Ruth’s malpractice coverage.

a. **Virginia Rule 1.2 Scope of Representation and Comments [1], [6-7]**

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

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

Comments

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer’s professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer’s scope of authority in litigation.

Services Limited in Objectives or Means

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.
b. **Regret and Second Guesses?** Often, after a settlement has been reached and time has passed, clients reflect on their decision to settle and wonder if they could have gotten a better deal. (This can also occur after the settlement money has run out…) The clients then try to pin the blame on their lawyer, sometimes even forgetting the specific details and reasons they decided to take the settlement (for example, wanting to remarry and just get the divorce over with, or not wanting to spend additional money on an expert witness, etc.). Below are some of the common problems that contribute to this:

- **The Blame Game:** The client is now blaming the lawyer for the fact that she will be receiving less than she expected from her husband’s retirement accounts. The lawyer reminds Beth that she and her ex-husband had already agreed to split the benefits 50/50 before the lawyer got involved and that Beth wanted to keep legal costs low and just get the divorce over and finalized. Hopefully, the various legal options presented by the lawyer and ultimately rejected by the client, either because of expense or length of time to pursue, are well documented in the file.

- **Reduced Fees:** Here the lawyer had tried to keep the fees down in a domestic case and had not spent the time to read every word of the spouse’s retirement plan. Fortunately, the lawyer remembered why there was less attention given to this file. But that may not help her defense against an ethics complaint or a malpractice claim. Unless both the lawyer and the client agreed to limit the scope of representation, which should be done in the engagement agreement, the lawyer will have a difficult time defending herself, and even then a limited scope of representation may be scrutinized regarding reasonableness.

- **Getting in Midstream:** Beth and her ex-husband had already come to some agreement as to the splitting of their assets before she came to see the lawyer. Always identify the scope of representation at the time of your engagement. If, as here, an agreement has already been reached by the parties and the terms are set, clearly document and identify the parameters of representation in the engagement agreement. Also clearly document and identify the terms of the agreement that preceded the lawyer.

- **Document It:** Many times, when a phone call like the one in the vignette comes in, the attorney cannot recall, at least not right away, why things were done a certain way. Keep good notes in your file if you are deviating from your regular recommendations or course of representation. Decisions that clients make are often a reflection of their emotional and financial circumstances at the time. After the representation is over, clients may look back and scrutinize the representation, failing to remember why they made certain decision at a particular time. Documenting these decisions at the actual time they were made and being able to remind the client why they made the decision go a long way towards protecting the lawyer when there is second-guessing.
c. **Representing Friends and Family:** Where an attorney is representing a friend or family member, it is common for the working relationship to be more casual. When this occurs, the typical office procedures and formalities that would normally be applied to handling the client’s matter often are not maintained or are omitted altogether. This has the potential to be harmful to both the client and the lawyer.

- **Separate Each Representation:** When representing friends and family, you should make sure to formally acknowledge all new matters, and if it is a long-standing or on-going client, you should make sure to separately identify each new matter you undertake. This includes:
  
  (i) opening a file for each new matter;  
  (ii) identifying who specifically you are representing;  
  (iii) doing an acceptance letter or engagement letter; and  
  (iv) doing a conflicts check.

- **During the Representation:** You should make sure to communicate with the individual or entity you are representing formally enough to document the advice and information being exchanged between you and the client. Using family members to transmit information and “over-the-fence” communications should be kept to a minimum.

4. **Whose In Charge?** Clients who need to be in control of everything and have a bullying approach can be overbearing and difficult to deal with. They may insist on pursuing a course of action in a manner the lawyer feels is unprofessional or even unethical. Also, these types of clients are often demanding and want access to the lawyer around the clock. In this vignette, bankruptcy counsel, corporate counsel, and the client are having their second meeting to discuss the client’s bankruptcy options. The client has signed the engagement agreement and begins to reveal his philosophy on how the case should be handled. The client has recently gone through a divorce, and there are elements of the bankruptcy that he wants to use to frustrate his ex-wife. He wants to receive his file electronically and is unwilling to allow the attorney to keep a copy of some of his corporate documents. He also advises he’ll fight to the bitter end and that they must work towards that goal as a “team.”

- **Client Screening, or “I should have listened to my gut”:** In order to keep control of your practice and maintain balance in your professional life, lawyers need to screen their clients and decide which ones to accept and which ones to decline. This client is very likely a bully who is going to insist on very aggressive tactics that the lawyer may or may not find appropriate to the representation. But what the lawyer thinks about the tactics will likely not make any difference to the client who will insist on doing it his way. Red flags in this vignette for client screening include:
  
  - Client’s Attitude—“I will fight them every step of the way.”
  - Client’s Expectation—“I need protection for my assets right now.”
• Client’s Demands—“I want us to keep in close contact during all of this.”

• Client’s Fraud—“You can see, but not keep, copies of some of my business documents.”

Screening helps you make sure you can have a good working relationship with the client and can satisfy his or her expectations and legal objectives. In the long run, this helps build a more successful practice and prevents ethics complaints and malpractice claims. There were numerous red flags which the lawyer should have used to evaluate whether she wanted to work with this bullying client. Questions about the client’s integrity were apparent. Particularly, the lawyer should not have agreed to the client’s request that she not retain copies of certain business documents. Is this the client’s first run at obscuring information or is it just a control issue? Either way, the lawyer needs to seriously consider whether she wants to work with a client who has these characteristics.

b. 24/7: This lawyer gets caught up in the client’s urgency, taking calls from him at all hours of the day, on any number of topics. He is a demanding client who always needs an answer yesterday. This client’s philosophy is “I pay you so I own you.” The lawyer needs to set boundaries from the very beginning of the representation regarding when and how she can be reached and what sort of response time the client can expect. One restraint might be to charge the client significantly more for calls after hours; this should be established from the outset of the representation and included in the engagement agreement. Other considerations, do you give your client your cell number?

• Always Urgent: Every need or question this client has is always urgent. The lawyer needs to establish from the outset of the representation what sort of response time the client can expect regarding questions and inquiries. It may not be wise to always interrupt what you are doing to give a client an answer to a question. The lawyer needs to be careful when trying to respond quickly to a client because facts may be incomplete or necessary information omitted. This can create the perfect environment for the lawyer to give “incomplete advice” or wrong advice that may lead to a malpractice claim.

c. Zealous Representation: An aggressive, bullying client often demands that the lawyer use aggressive, bullying tactics when representing him/her. Changes to the Rules of Professional Conduct reflect that a lawyer need not press for every advantage when representing a client and that “zealous representation” is not a shield behind which lawyers can hide when engaging in unethical and unprofessional conduct. Nor should a bullying client’s appetite for aggression be an excuse for unprofessional or outrageously aggressive behavior on the part of the lawyer.

• Virginia Rules: With the adoption of Virginia’s version of the Model Rules of Professional Conduct, there is no longer a direct counterpart to the Rules of Professional Responsibility with regard to DR 7-101 (A) and (B). Representing a Client Zealously and Limitations on
Zealous Representation, respectively. While the term zeal has not completely disappeared from the rules, it has been tempered and explained in an effort to curb abusive behavior that was often justified on the basis of “zealously representing the client.” Zeal in advocacy is referenced various times in the comments of several different Virginia rules. (See Rules and Comments below.) There are also numerous rules and comments that address a lawyer’s conduct as relates to the rights of third persons and a lawyer’s misconduct such as fraud or deceit, or assisting a client with criminal conduct. (See Rules and Comments below.)

- Virginia Rule 1.3 Diligence and Comment [1], [2]; Virginia Rule 3.4 (a) and (j) Fairness to Opposing Party and Counsel and Comments [1], [6-8]

  (i) **Virginia Rule 1.3 Diligence**

  (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

  (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

  (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

  **Comments**

  [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer’s workload should be controlled so that each matter can be handled adequately.

  [2] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client’s needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client’s interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

  (ii) **Virginia Rule 3.4 (a) and (j) Fairness to Opposing Party and Counsel and Comments [1], [6-8]**

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

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Comments

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. [Emphasis added.]

[6] Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. [Emphasis added.]

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

[8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer’s conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. [Emphasis added.] A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.
Virginia Rule 1.2(c) Scope of Representation; Virginia Rule 4.4 Respect for Rights of Third Persons; and Virginia Rule 8.4 Misconduct and Comment [2]

(i) Virginia Rule 1.2(c) Scope of Representation…

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law….

(ii) Virginia Rule 4.4 Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(iii) Virginia Rule 8.4 Misconduct and Comment [2]

It is professional misconduct for a lawyer to:

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

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

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

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

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

Comment

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that
have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. [Emphasis added.]

e. **Professionalism: Where does it fit into “zealous” representation?**

“Professionalism among lawyers is more than competence. It is more than the ethical practice of law. Professionalism also means civility, and civility means courtesy, decency, fairness, integrity, and similar hallmarks of virtue. Professionalism means being honorable towards opposing counsel, toward clients, toward the court, toward witnesses, toward colleagues, toward everyone. *Competence and ethics represent the floor below which no judge or lawyer may descend. Professionalism is the ceiling, the height of the profession of law, the goal to which all judges and lawyers should ascend.*” (emphasis added) (Quoted from the “Professionalism in the Legal Profession” by the Hon. Gerald Lebovits in the Richmond County Bar Association Journal (New York), Summer 2006, pp. 8, 12-14.)

- **See Principles of Professionalism for Virginia Lawyers** endorsed by the Virginia Supreme Court and all statewide bar organization in 2008, <www.vba.org>. These Principles provide guidance on the professional behavior to which Virginia lawyers should aspire.

f. **The Vignette:** As evidenced by this vignette, angry and aggressive clients may demand similar conduct from the lawyer during the representation. Zealous representation should not be an excuse for behavior that crosses the line and becomes abusive, boorish, and disrespectful behavior that obstructs the administration of justice. As the above ethics rules and professional principles demonstrate, lawyers have a responsibility to set the tone and character of the representation. If the client persists in demanding an approach that the lawyer believes is unprofessional or unethical, it may be time to terminate the representation.

5. **The Client Who Won’t Pay: Specifically, how should a lawyer handle a client billing dispute where there has been a bad result and the client refuses to pay?**

Our attorney, Mike, represented Stan, the defendant and a strong willed businessman, in a contract dispute case. The jury returned an unexpected verdict for the plaintiff in the amount of $85,000. Stan is not happy and hires new counsel to appeal. Mike subsequently sends Stan a $15,000 bill for the trial and preparation time. Also included in the bill are expense charges for Westlaw service that are in addition to the attorney's time for research and charges for a set of CD-Rom’s the attorney bought that had contract information on them.

Stan calls to express his displeasure over the bill for legal services. He indicates that he is not going to pay for the work and that he will be pursuing a claim against Mike for the attorneys’ fees to file the appeal and the damages from the underlying case if he isn’t successful on appeal. It is his position that Mike committed legal malpractice in his lack of preparation for the case and in the failure to call Hawthorne, a witness, at trial. He also demands that he be given another copy of his file, both paper and
electronic. Mike tells Stan that he has given him copies of everything in his file as they went. He also tells Stan that any dispute over the bill or for legal malpractice will have to be submitted to arbitration per the engagement agreement the client signed.

a. **Virginia Rule 1.5 Fees (a) and (b)**

(a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent.

(b) The lawyer’s fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

b. **Practice Management Consideration: Getting Paid.** The client is upset because, after unexpectedly losing his case, he has now received by mail a very large bill from the lawyer for his legal services. This is a classic billing mistake that firms often make because now, in light of the bad result, a fee dispute with the client could spark a subsequent malpractice claim. Is it worth the risk to send a bill for a large legal fee following a bad result, particularly if neither the lawyer nor the client anticipated the adverse jury verdict?

- **Prepare the Client with a Phone Call:** One suggestion would be for the lawyer to prepare the client for the upcoming bill by calling him on the phone before he actually receives the bill by mail. A frank discussion about the bill to be received could eliminate the element of
surprise and anger on the client’s behalf. Another suggestion would be for the lawyer to discuss the large amount due with his partners and strategize about the best way to present to the client what is owed to the firm. Possibly writing off a portion of the bill could be balanced against the risk of further angering the already disgruntled client and sparking a fee dispute and/or malpractice claim.

- **Evaluate Client “Personality”:** It is often the case that the client who is the most authoritative and determined to prevail will scrutinize all the preparation and decisions at trial looking for the error that caused them to lose. Of course, that “error” was the fault of the lawyer. Make sure that you do not encourage the “invincible client” attitude in your interaction with the client. Client education regarding outcome and results, performed by the attorney, should occur throughout the representation. It should include a realistic evaluation of the pros and cons of the case and the reminder that an unsatisfactory result is always a possibility in court. These discussions should be documented in the file.

- **Are There Specific Problems with Mike’s Bill for Services?**

  (i) **Billing for Legal Research:** In addition to billing his time, the lawyer also billed the client for the expenses he incurred for doing on-line Westlaw research. In an Illinois contingency fee case dealing with this issue, the court ruled that research fees are considered to be part of the attorney’s fees and were not contemplated as expenses under the contract which called for “the client to pay the customary costs and reasonable out-of-pocket expenses.” If the firm is going to bill the client for the on-line time as an expense, it should be clearly set out in the engagement agreement under the types of expenses the client could expect to pay. *(Guerrant v. Roth*, Ill. App. Ct. 1st. Dist. No. 1-01-3690, 9/13/02.)

  (ii) **Billing for CD-ROMs:** The client was also billed for a CD-Rom the firm bought with current contract dispute information on it. Quite often these resources have a license set to expire within one year if not renewed. In a North Carolina case considering this issue, the court concluded that the lawyer’s fee agreement with the client authorized computer research but did not extend to the purchase of basic reference materials. The purchase of the CD-Rom without the consent of the client was found to be in violation of **Rule 1.7** and **Rule 8.4**. Charges such as this will be upheld only if it is reasonable pursuant to **Rule 1.5** and made with the client’s full knowledge of all the material circumstances relating to the reasonableness of the fee. Finally, if the client pays for it, should it be turned over to the client as part of his file? Yes, if possible. *(North Carolina State Bar v. Gilbert*, N.C. Ct. App., No. COA01-769, 7/16/02.)
c. **Submitting the Fee Dispute to Arbitration:** A safer venue for resolution of fee disputes would be mediation or arbitration. This lawyer and firm included an arbitration provision in their engagement agreement. Such a provision referring all fee disputes between lawyer and client to arbitration is normally upheld by the courts if the engagement agreement clearly identified and explained the provision such that the client understood its meaning that the client was waiving all other rights and remedies except arbitration. The arbitration clause must not be unfair, unconscionable or inequitable when entered into. Disclosure must be such that the client is able to make an informed decision as to the rights and remedies forfeited in agreeing to the provision. (*See Virginia LEO 1586 and ABA Formal Opinion 02-425 Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims.*)

- **A fee arbitration provision** can help provide a forum for collecting fees while removing the threat of a counterclaim for malpractice. *Comment [9] to Virginia Rule 1.5 Fees* states that where a lawyer has a fee dispute or resolution program available to her/him, the lawyer should “conscientiously consider” submitting any resulting fee disputes with clients to the program.

- **Arbitration Provision for Attorney’s Malpractice:** Before inserting such a provision into your engagement agreement, you should consult with your state bar to determine if it would be ethical. Only a few states have found such a provision to be ethical. Cases where such provisions have been upheld normally involve a sophisticated client and both a written and oral discussion of the provision and its implications; some even require that the client must be encouraged to seek the advice of independent legal counsel before entering into such an agreement. Sophisticated corporate clients are typically the best sort of candidate for this provision and are usually the type of situation where it has been found ethical.

(i) **Virginia:** While it is not unethical *per se* for a Virginia attorney at the time of engagement with adequate disclosure and informed consent to limit the malpractice liability forum to binding arbitration, use of such provisions is not encouraged because they erode the public’s confidence in lawyers, and any such provision would receive heightened ethical scrutiny for fairness, overreaching and compliance with Rule 1.7(b) and 1.8(a) and (b). *See Virginia LEO 1707.* Prior Virginia LEO 638 recognizes that insertion of a binding arbitration provision for any malpractice dispute with a client did not constitute a limitation on the lawyer’s liability in violation of DR 6-102 [Rule 1.8(h)] because it merely identified a forum for determination of liability and did not specifically limit liability. (*See also Virginia LEO 1550.*) However, the Committee has made the point that a binding arbitration provision for malpractice liability accompanied by the necessary disclosures and consent erodes the public’s
confidence and trust in attorneys, particularly when the initial consultation requires the client to seek other counsel to evaluate a provision in the engagement agreement. Use of such provisions is discouraged.

d. **Providing the Client with a Copy of the File:** While the lawyer in this vignette has given the client copies of the file documents throughout the litigation, the client has now asked for another complete copy. Pursuant to [Virginia Rule 1.16(e)](https://www.bar.org/rules-and-guidance/rules-of-professional-conduct/virginia-rule-1.16), the lawyer is required to provide the client with one final complete set. If the engagement agreement so provided, the cost for the copies of all documents other than the original provided by the client could be charged to the client, but the copies should not be held up pending payment of the copy cost where to do so would prejudice the client. In this case, there is an on-going appeal for which the client needs the file.

(i) **Professional Responsibility Consideration:** [Virginia Rule 1.16](https://www.bar.org/rules-and-guidance/rules-of-professional-conduct/virginia-rule-1.16) Declining Or Terminating Representation…

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer’s possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client’s new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer’s file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer’s copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client’s refusal to pay for such materials as a basis to refuse the client’s request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination;
provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

(ii) **Virginia Rule 1.16(e)** specifically addresses how to handle the client’s file. **Rule 1.16(e)** breaks the contents into three categories.

- **Original Documents:** The first is “all original, client-furnished documents and any originals of legal instruments or official documents.” Those documents are deemed to be the client’s property, and the lawyer must unconditionally return them to the client upon request, regardless of whether the lawyer’s fees have been paid. The lawyer cannot charge the client for copying the original documents provided by the client.

- **Work Product, Communications and other Materials:** The second category includes lawyer/client and lawyer/third party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda and other attorney work product documents, research materials and copies of prior bills. For this second category, pursuant to the engagement agreement, the lawyer may charge the client for the expense of making a copy of the items.

- **No Retaining Lien:** For both of these categories, a lawyer must provide the requested items regardless of whether the client has paid his bill. This essentially wipes out the lawyer’s right to a common law retaining lien. A lawyer can still pursue all normal collection options against a former client for unpaid fees; however, the retention of the file cannot be held up in exchange for payment of the bill for fees, the copying cost, or other costs arising from the representation.

- **Internal Documents:** The third category of documents includes copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations or difficulties arising from the lawyer-client relationship. A lawyer is not required to turn these items over to the client. However, the lawyer must exercise discretion to ensure that the notes are not necessary or useful to the client’s cause. Be careful with this exception and construe it very narrowly. It is important to note that attorney work product is not in this category. An attorney must provide copies of things like his research notes, drafts of documents and outlines of case strategies to the client upon request, as those items are within the second category discussed above.
• **Copying the File:** Can a lawyer charge the client for copying the file? The lawyer **cannot** charge for copying the original documents provided by the client. The attorney is copying those documents for his/her benefit. Regarding other documents not provided by the client, the attorney may charge for providing the client copies of those documents as set out in the engagement agreement, but under no circumstances can the attorney withhold the file for the client’s failure to pay the cost of copying these documents.

• **How Many Copies Must Be Provided:** Note that under Virginia Rule 1.16(e), the lawyer has met his/her obligation to the client by providing the file documents one time in total at the conclusion or termination of the representation. The lawyer is not required to provide multiple copies. However, the lawyer has not met his/her obligation under this Rule by providing copies of the file documents on an item-by-item basis during the course of the representation.

• **Always Keep a Copy:** Always keep a copy of the file for the firm. It is particularly important that staff know how to handle a request for the file.

• **Request a Receipt:** Have the client sign a receipt specifying the entire contents of the file were returned to him/her (to prevent later disputes about what was/was not in file received by client). But note pursuant to Virginia LEO 1690, compendium opinion, a lawyer is permitted to ask a former client to sign a receipt that describes the documents delivered to the former client from his file. However, it is not ethically permissible for a lawyer to refuse to surrender documents until his former client signs a receipt. See also Virginia LEO 1485.

• **File Includes Electronic Information:** Also remember that the client’s file includes electronically filed and stored documents (including e-mails). Make sure your filing system contemplates keeping track of both paper and electronic information. Make sure you can produce a complete copy of the file for the client and yourself. The file can be produced electronically, so long as it is not a hardship on the client.

**WHAT CONSTITUTES THE FILE?**

Generally, the file consists of:

1. Papers, documents (electronic or hard copy) and real evidence furnished to the attorney by the client.

2. Correspondence and e-mails between the attorney and others concerning the client matter.
3. Pleadings, transcripts, and other documents filed with a court or another party or agency.

4. Investigatory or discovery documents including medical records, photographs, tapes, reports, witness statement, depositions and demonstrative evidence.

5. Legal Memoranda and other attorney work product documents prepared for or collected on behalf of the client.

6. Research Materials collected on behalf of the client.

7. Bills previously submitted to the client.

8. Personal notes of the attorney containing the attorney's analysis of the case.

9. Remember that the file includes materials that may not be in hard copy form, but are instead stored electronically.

6. “Supersaver” Client: What issues does a lawyer face when the client wants to keep fees low by only using the lawyer for some aspects of the representation? This client, Bob Johnson, a retired Army colonel and engineer, is savvy enough to understand his legal rights after his car accident, and he has attempted to handle parts of his personal injury claim on his own. Bob only wanted his lawyer to “help” him with specific legal questions, and subsequently, he only wanted to pay for those specific legal answers to keep his legal fees down. Our lawyer did help Bob with bits and pieces of the case, however, once the negotiations stalled out, Bob wanted the lawyer to help him file suit. On the day Bob is due to come in and discuss filing suit with the lawyer’s help, our lawyer realizes the statute of limitations has expired on the claim. Our lawyer is upset because Bob was never “officially a client” of his firm, and so, his statute of limitations was never properly calendared in the firm’s system.

a. Virginia Rule 1.2 Scope of Representation and Comments [1], [6-7]

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

   (b) A lawyer may limit the objectives of the representation if the client consents after consultation.

   (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.
(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

Comments

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer’s professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer’s scope of authority in litigation ....

Services Limited in Objectives or Means

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.

b. Limited Scope of Representation or “Unbundled Legal Services”: Pros and Cons: Here, our attorney agreed to represent the client on a very limited basis. As stated, this is a somewhat sophisticated client who is able and willing to maneuver himself through the negotiating process. This client, initially, does not need a “full service” attorney, nor does he want to pay for one. While the Rules of Professional Conduct under Rule 1.2 (c) clearly provide for a limited scope of representation, some types of representation are more suited to this than others. For example, in transactional work, there are often clear tasks that can be separated out for the lawyer to perform. However, in litigation, it maybe
much more difficult to carve out parts of the representation to be handled by the
lawyer. Representation of a client in litigation is often similar to a line of
dominoes. The representation starts a chain reaction of issues that are
intertwined making it difficult to take on one without affecting them all. For
example, in this vignette, who is responsible for identifying and diarying the
statute of limitations? While the motivation for the client may be saving money,
and the incentive for the lawyer may be “something is better than nothing,” it
may be difficult to control or limit your malpractice exposure if the
representation is not amenable to a clear division of labor.

- **What are Unbundled Legal Services?** Also called “discrete task
representation” or “limited services representation,” unbundling is
when a client hires an attorney to perform only specified tasks agreed
upon beforehand by both attorney and client. The concept, while not
new, has been utilized in the transactional world for many years and is
now being considered in other areas of practice including litigation,
and particularly, family law.

- **Why the Increased Interest in Unbundling:** Two divergent trends
in the legal environment are pushing unbundling to the forefront as a
possible solution. First, nationwide, court statistics show a significant
increase in the number of clients who are unrepresented (both Arizona
and Oregon have jurisdictions where over 40% of the divorce cases
include one unrepresented party). The most common reasons for
choosing to be unrepresented: Either because they feel they can’t
afford the price of traditional representation, or because of a desire to
limit the adversity and to stay in control of their own matter. But at
what costs? Studies show that these unrepresented clients tend to give
up more of their legal rights than represented parties. The second
trend in motion is unemployment and underemployment of many
younger lawyers nationwide who are finding it tougher to land their
first job and are experiencing tougher competition for clients which
makes it more difficult to achieve a steady client flow. Thus, more
people aren’t hiring lawyers, often hurting themselves in the process,
and many lawyers need more work. Not every situation is appropriate
for unbundling or discrete tasks; however, unbundling may be the
solution that can help bring these two trends into alignment. Clients
retain control and only pay for the discrete tasks they can afford.
Meanwhile, by focusing on providing just the services the client can
afford, the lawyer generates an opportunity for legal services where
the client might otherwise go forward without counsel.

c. **Ethical Implications of Unbundling?** There are several issues that should be
considered and/or discussed with the client including:

- **Limited Scope within Reason:** Pursuant to **Virginia Rule 1.2 Scope of
Representation. Comment [7]**, a client cannot be asked to agree to a
partial representation that is so limited in scope as to violate **Virginia
Rule 1.1 Competency**. Thus, in providing a partial representation, the
lawyer must still be able to meet the requirement of competent
representation which “requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

- **Consultation and Consent:** Pursuant to Virginia Rule 1.2(b), “[a] lawyer may limit the objectives of representation if the client consents after consultation.” The scope of representation including the limitations on representation needs to be clearly defined and explained to the client, and while the rule does not require consent in writing, best practice would be to include the limitations on representation in a written engagement agreement.

- **ABA’s Model Rules of Professional Conduct Rule 1.2(c).** Note Rule 1.2(c) of the ABA’s Model Rules of Professional Conduct has been amended to reflect that a lawyer may limit the scope of representation if the “limitation is reasonable under the circumstances and the client gives informed consent.”

- **Diagnostic Interview/Reliance on Client Facts:** The lawyer needs to engage in a thorough initial diagnostic interview with the client and must have the ability to rely on the facts provided by the client without additional investigation. Consider Virginia Rule 3.1 Meritorious Claims and Contentions and other state court rules of civil procedure, which typically require reasonable inquiry by the lawyer into the facts and allegations of a suit before filing a pleading. “Reasonable inquiry” for this purpose is not necessarily based solely on representations from the litigant. Several states have revised their ethics rules and procedural rules to allow the lawyer in a limited representation to rely on the pro se party’s representation of facts in most situations. In Virginia, a committee of the Virginia State Bar, after considering whether any changes should be made to our rules regarding issues related to “unbundling” legal services, decided not to recommend any changes.

- **Communication with Persons Represented by Counsel:** When can counsel on the other side work directly with the client who is receiving unbundled legal services (unless unbundled services include negotiations to be handled by the lawyer)? Consider Virginia Rule 4.2 Communication with Persons Represented by Counsel.

- **Entry of Appearances and Withdrawals for Limited Representations in Court:** If the lawyer represents the client in court for a portion of their legal matter, how does that integrate with the traditional rules of being the “attorney of record” once the lawyer makes an appearance? Some states have now revised or clarified their rules of court to allow for “limited appearances” by lawyers on behalf of the client. These rules typically address three issues: how the lawyer goes about creating the limited appearance, the obligation to provide the opposing side with notice, and the procedure for withdrawal. In Virginia, a committee of the Virginia State Bar, after considering whether any changes should be made to our rules
regarding issues related to “unbundling” legal services, decided not to recommend any changes.

- **Undisclosed Legal Assistance to Pro Se Litigants (Ghostwriting):** One of the areas of ethical concern is the use of a lawyer to assist with drafting court pleadings without the lawyer signing off on the pleadings, i.e. ghostwriting. If the assistance of the lawyer is not disclosed to the court, does that constitute a misrepresentation or fraud that would violate Rule 8.4 Misconduct? In May of 2007, Formal ABA Opinion 07-446 concluded that lawyers who assist pro se litigants with court filings are not required by the ethics rules to inform the court or the opponent of their role. The opinion states that absent an affirmative statement by the client that can be attributed to the lawyer that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). The opinion goes on to state that it supersedes prior Informal ABA Opinion 1414 which required that at a minimum, the lawyer must make the court aware of the fact that a document was drafted by a lawyer.

(i) **Virginia:** Generally, a lawyer assisting a pro se litigant must disclose his/her involvement to the court. Failure to do so would be a misrepresentation and unethical under Virginia Rule 3.4 Fairness to Opposing Counsel and Rule 8.4 Misconduct. (See Virginia LEOs 1127 and 1592.)

(ii) **Other Jurisdictions:** Other jurisdictions and ethics committees have resolved the subject of ghostwriting with mixed results. Some have held there is no need to advise the court. By contrast, other state ethics opinions have concluded that ghostwriting is inherently misleading and allows a lawyer to duck responsibility for promoting frivolous litigation. A third view follows a middle ground approach in which ghostwriting lawyers must disclose the fact of legal assistance to avoid misleading the court and other parties, but need not be identified. See opinions from Iowa, Florida, Massachusetts, New Hampshire, Utah, and New York City.

d. **Malpractice Considerations in Limited Scope of Representation:**

- **Evaluate: What Exactly Does This Client Need/Want?** Both the client and the lawyer need to understand what the client needs and wants from the legal representation. Limiting the scope of representation is permissible as long as the client understands and agrees. However, under a cost-benefit analysis, be very careful when attempting to limit the scope of the representation because ultimately, regardless of how little the lawyer is actually doing for the client, the lawyer may still be taking on malpractice exposure beyond the work for which he or she is being paid. In some circumstances because of the nature of the client’s legal needs, the time and energy spent limiting the scope of representation may not be enough to adequately protect the lawyer from a malpractice claim. Ask yourself, “What
are the risks?” And “Can a limited scope of representation adequately serve the client's legal interest?”

- **Reduce It To Writing:** It is a good practice to avoid any misunderstandings between the lawyer and the client by putting the parameters of the limited scope of representation in writing. Be sure to define the scope and make it clear that the lawyer has not been retained for any other purpose. If, during the limited representation, the lawyer spots other legal issues that need to be considered but are outside the scope of representation, this information should be communicated to the client, and the client’s decision whether to have the lawyer take on the additional issues should be documented.

- **Be Careful Not To Expand Scope Arbitrarily:** “Having set out the terms of the engagement, the lawyer must not stray from those terms. A lawyer who agrees only to provide certain services then goes on to provide broader representation may find herself ‘on the hook’ for providing full legal services despite her engagement letter to the contrary. If your representation begins to expand into new areas or matters, a new engagement letter for each area or matter is required.”

  (Stephen Terrell, *Rules of Engagement: Taking the Offense When It Comes to Defense*, GPSOLO, October/November 2002, pp. 26-29, p. 28.)

- **Limited Scope Shouldn’t Equal Limited Systems and Procedures:** In this vignette, the failure to enter the matter into the firm’s system for docket control resulted in a missed statute of limitations. With discreet task lawyering, there is sometimes a tendency not to implement all the procedures and systems you would ordinarily use, but this can be a huge mistake. Be aware of including these cases in all your regular office procedures, like calendaring and docket control, conflicts checking, case management, etc.

7. **The Sneaky Client: How should attorneys react when they find out their client has been sneaking and snooping around?** In this vignette, Barry, the client, informs his lawyer, Mitch that he has just been voted out of Agee and Company. Barry then indicates that he gathered some significant information about the company’s activities by finding the new password on the printer and using it on his own wireless laptop to gain access to the company’s network. How should Mitch have responded to this disclosure by Barry?

  a. **Virginia Rule 1.2(c) Scope of Representation, Comments [9-10] and [12]; Virginia Rule 1.6 Confidentiality of Information; and Rule 1.16(b) Declining and Terminating Representation and Comments [7-8]**

  **Virginia Rule 1.2(c) Scope of Representation…**

  (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of
conduct with a client and may counsel or assist a client to make a
good faith effort to determine the validity, scope, meaning, or
application of the law.

Comments

Criminal, Fraudulent and Prohibited Transactions

[9] A lawyer is required to give an honest opinion about the actual consequences that appear
likely to result from a client’s conduct. The fact that a client uses advice in a course of action
that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action.
However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There
is a critical distinction between presenting an analysis of legal aspects of questionable
conduct and recommending the means by which a crime or fraud might be committed with
impunity.

[10] When the client’s course of action has already begun and is continuing, the lawyer’s
responsibility is especially delicate. The lawyer is not permitted to reveal the client’s
wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is
required to avoid furthering the purpose, for example, by suggesting how it might be con-
cealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally
supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16.

[12] Paragraph (c) applies whether or not the defrauded party is a party to the transaction.
Hence, a lawyer should not participate in a sham transaction; for example, a transaction to
effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude
undertaking a criminal defense incident to a general retainer for legal services to a lawful
enterprise. The last clause of paragraph (c) recognizes that determining the validity or
interpretation of a statute or regulation may require a course of action involving disobedience
of the statute or regulation or of the interpretation placed upon it by governmental authorities.
See also Rule 3.4(d).

Virginia Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client
privilege under applicable law or other information gained in the professional
relationship that the client has requested be held inviolate or the disclosure of
which would be embarrassing or would be likely to be detrimental to the
client unless the client consents after consultation, except for disclosures that
are impliedly authorized in order to carry out the representation, and except as
stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the
lawyer in a controversy between the lawyer and the client, to establish
a defense to a criminal charge or civil claim against the lawyer based
upon conduct in which the client was involved, or to respond to
allegations in any proceeding concerning the lawyer’s representation
of the client
such information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is dearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

Virginia Rule 1.16(b) Declining and Terminating Representation…

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
(1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled,

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists....

Comments

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client’s interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer’s services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

b. Lawyer Should Counsel Client Not to Engage in Conduct which is Criminal or Fraudulent: Consider Virginia Rule 1.2(c) and Comments [9-10] which discuss the fact that a lawyer should not counsel or assist a client to engage in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, it does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Comment [9] states “There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.” If after counseling the client not to engage in criminal or fraudulent conduct, the client persists, then the lawyer should withdraw pursuant to Virginia 1.16(a) and (b), and consult Virginia Rule 1.6(b) and (c) to determine whether the disclosure of the client’s confidential information relative to the criminal or fraudulent conduct is permissive or required.

c. Analysis: In this vignette, the client’s conduct is probably not criminal or in violation of the law; however, the best course of action for the lawyer is to discourage client activities that the lawyer is uncomfortable with and which,
if discovered, could impugn the integrity or character of the client as a witness. Where a lawyer and a client disagree about the use of legal but underhanded tactics, it is often best to end the representation if the client is not going to be satisfied with the representation unless these tactics are used. Consider Virginia Rule 1.2(c) and Comments [9-10] as set forth above.

d. Anti-Hacking Law: In the case of *Egilman v. Keller and Heckman*, the court held that a law firm’s unauthorized use of a username/password combination to gain access to an opposing parties’ expert witness’s personal Website is not an unlawful “circumvention” prohibited by the anti-hacking provisions of the Digital Millennium Copyright Act. (*Egilman v. Keller & Heckman LLP*, D.D.C., No. 04-00876 (HHK), 11/10/05, 21 Law. Man. Prof. Conduct 596.)

e. Practice Management Consideration: Computer Security for Wireless Technology and Working Remotely. In today’s world, with the capacity to electronically access everything from office e-mail to client files and documents, lawyers have tremendous flexibility in choosing where and when to work. However, just as in a traditional office, lawyers must be careful when working remotely to maintain and safeguard client information and confidentiality under Virginia Rule 1.6. Before using remote access and wireless access, appropriate security should be in place on your laptop or PDA. Firewalls, passwords, and antivirus software should be part of the set up when working outside a traditional office. If you will be working remotely on a regular basis, additional security can be achieved by using a virtual private network (VPN). A VPN helps create a secure private network for your information. Thus, if you will be regularly working outside the office, it may be best to dedicate a laptop to that purpose and use a VPN.

(i) Personal Computers: Lawyers have an ethical duty to safeguard and protect client information and confidences from destruction or interception by third parties. Consider the following basic security measures which should be a minimum for your computer, whether in the office, at home, or on the road:

- Install and use security software—including antivirus programs, spyware protection and a firewall application—and keep them current with automatic updates. Promptly install patches for your operating system and all applications.
- Use care when opening embedded links and e-mail attachments.
- Be sure your anti-malware software scans the latter before you open them.
- Religiously back up important data and files.
- Use strong passwords, passphrases or other authentication.
- Use caution when downloading and installing programs.
• Install and use a hardware firewall.
• Install and use a file encryption program.
• Configure the operating system, Internet browser and other software in a secure manner.
• Before disposal or reuse of computers and other storage media, securely erase the information on them using data-wiping software (such as Data Eraser or PGP Wipe). Deleting files or reformatting drives is not sufficient.
• Additional security measures are necessary for networks, including measures for secure network design, strong access controls and data segmentation. Wireless networks require particular attention, including use of current technology and secure configuration. Consult your IT professional for these.

Bullet Points are from the article “Basics for Being Safe Not Sorry,” by Erik Mazzone and David Reis, Law Practice Magazine, <www.abanet.org> (March 2009.)

(ii) **Working Wireless:** If not properly secured, wireless networks are very susceptible to hacking by outsiders. Consider the following security precautions:

“Suggestions for attorneys that use wireless networks include, at a minimum:

• that they use current technology, including security features;
• that the wireless network is securely configured (VPN or GoToMyPC); and
• that they have in place appropriate security policies and practices for the wireless network. In addition, they should consult with information security professionals about security risks and make a professional judgment that the use of wireless technology under the circumstances is reasonable.”

“Securing Your Clients’ Data While on the Road” by David Reis and Reid Trautz, Law Practice Today, (October 2008).

(iii) **Virtual-Private Networking (VPN):** When working remotely, a VPN connection allows you to connect to your office network using a secure communications network tunneled through another network, such as the internet. The communication tunnel allows the data between the office network and the remote user to be encrypted to protect the security of the information as it is passed back and forth. Note, the VPN service software is included with Microsoft’s server operating systems and the VPN client software is included with
Microsoft 2000, XP and Vista operating system. One advantage of using a VPN is it allows for multiple users, whereas other options for securing remote access are one-on-one solutions. It is best to have an IT consultant set this up for you.

(iv) **GoToMyPC or LogMeIn:** These service providers allow you to connect to your work computer when you are away from the office. For a solo user (or a firm without a server) who wants remote access this sort of option may be less expensive than a VPN while still secure. Like a VPN, the data transmission between the computer and the remote user are encrypted and secure. To connect to the work computer, host software must be installed and running on the host machine, and both the remote user and the host computer must have internet access. The service provider, for example, GoToMyPC Web site, maintains contact with the host computer so the host’s IP address is always known. This is important because the solution works even if the host’s computer has a dynamic internet connection that will not remain constant. Also, no configuration to the company firewall will need to be made to get up and running. You will pay per license, about $180.00 annually for GoToMyPC or $70.00 for LogMeIn.

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**Risk v. Benefit? Interesting Statistic:**

"It has been reported that as many of 10% of laptops used by American businesses are stolen during their useful lives and 97% of them are never recovered. An August 2007 survey reports that 70% of data breaches result from the loss or theft of off-network equipment. The most common devices involved are laptops and PDAs, followed closely by USB drives." ("Securing Your Clients' Data While on the Road" by David Reis and Reid Trautz, Law Practice Today, (October 2008)). To help secure these devices which can be easily lost, stolen, or compromised implement the following precautions:

- Don’t store unnecessary confidential information on your laptop or portable devices.
- Always back up data to an external hard drive or the network server. That way, if your laptop is stolen or crashes, you still have your data.
- Use strong authentication, preferably two-factor.
- Encrypt all sensitive data. Consider encrypting your hard drive and data by using software (PGP, TrueCrypt and PC Guardian.) In the event your laptop is lost or stolen, your data is protected.
- Never leave access numbers, passwords or security devices in your carrying case or with your mobile device.
- Consider using a tracking-and-wiping program. This software will automatically transmit the location of your laptop or other device if it is lost or stolen.
- Provide for physical security of your equipment at all points of travel.
• Buy a lock for your laptop. The vast majority of laptops have a Kensington security slot; buy a lock for it and use it to secure your laptop. <www.kensington.com> (price about $50.00)

Most bullet points are from the article “Basics for Being Safe Not Sorry,” by Erik Mazzone and David Ries, Law Practice Magazine, <www.abanet.org> (March 2009)
PRACTITIONERS' RESOURCES FOR AVOIDING LEGAL MALPRACTICE CLAIMS AND ETHICAL COMPLAINTS

Resources

1. **Minnesota Lawyers Mutual Risk Managers** at 800.422.1370. Wendy Inge and Jill Wells Nunnally also provide confidential attorney phone consultations on malpractice avoidance, claims repair, law office management, and malpractice insurance.

2. **Minnesota Lawyer’s Mutual (MLM)** (<www.mlmins.com>). Provides Professional Liability coverage to Illinois lawyers with the opportunity for online quotes. Also, an exclusive online risk management resource library, Practice Assets, is available to MLM Insured’s.

3. **MyLawyersMutual™** (<www.mylawyersmutual.com>). Launching in April 2010 exclusively for MLM policyholders. Designed to help policyholders manage their policy with MLM and manage the daily risks of running a law practice. This new service includes My Practice Assets™ that provides online practice tools to help better manage the risk associated with specific practice issues.

4. **RU@Risk?** (<www.attorneysatrisk.com>). MLM newly launched blog of insightful information about the hazards of practicing law.

5. **Questions about Law Office Products and Technology** (<www.mlmins.com> or 1-800-422-1370). If you have a basic question on law office products and technology contact Todd Scott, Vice President Member Services at ts Scott@mlmins.com.

6. MLM is available to conduct risk management, law office technology and/or law office software seminars for law firm, bar associations, or any group of twenty or more lawyers. Contact Todd Scott, Vice President Member Services at ts Scott@mlmins.com.

7. **Virginia Risk Management Hotline** at 800.215.7854. John J. Brandt, Independent Risk Manager for the Virginia State Bar, operates a confidential telephone hotline attorney consultation service for all members of the VSB, free of charge.

8. **Virginia State Bar Legal Ethics Hotline** at 804.775.0564. If you have a legal ethics question, please use the free Virginia Bar "Ethics Hotline."

9. **Lawyers Helping Lawyers** at 800.838.8358 (<www.valhl.org>). Personal and confidential counseling and intervention for impaired lawyers or those concerned about them. Confidentiality assured for callers and participants.

10. **Fee Dispute Resolution Program (FDRP)** (<www.vsb.org/site/public/fee-dispute-resolution-program>). Created as a voluntary program to help attorneys and clients resolve disputes over fees and costs paid, charged, or claimed for legal services provided by a member of the Virginia State Bar.

11. **Virginia State Bar** (<www.vsb.org>). Provides searchable on-line links to Professional Guidelines and Rules of Professional Conduct; approved rule changes; proposed rule changes; online MCLE reporting; proposed Legal Ethics Opinions, and links to other legal resources.

Ethics Advisory Opinions and Professionalism Rules:


15. ABA ETHICSearch Research Service <www.abanet.org/cpr/ethicsearch>. A research service, staffed by the ABA Legal Ethics Department, providing citations to applicable ABA ethics rules, ethics opinions and other relevant research materials in answer to questions concerning legal ethics. Questions can also be made by phone (312/988-5323), mail (ETHICSearch, Center for Professional Responsibility, ABA, 541 North Fairbanks Court, Chicago, IL 60611-3314), fax (312/988-5491) or e-mail ethicsearch@staff.abanet.org.

Legal Ethics Sites


20. American College of Trust and Estate Counsel (ACTEC) <www.actec.org>. Commentaries on certain ABA Model Rules of Professional Conduct as they relate to common ethics issues for lawyers in the areas of trust and estate planning. Includes checklists and engagement forms.

21. American Bar Association Center for Professional Responsibility <www.abanet.org/cpr>. Provides resources in legal ethics including the ABA Model Rules of Professional Conduct and headnote summaries of recent formal ethics opinions issued by the ABA. Also, provides links to directories of lawyer regulatory, lawyer assistance programs and client protection agencies in each jurisdiction and resource links.
22. ABA Commission on Evaluation of the Rules of Professional Conduct
<www.abanet.org/cpr/mrpc/e2k_chair_intro.html>. An excellent website which contains its recommendations and background material.

PERCENT OF CLAIMS BY TYPE OF ALLEGED ERROR

Alleged Error Year 1980-2009       Alleged Error %
Type of Alleged Error Administrative       16.89%
Type of Alleged Error Substantive       70.42%
Type of Alleged Error Intentional Wrong       12.69%
NOTE: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will Minnesota Lawyers Mutual be liable for any direct, indirect, or consequential damages resulting from the use of this material.

APPENDIX I

GENERAL ENGAGEMENT LETTER

[Date]

[Name and Address of Client]

Dear ______________:

I enjoyed meeting with you on __________ to discuss our representation of you. [Option] In this joint representation, I must and will treat you [both] equally in all regards, including all communications. I will communicate all matters to both of you and will share all communications from each of you with the other. If one of you shares information with me that you do not want shared with the other, I will no longer be able to represent either of you.

This letter will confirm our agreement and if after reviewing it, you have no further questions about the terms of my representation, please sign the extra copy enclosed and return it to my office in the postage-paid envelope enclosed for your convenience. Our work will begin when we receive the signed copy of this letter [and required deposit].

Conflict of Interest Acknowledgement and Waiver [where applicable]

Previously, we discussed orally the potential for a conflict of interest in my [firm's] representation of you [client]. As I explained, a conflict may arise whenever the interests of a current client might affect, or be affected by, the personal, business, financial or professional interests of a lawyer, a professional or business associate or relative of the lawyer, another current client, or a former client. When there are such multiple interests, there is always a possibility for the existence to interfere with the lawyer's ability to serve one set of interests without adversely affecting other interests. Whenever such interests become conflicting, it is necessary for the lawyer to withdraw from all attorney-client relationships affected by such conflict, and it is then necessary for each person to hire a new lawyer.

With respect to [describe representation and subject matter], there exists the possibility for the following interests of the following persons to become conflicting: [describe all reasonably foreseeable interests that each client and former client might, in the course of after-the-fact dissatisfaction, claim to have adversely affected the lawyer's judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, you believe one lawyer can adequately represent, advance, or protect each such interest without harming any other such interests. Therefore, you agree that you want me to represent each of you in this matter, and you each refuse to exercise your right to hire a different lawyer and hereby waive the conflicts described.

________________________________________________________________________

1 Use if joint representation.
Scope of Representation

I will undertake the following work on your behalf: [set forth the scope of the representation]. [My work will not include {set forth specific matters excluded from the representation if appropriate}].

Your Rights

We want you to be well informed about your legal matter. Therefore, we will send you copies of all correspondence and [pleadings, document drafts, etc] we send and receive. Furthermore, we endeavor to answer all telephone calls the same day. Because I have other clients and other matters, I cannot always be available for you; however, you can feel free to contact my [associate/paralegal/secretary by name] who will be assisting me on this matter. I encourage you to keep detailed notes of questions that may arise and of any new information, witnesses, or other important matters that come to your attention. Please call me if something is truly urgent, but otherwise, it is best to schedule an appointment to discuss your accumulated questions and concerns.

If at any time you become dissatisfied with our handling of this matter, you should not hesitate to tell me immediately so we can discuss and resolve the problem. It is essential to your representation that we maintain a good relationship throughout. You may terminate our representation at any time. In the event of termination, you will be responsible for payment of any fees earned or expenses incurred. We may terminate this representation only as permitted or required by laws and regulations. After reasonable notice, failure on your part to substantially fulfill your obligation to pay expenses [or fees or make deposits] when due will be cause for such termination.

Your Responsibilities

To achieve the best possible representation of you will need to cooperate with us fully and provide us with all the information we need to assist you. So that we may maintain continuous contact with you throughout the representation, please notify us immediately if there is any change in your address or telephone number. Specific information and documents needed are [        ]

You will receive an itemized monthly statement of fees and expenses associated with our services. [Payment is due upon receipt.] [The fees and expenses will be deducted from your deposit, and we will advise you from time to time if an additional amount is needed to maintain a sufficient deposit to cover anticipated fees and expenses.] An interest charge of ___% shall be applied to any amounts owed the firm after 30 days. My rate per hour for work is $____. From time to time, other members of the firm as well as our staff may engage in work on this matter, and their rates are as follows: partners, $_____ per hour; associate attorneys, $_____ per hour; legal assistants, $_______ per hour.

In addition to the fees set forth above, you will be responsible for expenses incurred in connection with this matter. Such expenses may include, among others, copying, delivery, and telephone charges, fees for professional services, and travel expenses. If the firm makes payment for you, you will need to reimburse us promptly.

[If we have to bring suit against you to collect any balance owed, you agree to pay us an additional amount of ___% of the balance owed as attorney fees. To secure any balance you owe us, you grant us a security interest in any property that may come into our possession in the course of our representation and any claim or cause of action on which we are representing you. You can seek additional independent legal counsel on this issue before signing this agreement, if you wish.]

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2 Do not use this phrase if this is a contingent fee agreement.
3 Regarding Interest: Pursuant to Virginia LEOs 1247 and 1595 and so long as it is disclosed and agreed upon at the outset of the representation, an attorney may charge a client interest on fees and costs. The client must be allowed to retain the right of prepayment without penalty and the interest charged must comply with Virginia law.
4 Do not use this phrase if this is a contingent fee agreement.
5 Consider ABA F.O. 93-379 which states that a lawyer may recover reasonable cost for expenses such as photocopying; charges for expenses should be explained to the client at the outset of the representation. It is best if all fees and expenses are disclosed in writing in the engagement letter. Consult your state's ethics opinions for charging for expenses.
6 Regarding a securing interest in the property of the client consult your state's specific ethics opinions. Note that ABA F.O. 02-47 allowed a lawyer to secure payment of fees by acquiring a security interest in client's property so long as the lawyer complies with Rule 1.8(a) and (I).
While the agreement is intended to prevent any confusion of the terms of my representation, should a fee dispute arise you are agreeing, pursuant to this paragraph, to submit any fee dispute between us to arbitration with your bar’s program name. You understand that you have the right to use other court forums to address fee disputes, but we are both agreeable to compromising those rights to submit to binding arbitration. Any decision made by the arbitration panel, whether for you or me, will be final and non-appealable. It has the same effect and enforceability as if rendered by a court of law. The arbitration panel would hear us in [locality] and would be composed of those individuals, two attorneys and one layman. The [local bar organization] selects the panel from among a list of volunteers who have agreed to hear fee disputes. There are no costs associated with the panelists. You can seek additional independent legal counsel on this issue before signing this agreement, if you wish.

File Retention

During the representation, you will be provided with copies of all documents generated or received by the firm on this matter. Please make sure you keep these together in a safe place as they are your copy of the file. At the conclusion of the representation, the firm will retain your file for a period of ____ years. Should you need all or a portion of the file reproduced during that time please contact our office for assistance. There will be a reasonable copying charge for this service. After (month/date/year) your file will be destroyed; if you wish to take possession of it at that time it is up to you to make arrangements with the firm to pick it up. No additional notice of the destruction date will be provided to you.

Course of the Matter

Generally, matters of this type have _____ stages consisting of _______. While they typically are completed within [estimated time frame], this estimated time frame and the resulting costs of our representation depends upon factors not always within our control such as the level of cooperation of the other side, [the Court’s docket, and the particular judge's inclination to become involved in the management of the case prior to trial and the time the Court allows during trial.].

No Guarantee of Result

We will use our best efforts in representing you in this matter, but you acknowledge that we can give no assurances as to the final outcome.

If the above terms are acceptable, please sign and return one of the enclosed copies of this letter. I look forward to working with you.

Sincerely yours,

[Name of Firm]

By_________________________

[Name of Attorney]

I understand and accept the terms of this Agreement.

[Name of Client]

Date of Acceptance

[ ]

7 Binding arbitration: VA. LEO 1586, states it is permissible to include provisions that include binding arbitration of fee disputes, provided the client has been fully advised of the advantages and disadvantages of arbitration and has given informed consent to the inclusion of the provision.
8 Check the ethics rules in your state to determine if you can charge a fee for providing any additional copies.
9 Optional language regarding client pick-up of file.
NOTE: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will Minnesota Lawyers Mutual be liable for any direct, indirect, or consequential damages resulting from the use of this material.

APPENDIX II

NON-ENGAGEMENT LETTER

[Date]

[Name and Address of Client]

Re: Consultation of [date of consult]

Dear ______________:

Thank you for [meeting with me]/[speaking with me by telephone] on _______ to discuss __________________________. I greatly appreciate the confidence you have expressed in our firm, but we are not in a position to represent you on this particular matter.

[Please be advised that your claim may become barred by the passage of time as a result of the applicable statute of limitations. Therefore, you should consult another attorney immediately about your claim.]

[Please be advised a default judgment may be entered against you if an answer or other action is not taken in a timely manner. Therefore, you should consult another attorney immediately about responding to this claim.]

I would also like to emphasize that in declining to represent you, the firm is not expressing an opinion on the merits of your case. We neither had an opportunity to investigate the facts in this matter nor to research the applicable law.

[Since we did not undertake to provide you with any legal advice regarding this matter, no charge is being made for any legal fees or expenses.]

[I am enclosing all the original documents and materials you left with me following our meeting.]¹

In the future should you require legal assistance regarding some other matter, I hope you will contact me.

Sincerely yours,

[Name of Firm]

By_________________________
[Name of Attorney]

________________________________________________________________________

¹Keep a copy of any documents, which establish basic information on the case including the statute of limitations.
APPENDIX III

TERMINATION LETTER

[Date]

[Name and Address of Client]

Dear ____________:

This letter will confirm our understanding that effective __________, this firm will no longer represent you in connection with _________________________________.

I urge you to promptly retain other counsel to represent you in this matter. I will cooperate with your new counsel during the transition process and will provide him/her with any original documents, (keep copy for self), correspondence, pleadings, investigative reports and records which I have not previously sent to you.

[Where counsel of record] I will notice the Court and have prepared the enclosed Order releasing me as counsel of record. Please endorse the Order releasing me and return it in the enclosed stamped envelope so I may present it to the Court for entry. Without your signature it will be necessary for you to appear at the hearing. If you have already retained new counsel please let me know who it is so I may forward the appropriate Order to your new attorney.

Sincerely yours,

[Name of Firm]

By____________________
[Name of Attorney]
APPENDIX IV

CLOSING LETTER

[Date]

[Name and Address of Client]

[RE: Matter Concluded]

Dear __________________:

As I close my file on this matter, I want to thank you for the opportunity to have represented you in ____________________. This letter will confirm that we have concluded our legal representation in connection with ____________ and will not be providing any further legal services concerning this matter unless you request us to do so. Our final statement for professional fees and expense is enclosed.

Additionally, I have enclosed the following original documents: [list]

Should you want any of the other documents in the file please let me know. The firm routinely destroys all files pertaining to a matter _____ years from the date on which our representation is concluded.

It was our privilege to represent you in this matter. If the firm or I can be of some further assistance to you in a future legal matter we hope you will contact us.

Sincerely yours,

[Name of Firm]

By ______________________________
[Name of Attorney]

Enclosures: ________________________________

Date: __________________