

A NEW TWIST FOR AN OLDE CODE:
EXAMINING VIRGINIA'S NEW RULES OF
PROFESSIONAL CONDUCT

PART II

*Charles H. Oates**

I. INTRODUCTION

A previous article containing an in-depth analysis of the recently adopted Virginia Rules of Professional Conduct,¹ co-authored with Marie Summerlin Hamm, was published in the Regent University Law Review.² That article examined seventeen of the Virginia Rules provisions³ that altered the practitioner's standard of ethical conduct. This is a sequel to that article.

* Associate Professor of Law and Law Library Director, Regent University School of Law; M.S.L.S., Catholic University of America; J.D., Stetson University College of Law; B.A., University of Florida. Professor Oates teaches Professional Responsibility.

The author gratefully acknowledges the assistance of the following members of the Virginia State Bar Special Committee to Study the Code of Professional Responsibility: Dennis W. Dohnal, Paula L. Hannaford, Lawrence H. Hoover, John M. Levy, and Thomas E. Spahn. Their willingness to discuss specific provisions and to describe the revision process allowed the author an invaluable glimpse into the minds of the drafters. In addition, Thomas E. Spahn, Richmond attorney, prepared and made available very helpful charts depicting the substantive changes. The charts are easy to follow and provide an excellent summary of the substantive changes. See Thomas E. Spahn, Detailed Comparison Chart: Substantive Differences Between the Virginia Rules of Professional Conduct and Code of Professional Responsibility, at <http://www.vsb.org/profguides/chart.html> (Jan. 25, 1999). Special thanks are also extended to Eric L. Welsh, Associate Research Services Librarian, for his meticulous search assistance, and to Deborah Dolenti for her valuable assistance in locating and organizing source materials.

¹ On January 25, 1999, the Virginia Supreme Court adopted the Virginia Rules and set January 1, 2000, as the effective date. VA. RULES OF PROF'L CONDUCT (2000), available at <http://www.courts.state.va.us/scv/amendments/conduct.pdf> (last visited Nov. 15, 2001).

² Charles H. Oates & Marie Summerlin Hamm, *A New Twist for an Olde Code: Examining Virginia's New Rules of Professional Conduct*, 13 REGENT U. L. REV. 65, 65 (2000). See that article for a detailed discussion of the history preceding and the rationale for the rules change in Virginia that became effective January 1, 2000. *Id.*

³ *Id.* That article addressed Virginia Rules 1.2 (scope of representation), 1.5 (fees), 1.6 (confidentiality), 2.1 (advisor), 2.2 (intermediary), 2.3 (evaluation for third persons), 2.10 (third party neutral), 2.11 (mediator), 3.1 (meritorious claims), 3.3 (candor), 3.4 (fairness), 3.5 (impartiality), 3.6 (trial publicity), 3.7 (lawyer as witness), 4.2 (communication with persons represented by counsel), 5.1 (supervisory lawyers), and 5.6

This essay seeks to introduce some of the more significant changes wrought by the transition from the Virginia Code to the Virginia Rules that were not treated in the previous article.⁴ For a brief synopsis of the process involved in the development of the new Rules, see the earlier article.⁵ Part II provides the text of selected rules, and compares and contrasts those rules with the provisions of the former Virginia Code of Professional Responsibility⁶ (Virginia CPR), the American Bar Association's Model Rules of Professional Conduct⁷ (Model Rules), the American Bar Association's proposed major revisions of the Model Rules⁸ (Proposed Model Rules) as submitted by the ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), and the Restatement (Third) of the Law Governing Lawyers.⁹ Part III concludes with a recommendation for change, examines the practical impact the new Rules have had on Virginia practitioners in the relatively brief period since their adoption, and prognosticates their likely effects into the future.

(restrictions on right to practice). VA. RULES OF PROF'L CONDUCT R. 1.2, 1.5, 1.6, 2.1-2.3, 2.10, 2.11, 3.1, 3.3-3.7, 4.2, 5.1, 5.6 (2000).

⁴ Specifically, this article addresses Virginia Rules 1.8 (conflicts of interest and prohibited transactions), 1.11 (successive government and private employment), 1.13 (organization as client), 1.15 (safekeeping property), 1.16 (declining or terminating representation), 1.17 (sale of law practice), 6.1 (pro bono services), 6.3 (membership in legal services organization), 8.1 (bar admission and disciplinary matters), 8.3 (reporting professional misconduct), and 8.5 (disciplinary authority; choice of law). VA. RULES OF PROF'L CONDUCT R. 1.8, 1.11, 1.13, 1.15, 1.16, 1.17, 6.1, 6.3, 8.1, 8.3, 8.5 (2000). Both articles arose out of a joint Continuing Legal Education (CLE) presentation by the author of this article and his colleague, Joe A. Tucker, Regent University Professor of Law, at the Norfolk and Portsmouth Bar Association's annual Ethics Extravaganza on June 25, 1997. The rules originally addressed by Professor Tucker in that presentation are updated, analyzed and discussed in depth in this article. Appreciation is extended to Professor Tucker for laying the initial groundwork for this article.

⁵ Oates & Hamm, *supra* note 2, at 66-71.

⁶ REVISED VA. CODE OF PROF'L RESPONSIBILITY (1983).

⁷ MODEL RULES OF PROF'L CONDUCT (1998).

⁸ Margaret Colgate Love, ABA Ethics 2000 Commission Final Report – Summary of Recommendations, at http://www.abanet.org/cpr/e2k-mlove_article.html (June 9, 2001). The American Bar Association's Commission on the Evaluation of Rules of Professional Conduct completed a comprehensive study and review of the Model Rules. The Commission initiated its inquiry in August 1997 and submitted a final report to the ABA House of Delegates in May 2001.

⁹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). The Restatement (Third) of the Law Governing Lawyers was published in final form subsequent to the final draft of the earlier article. Drafts of the Restatement were not considered in that article. This article, however, does contemplate notable differences between the Restatement (Third) and the Virginia Rules discussed herein.

II. TEXT OF SELECTED RULES AND COMPARISONS

A. Rule 1.8, Conflict of Interest: Prohibited Transactions

1. Text of Virginia Rule 1.8

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses ; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

2. Summary

Rule 1.8 enumerates and proscribes certain conflicts of interest, and prohibits various transactions among lawyers, their clients, and in some cases third persons. Underlying the conflict-of-interest provisions of these Rules is the fundamental principle of loyalty to the client.¹⁰ The subsections of this Rule enumerate situations in which a lawyer's self-interest may trump that duty of loyalty. Restraints on the lawyer's conduct are relaxed in instances where (1) the client consents,¹¹ (2) the client is given opportunity to seek (or does obtain) independent counsel,¹² (3) the terms are fair and reasonable with full disclosure to the client,¹³ the information or activity is permitted, required, protected or prohibited by another Rule,¹⁴ or the client is related.¹⁵

¹⁰ VA. RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2000). Loyalty is essential to the lawyer's relationship with a client. *Id.* Appropriate action should be taken at all times to insure that conflicts of interests do not interfere with that duty of loyalty to the client.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

Id.

¹¹ *Id.* R. 1.8 (a)(3), (b), (f)(1), (g), (i).

¹² *Id.* R. 1.8 (a)(2), (h).

¹³ *Id.* R. 1.8 (a)(1).

¹⁴ *Id.* R. 1.8 (b) (allowing transactions except as permitted or required by Rule 1.6 or 3.3); *Id.* R. 1.8 (f)(3) (allowing transactions unless protected as required by Rule 1.6); *Id.* R. 1.8 (j)(2) (allowing transactions unless prohibited by Rule 1.5).

Business transactions between lawyer and client are not prohibited outright, but they are limited in a way that is designed to protect the client.¹⁶ The transactions must be objectively fair to the client, and the client must be provided a written explanation of the terms,¹⁷ offered an opportunity to consult with independent counsel,¹⁸ and consent in writing to the arrangement.¹⁹

Illustrations of common business transactions that may violate Rule 1.8(a) include loans between lawyer and client, personal use of client funds, prohibited sales transactions, solicitation of investments, and acquiring an interest adverse to that of the client.²⁰

Under the Virginia Code, the lawyer was not free to seek to persuade his client to permit him to invest in an undertaking of the client.²¹ However, Rule 1.8(a) does not prohibit a lawyer from initiating a discussion about potential business transactions with a client.²²

Paragraph (d) prohibits a lawyer from negotiating to acquire literary or media rights from a client prior to the conclusion of *all aspects*

¹⁵ *Id.* R. 1.8 (c).

¹⁶ *See generally* VA. RULES OF PROF'L CONDUCT R. 1.8(a) (2000).

¹⁷ *Id.* R. 1.8(a)(1). *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 (2000) (providing that lawyer may not participate in business or financial transaction with client unless (1) the terms and risks to the client are reasonable and the client has adequate information about the terms and risks or (2) the transaction is a standard commercial transaction in which no legal services are rendered, but not requiring that anything be in writing).

¹⁸ *Id.* R. 1.8(a)(2).

¹⁹ *Id.* R. 1.8(a)(3). *But see* REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 5-104(A) (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 (3) (2000) (stating that client consent need not be in writing).

Paragraph (a), which tracks the Model Rule verbatim, combines elements of both DR 5-104(A) and EC 5-3. The Comment relating to that paragraph provides the practitioner with some additional guidance by way of examples not offered by the Virginia Disciplinary Rules or Ethical Considerations. VA. RULES OF PROF'L CONDUCT R. 1.8(a) cmt. 1 (2000). The comment provides that "a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment." *Id.* The comment further offers exceptions to the rule by way of examples of standard commercial transactions between the lawyer and client for products or services generally marketed to others. Examples of innocuous standard commercial transactions between lawyer and client include "banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services." *Id.* The comment goes on to say that in such transactions there is no advantage to the lawyer, and the restrictions of paragraph (a) are unnecessary and impracticable. *Id.*

²⁰ ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (4th ed. 1999) (discussing various cases, articles, ethics opinions, and other related materials).

²¹ REVISED VA. CODE OF PROF'L RESPONSIBILITY EC 5-3 (1983).

²² VA. RULES OF PROF'L CONDUCT R. 1.8(a) (2000).

of a matter giving rise to the representation,²³ based on information relating to the representation.²⁴ The rationale for the rule is that a lawyer's self-interest should not interfere with the client's interests. A lawyer may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. The comment to Rule 1.8 notes that "[m]easures suitable in the representation of the client may detract from the publication value of an account of the representation."²⁵ Similarly, a lawyer cannot base a fee contract upon the acquisition of literary or media rights to the client's story;²⁶ however, the lawyer's fee may include a share in ownership of the literary property rights.²⁷

Another change for the Virginia practitioner involves the payment of court costs and expenses of litigation. Under the former Code, the client remained ultimately liable for litigation expenses, regardless of the outcome of the case.²⁸ The new Virginia Rules provide an exception only in the case of indigent clients.²⁹ Lawyers may now pay court costs and expenses of litigation on behalf of indigent clients without running afoul of the prohibition against providing financial assistance to a client in connection with litigation.³⁰ The Model Rules are less restrictive. In

²³ The italicized phrase does not appear in the Model Rules; it was retained from the former Virginia Code and recommended by the Special Committee to Study the Code of Professional Responsibility (Special Committee). See Petition to Adopt the Virginia Rules of Professional Conduct (Va. Filed Sept. 24, 1998) [hereinafter Petition]. EC 5-4 stated that in order to avoid "potentially differing interests" a lawyer should "scrupulously avoid [literary arrangements with a client] prior to the termination of all aspects of the matter giving rise to the employment, even though [the lawyer's] employment has previously ended." VA. RULES OF PROF'L CONDUCT R. 1.8 *Virginia Code Comparison* (2000).

²⁴ VA. RULES OF PROF'L CONDUCT R. 1.8(d) (2000). Obviously, the Special Committee wanted to resolve all doubts in favor of the client concerning when such negotiations could begin. This consideration is commendable.

²⁵ VA. RULES OF PROF'L CONDUCT R. 1.8 cmt. 3 (2000). For example, a lawyer in a criminal case who has contracted for literary or media rights might be tempted to want to sensationalize the case through a trial without attempting to negotiate a plea in good faith. The author acknowledges Professor Nathan Crystal for this example. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 89 (2d ed. 2000).

²⁶ ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (4th ed. 1999) (citing cases that reject fee contracts based on the acquisition of literary or media rights).

²⁷ VA. RULES OF PROF'L CONDUCT R. 1.8 cmt. 3 (2000). Such a fee agreement is permissible provided the arrangement conforms to Rule 1.5 (fees) and paragraph (j). *Id.*

²⁸ REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1983).

²⁹ VA. RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2000).

³⁰ The exception codifies existing case law supporting the payment of court costs on behalf of a pro bono litigant. See, e.g., *Baker v. Am. Broad. Co.*, 585 F. Supp. 291, 294 (E.D.N.Y. 1984) ("Representation by an attorney who can absorb litigation expenses may be the only way an impecunious litigant can pursue a cause of action.").

non-indigent cases, they allow the lawyer to condition the repayment of advanced costs and expenses upon the outcome of the matter.³¹

Under paragraph (j), a lawyer may not acquire an interest in literary or media rights that are the subject of litigation even after the conclusion of all aspects of the matter giving rise to the representation.³² This follows the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation, subject to an exception for contingent fees in civil cases.³³ Criminal cases are not included in the exception.³⁴ Therefore, a lawyer in a criminal case may not acquire an interest in literary or media rights.

Lawyers remain liable for their own personal malpractice in every state, regardless of the form in which they practice.³⁵ Generally, a lawyer's attempt to limit or negate that liability prospectively is unethical.³⁶ The first part of Rule 1.8(h) prohibiting a lawyer from prospectively limiting his or her liability to a client for malpractice retains the general restriction found in the Virginia Code.³⁷ However, an exception was added allowing in-house lawyers to arrange for indemnification comparable to that obtainable by other officers and employees of entities.³⁸

³¹ MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(1) (1998). For example, repayment of advanced court costs and expenses of litigation in a contingency fee case could be conditioned upon a recovery. The lawyer may agree not to seek reimbursement from the client for such costs and expenses if unsuccessful. By comparison, Virginia lawyers are not free to relieve their non-indigent contingency fee clients of the obligation to reimburse advanced court costs and expenses of litigation, which can be quite substantial in large cases, in the event there is no recovery.

³² VA. RULES OF PROF'L CONDUCT R. 1.8(j) (2000). Paragraph (j) allows an exception in the case of contingent fees in civil cases, unless prohibited by Rule 1.5 (such as in domestic relations matters). *Id.* Lawyers are not permitted to charge contingent fees in criminal cases. *Id.* R. 1.5(d).

³³ *Id.* cmt. 7.

³⁴ *Id.* Moreover, lawyers are not permitted to charge contingent fees in criminal cases. *Id.* R. 1.5(d).

³⁵ Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 BUS. LAW. 85, 104, 107 (1995).

³⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54 cmt. b (2000) (stating that such agreement violates public policy by tending to undermine competent and diligent representation, and many clients are unable to evaluate effectively such agreement).

³⁷ REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 6-102 (1983).

³⁸ VA. RULES OF PROF'L CONDUCT R. 1.8(h) *Comm. Commentary* (2000). The Committee voted to insist that the client have independent representation in agreeing to any such arrangement. *Id.* *But cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54 (2) (2000) (stating that prospective limitation of a lawyer's liability to a client for malpractice is unenforceable); MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (1998) (prohibiting a lawyer from prospectively limiting his or her liability to a client for malpractice, unless permitted by law and the client is independently represented in making the agreement).

Formerly in Virginia closely related lawyers were not allowed to represent clients adverse to each other.³⁹ The prohibition reflects the perception that closely related lawyers may inadvertently breach the confidences of clients with conflicting interests. New Rule 1.8(i), adopting the *ABA Model Rules* approach, continues the prohibition for lawyers who are members of the same nuclear family, but allows a consentable waiver.⁴⁰ Proscribed consentable relationships include parent and child, siblings or spouses, or a lawyer who is intimately involved with another lawyer.⁴¹

B. Rule 1.11, Successive Government and Private Employment

1. Text of Virginia Rule 1.11

- (a) A lawyer who holds public office shall not:
 - (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
 - (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or
 - (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.
- (b) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

³⁹ The Virginia Code was interpreted to create a non-waivable *per se* conflict of interest in such circumstances. VA. RULES OF PROF'L CONDUCT R. 1.8(i) *Comm. Commentary* (2000). See also Va. Comm. on Legal Ethics, Op. 190 (1985) (prohibiting adversial representation between related lawyers defined as husband/wife, parent/child, and siblings).

⁴⁰ See VA. RULES OF PROF'L CONDUCT R. 1.8(i) *Comm. Commentary* (2000) (explaining that representation is permissible as long as both clients consent after full disclosure).

⁴¹ See VA. RULES OF PROF'L CONDUCT R. 1.8(i) (2000). But see MODEL RULES OF PROF'L CONDUCT R. 1.8(i) (1998) (stating no prohibition against a lawyer who is intimately involved with another lawyer).

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(f) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

2. Summary

Rule 1.11 addresses the ethical issues associated with successive government and private employment. Appropriately described by some as the "revolving door" phenomenon, it occurs frequently as lawyers migrate between public and private employment.⁴² A lawyer who is a public officer should not engage in activities in which his or her

⁴² See generally ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.11 *Legal Background, Introduction: the "Revolving Door" Problem* (4th ed. 1999).

interests, personal or professional, are or foreseeably may be in conflict with official duties or obligations to the public.⁴³ The Rule is intended to prevent a lawyer from exploiting public office for the advantage of the lawyer or a private client.

Paragraph (a) is noteworthy in two respects.⁴⁴ First, it prevents the lawyer as well as the client from taking advantage of the duality.⁴⁵ Second, it places limitations on the lawyer's receipt of gifts in his or her capacity as a public official.⁴⁶

Generally, paragraphs (b) and (c) deal with private practitioners who were formerly government employees. In these situations, the risk is that power vested in public authority might be used for the special benefit of a private client. Also, the private client may gain an unfair advantage by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.⁴⁷

There is a general prohibition against representing a private client in a matter in which the lawyer participated as a public officer or employee. The prohibition also extends to those specially retained by

⁴³ VA. RULES OF PROF'L CONDUCT R. 1.11 cmt. 1 (2000).

⁴⁴ Paragraph (a) is identical to the former Virginia Code. See REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 8-101(A) (1983). Generally, the Committee believed that the ABA Model Rule provides more complete guidance than did the Virginia Code regarding lawyers' movement between the public and private sectors. VA. RULES OF PROF'L CONDUCT R. 1.11 *Comm. Commentary* (2000). However, the Committee added the language of DR 8-101(A) in order to provide a more complete statement regarding the responsibilities of lawyers who are public officials. *Id.* By adding a paragraph not found in the Model Rule, they changed the numbering of the Rule. Compare MODEL RULES OF PROF'L CONDUCT R. 1.11 (1998) with VA. RULES OF PROF'L CONDUCT R. 1.11 (2000). (Paragraph (a) of the Model Rule became paragraph (b) of the Virginia Rule; paragraph (b) of the Model Rule became paragraph (c) of the Virginia Rule, and so on).

⁴⁵ VA. RULES OF PROF'L CONDUCT R. 1.11(a) (2000) (stating that neither the lawyer nor the client may obtain a special advantage from the public position).

⁴⁶ The Committee is to be commended for equal treatment of the lawyer and the client. Compare MODEL RULES OF PROF'L CONDUCT R. 1.11 (1998) with VA RULES OF PROF'L CONDUCT R. 1.11(a)(1)-(3) (2000). The Model Rule decries any special advantage to the client as a result of the lawyer's duality. MODEL RULES OF PROF'L CONDUCT R. 1.11 (1998). The new Virginia Rule prohibits the lawyer also from receiving any special advantage from the situation, including the receipt of certain gifts. VA RULES OF PROF'L CONDUCT R. 1.11 (2000). The language limiting gifts provides that "[a] lawyer who holds public office shall not . . . accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official." VA. RULES OF PROF'L CONDUCT R. 1.11(a)(3) (2000).

⁴⁷ VA. RULES OF PROF'L CONDUCT R. 1.11 cmt. 3 (2000). Compare VA. RULES OF PROF'L CONDUCT R. 1.11 (2000) with REVISED VA. CODE OF PROF'L RESPONSIBILITY (1983). Paragraphs (c), (d), (e) and (f) are new to Virginia practitioners and have no counterparts in the Virginia Code.

government,⁴⁸ and even to those not charging a fee to the private client according to some older case law.⁴⁹

Paragraph (b) contains four noteworthy exceptions to the general prohibition. First, the law may expressly permit otherwise.⁵⁰ Second, if the lawyer did not participate "personally and substantially" as a public officer or employee.⁵¹ Third, the violation may be cured where both the private client and the appropriate government agency "consent after consultation."⁵² And fourth, other lawyers in the firm are eligible to

⁴⁸ See VA. RULES OF PROF'L CONDUCT R. 1.11 cmt. 2 (2000) (subjecting lawyers "specially retained" by the government to Rule 1.11 and to conflict of interest statutes and government regulations, as well as to Rule 1.7 (prohibiting the representing of adverse interests) and Rule 1.9 (protections afforded former clients). *But see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-409 n.4 (1997) (conceding that obligations of lawyers retained ad hoc to work for a government entity may be controlled by Rule 1.9 (conflicts: former clients) rather than Rule 1.11).

⁴⁹ See *Telos, Inc. v. Hawaiian Tel. Co.*, 397 F. Supp. 1314, 1317 (D. Haw. 1975) (acknowledging that a lawyer may derive benefits other than fees, such as valuable exposure and enhanced reputation, from working on a particular case).

⁵⁰ VA. RULES OF PROF'L CONDUCT R. 1.11(b) (2000). *But cf.* 18 U.S.C. § 207 (2001) (covering federal employees leaving governmental service, and imposing criminal penalties for violations); Exec. Order No. 12,834, 3 C.F.R. 58 (1994), *reprinted in* 5 U.S.C. 57,301 (1994) (prohibiting certain executive branch appointees from lobbying the former agency where employed for a period of five years). President Clinton issued this executive order shortly after becoming president, and, interestingly, rescinded it shortly before leaving the presidency. See Exec. Order No. 13,184, 66 Fed. Reg. 697 (Dec. 28, 2000) (revoking Exec. Order 12,834). For an explanation why he did it, see Jim VandeHei & Jeanne Cummings, *Clinton Lifts Lobbying Ban On Staffers*, WALL ST. J., Dec. 29, 2000, at A18 (stating questionable rationale that "it is improbable that 'Clinton appointees will have undue influence with Bush appointees'").

⁵¹ VA. RULES OF PROF'L CONDUCT R. 1.11(b) (2000). See, e.g., *United States v. Ta*, 938 F. Supp. 762 (D. Utah 1996) (holding that a defense lawyer who was formerly responsible for influencing the framing of an indictment in Federal Court against defendant was "substantially involved"; lawyer was not disqualified for other reasons). See also ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.11 *Legal Background* (4th ed. 1999) (containing law review articles and additional cases covering a variety of fact situations construing "personally and substantially").

⁵² *Id.* Compare VA. RULES OF PROF'L CONDUCT R. 1.11(b) (2000) with MODEL RULES OF PROF'L CONDUCT R. 1.11(a) (1998). The model rule does not require the client's consent in order to cure a violation. MODEL RULES OF PROF'L CONDUCT R. 1.11(a) (1998). The Committee modified the paragraph to require consent to representation by *both* the current client and the lawyer's former government agency in order to make paragraph (b) consistent with similar provisions of Rule 1.9(a) and (b) (covering conflicts with former client). VA. RULES OF PROF'L CONDUCT R. 1.11 *Comm. Commentary* (2000). The Committee wisely resolved the conflict between Rules 1.9 and 1.11 by this simple means. *Id.*; *but cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-409 (1997) (resolving the conflict by declaring that Rule 1.11 is controlling in matters of conflicts arising from moves between the government and the private sector); American Bar Association, Commission on Evaluation of the Rules of Professional Conduct, Report with Recommendation to the House of Delegates (Aug. 2001), *available at* http://www.abanet.org/cpr/e2k-whole_report_home.html [hereinafter *Ethics 2000*] (adding a provision clarifying that Rule 1.11 is the exclusive rule governing imputation of conflicts interest of government lawyers).

undertake the representation of the private client provided the disqualified lawyer is screened,⁵³ and written notice is given to the government agency.⁵⁴

A screened lawyer is prevented from receiving any compensation directly related to the fee in the matter in which the lawyer is disqualified.⁵⁵ However, the lawyer in this situation is not prohibited from receiving a salary or partnership share established by prior independent agreement.⁵⁶

Paragraph (d) imposes restrictions on a government lawyer (1) who has previously done work in the private sector, or (2) is negotiating for private employment upon leaving the government position.⁵⁷ Paragraph (d) does not impose imputed disqualification on other lawyers in the agency with which the lawyer in question has become associated.⁵⁸

It is important that there be a proper balance between necessary restrictions and the freedom to migrate to and from government employment. The government has a legitimate need to attract qualified lawyers as well as to maintain high standards of ethical conduct. In

"Consent after consultation" is a common phrase used throughout the Rules. *See generally* VA. RULES OF PROF'L CONDUCT (2000); MODEL RULES OF PROF'L CONDUCT (1998). *But see* Ethics 2000, *supra* note 52, *Terminology* (proposing to replace the concept of "consent after consultation" with the somewhat more familiar legal concept of "informed consent"); *Id.* R. 1.0 (creating a new terminology section). "Informed consent" is a much more familiar legal term and would have been a better choice for the Committee.

⁵³ *Id.* R. 1.0 (defining "screening" as "the 'timely' imposition of procedures designed to 'isolate' the personally disqualified lawyer so as to protect confidential information in the lawyer's possession"). Screening is permitted to prevent imputing personal disqualification to other members of a firm in the public-sector to private-sector context, but not in the private-sector to private-sector context. *Compare* VA. RULES OF PROF'L CONDUCT R. 1.11 (b)(1)-(c) (2000) (screening permitted) *with* VA. RULES OF PROF'L CONDUCT R. 1.9 (former clients) *and* VA. RULES OF PROF'L CONDUCT R. 1.10 (imputed disqualification) (2000) (screening not permitted in nongovernmental context). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.9, 1.10 (1998) (disallowing screening in private-sector to private-sector context). Screening under Rule 1.10 (or the ABA Model Code equivalent, DR 5-105) is permitted in only ten states: Illinois, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Oregon, Pennsylvania, Tennessee and Washington. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, 153-56 (2001) (chart on lawyer screening).

⁵⁴ VA. RULES OF PROF'L CONDUCT R. 1.11(b)(1)-(2) (2000).

⁵⁵ *Id.* R. 1.11(b)(1)-(c).

⁵⁶ *Id.* cmt. 5.

⁵⁷ VA. RULES OF PROF'L CONDUCT R. 1.11(d)(1)-(2) (2000). Lawyer may not (1) participate in a governmental matter in which the lawyer participated while in nongovernmental employment, unless no one is authorized by law or delegation to act in the lawyer's stead in the matter, or (2) negotiate for private employment with anyone involved in a matter in which the lawyer is participating, except for certain law clerks as permitted by Rule 1.12(b). *Id.* R. 1.12(b).

⁵⁸ *Id.* R. 1.11 cmt. 9.

order to maintain a proper balance, the safeguards of screening and waiver are an appropriate solution.⁵⁹

*C. Rule 1.13, Organization as Client*⁶⁰

1. Text of Virginia Rule 1.13

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may

⁵⁹ *Id.* R. 1.11 cmt. 3. The use of "screening" in both the Model Rules and the Virginia Rules is restricted to Rules 1.11 and 1.12 (former judge or arbitrator). It was expressly rejected in Rule 1.10 (imputed disqualification) of the Model Rules. ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.10 *Legal Background* (4th ed. 1999). *But cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (2000) (approving limited use of screening to cure imputed disqualification); Ethics 2000, *supra* note 52, R. 1.10 (proposing limited use of screening).

⁶⁰ There was no direct counterpart to this Rule in the Disciplinary Rules of the Virginia Code. VA. RULES OF PROF'L CONDUCT R. 1.13 *Virginia Code Comparison* (2000). The Committee adopted this Rule because it directly addresses matters only implicitly addressed in Ethical Considerations of the Virginia Code. *Id.* R. 1.13 *Comm. Commentary*.

decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

2. Summary

Paragraph (a) provides that a lawyer employed or retained by an organization represents the organization. Even though the only way to communicate with an entity is through its constituents,⁶¹ a lawyer's obligations are owed to the organization, not to any individuals.⁶²

When a constituent's conduct is likely to harm the organization, paragraph (b) explains the lawyer's responsibilities. When a lawyer for an organization becomes aware that a constituent is engaging in improper conduct that is likely to harm the organization, the lawyer is to consider at least four factors and three possible remedies before "proceed[ing] as is reasonably necessary in the best interest of the organization."⁶³

⁶¹ VA. RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 (2000) (defining constituents as officers, directors, employees, shareholders, and other equivalents such as in unincorporated associations).

⁶² VA. RULES OF PROF'L CONDUCT R. 1.13(a) (2000). *See, e.g.*, *Carlson v. Fredrikson & Byron, P.A.*, 475 N.W.2d 882, 890 (Minn. Ct. App. 1991) (holding that representation of a business does not equate with representation of its owner); *Jesse v. Danforth*, 485 N.W.2d 63 (Wis. 1992) (holding that a lawyer who incorporated group of physicians and continued to provide legal services to corporation may represent patient in a malpractice action against individual physicians).

⁶³ VA. RULES OF PROF'L CONDUCT R. 1.13(b) (2000). The four factors to be considered are (1) seriousness of violation and consequences, (2) scope and nature of the representation, (3) responsibility in the organization and apparent motivation, and (4) organizational policies on such matters; the three possible remedies are (1) seeking reconsideration of the matter, (2) advising that a legal opinion be sought, and (3) referring matter to higher authority within the organization, or highest authority if warranted. *Id.* For an application of the rule, *see, e.g.* *Ass'n of Bar of City of New York, Comm. on Prof'l Ethics*, Op. 1994-10 (1994) (stating that a lawyer representing limited partnership as well as sole general partner in individual capacity must disclose to limited partners improper conduct of general partner). *See generally* James P. Hemmer, *Resignation of Corporate Counsel: Fulfillment or Abdication of Duty*, 39 HASTINGS L.J. 641, 653-57 (1988); George D. Reyecraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 HASTINGS L.J. 605, 612 (1988).

When the lawyer discovers misconduct within the organization, the course of action is to "take it to the top," if warranted. But what if the highest authority within the organization refuses to take action against the misconduct? Paragraph (c) allows the lawyer to resign if he or she has not already been fired.⁶⁴

When it becomes apparent that the interests of the organization and a constituent are adverse, paragraph (d) obligates the lawyer to explain the identity of the client in order to avoid problems caused by confusion about the lawyer's role.⁶⁵ The lawyer should advise any constituent whose interest is or appears to be adverse to the organization of the conflict or potential conflict of interest, that the lawyer cannot represent him or her, and that the constituent may wish to obtain independent representation.⁶⁶ Failure to do so may cause the constituent to conclude that the lawyer represents the constituent as well as the organization.⁶⁷ Whether the lawyer should give a warning to any constituent individual may turn on the facts of each case.⁶⁸

Paragraph (e) recognizes that a lawyer for an organization may also undertake dual representation within the organization.⁶⁹ When an organization's lawyer is assigned or authorized to represent a constituent individual, the lawyer has an attorney-client relationship

⁶⁴ VA. RULES OF PROF'L CONDUCT R. 1.13(c) (2000). *See generally* Justine Thompson, *Who is Right about Responsibility: An Application of Rights Talk to Balla v. Gambro, Inc. and General Dynamics Corp. v. Rose*, 44 DUKE L.J. 1020 (1995) (discussing dilemma of reporting client's wrongful conduct). *Cf.* Nancy Kubasek et al., *The Social Obligation of Corporate Counsel: A Communitarian Justification for Allowing In-House Counsel to Sue for Retaliatory Discharge*, 11 GEO. J. LEGAL ETHICS 665 (1998).

⁶⁵ VA. RULES OF PROF'L CONDUCT R. 1.13(d) (2000).

⁶⁶ *Id.* cmt. 7. The comment goes on to say that "[c]are must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged." *Id.*

⁶⁷ If this belief is reasonable, it may create a lawyer-client relationship. *E.g.*, *Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987) (holding that a close corporation shareholder reasonably believed corporate counsel represented him individually; lawyer disqualified from representing corporation). *See generally* Note, *An Expectations Approach to Client Identity*, 106 HARV. L. REV. 687 (1993) (expectations approach preferable to bright-line method).

⁶⁸ VA. RULES OF PROF'L CONDUCT R. 1.13 cmt. 8 (2000).

⁶⁹ *Id.* R. 1.13(e). *But see* REVISED VA. CODE OF PROF'L RESPONSIBILITY EC 5-18 (1983) (stating that "Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.").

with both the individual and the organization.⁷⁰ Shareholder derivative actions are a type of problem arising out of dual representation.⁷¹

Lawyers for organizations were formerly prohibited from taking directives from non-lawyer officers or directors that served to regulate their professional judgment.⁷² These prohibitions do not exist in the new Virginia Rules.⁷³

D. Rule 1.15, Safekeeping Property

1. Text of Virginia Rule 1.15

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the

⁷⁰ VA. RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (2000). The lawyer's representation of both is controlled by the confidentiality and conflicts provisions of the Rules. *Id.* See also Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655 (1997).

⁷¹ VA. RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (2000). According to the comment, "Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization." *Id.* The question arises whether counsel for the organization may defend the action. "The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization." *Id.* R. 1.7 cmt. 11.

⁷² REVISED VA. CODE OF PROF'L RESPONSIBILITY EC 5-24 (1983) (stating that although a lawyer "may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman"); REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 5-106(B) (1983) (providing that a lawyer "shall not permit a person who . . . employs . . . him to render legal services for another to direct or regulate his professional judgment in rendering such legal services").

⁷³ VA. RULES OF PROF'L CONDUCT R. 1.13 (2000).

disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(c) A lawyer shall:

- (1) promptly notify a client of the receipt of the client's funds, securities, or other properties;
- (2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
- (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and
- (4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(d) Funds, securities or other properties held by a lawyer or law firm as a fiduciary shall be maintained in separate fiduciary accounts, and the lawyer or law firm shall not commingle the assets of such fiduciary accounts in a common account (including a book-entry custody account), except in the following cases:

(1) funds may be maintained in a common escrow account subject to the provisions of Rule 1.15(a) and (c) in the following cases:

- (i) funds that will likely be disbursed or distributed within thirty (30) days of deposit or receipt;
- (ii) funds of \$5,000.00 or less with respect to each trust or other fiduciary relationship;
- (iii) funds held temporarily for the purposes of paying insurance premiums or held for appropriate administration of trusts otherwise funded solely by life insurance policies; or
- (iv) trusts established pursuant to deeds of trust to which the provisions of Code of Virginia Section 55-58 through 55-67 are applicable;

(2) funds, securities, or other properties may be maintained in a common account:

- (i) where a common account is authorized by a will or trust instrument;
- (ii) where authorized by applicable state or federal laws or regulations or by order of a supervising court of competent jurisdiction; or
- (iii) where (a) a computerized or manual accounting system is established with record-keeping, accounting, clerical and administrative procedures to compute and credit or charge to each fiduciary interest its pro-rata

share of common account income, expenses, receipts and disbursements and investment activities (requiring monthly balancing and reconciliation of such common accounts), (b) the fiduciary at all times shows upon its records the interests of each separate fiduciary interest in each fund, security or other property held in the common account, the totals of which assets reconcile with the totals of the common account, (c) all the assets comprising the common account are titled or held in the name of the common account, and (d) no funds or property of the lawyer or law firm or funds or property held by the lawyer or the law firm other than as a fiduciary are held in the common account.

For purposes of this Rule, the term "fiduciary" includes only personal representative, trustee, receiver, guardian, committee, custodian and attorney-in-fact.

(e) **Record-Keeping Requirements, Required Books and Records.** As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

- (i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;
- (ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;
- (iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger

account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this subsection shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under subsection (i), above;

(iii) the records required under this subsection shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions. No escrow account shall be maintained in any financial institution which

does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format: (a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; (b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby; (c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefor.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(vi) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia; "Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client; "Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including

acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee; "Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above; "Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government; "Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected; "Law firm" includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State; "Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution; "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers.

Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow

account balance of the client or other person at the end of each period.

(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and

(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(6) Receipts and disbursements explained. The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

2. Summary⁷⁴

This Rule governs a lawyer's handling of the property of others. It describes the lawyer's duties regarding receiving, safeguarding, and distributing money and personal property belonging to a client. Where there is a breach of duty, lack of intent is no defense; the offense is a strict-liability transgression. It is irrelevant that the offense was

⁷⁴ Apparently the Committee felt that more is better. Compare VA. RULES OF PROF'L CONDUCT R. 1.15 (2000) (containing 2,467 words and consisting of six main sections and forty-five subsections) with MODEL RULES OF PROF'L CONDUCT R. 1.15 (1998) (containing 249 words and consisting of three relatively short paragraphs). Both cover the subject of safekeeping property. *Id.* The Virginia Rule contains substantial detail and specificity. The Virginia practitioner accused of violating these standards would be hard pressed to complain that he didn't know exactly what was required in the way of accounts, procedures, records, retention and reporting.

The probable explanation for the unusual length of the rule (ten times longer than the Model Rule) is that it followed substantially the counterparts in the Virginia Code. See *supra* notes 77, 79 and 81 (explaining that three of the disciplinary rules of the Virginia Code were adopted substantially or verbatim into Rule 1.15). This result is due to the corporate belief by the Special Committee that well-established Virginia ethics principles should be "disturbed only for good reason." See Petition, *supra* note 23.

inadvertent or that the client suffered no harm.⁷⁵ Such misconduct is considered particularly egregious.⁷⁶

The main paragraphs of Rule 1.15 deal with the following subjects: (a) funds held on behalf of a client,⁷⁷ (b) property in which both the lawyer and another person claim ownership,⁷⁸ (c) funds, securities or other property belonging to another,⁷⁹ (d) funds, securities or other property held as fiduciary,⁸⁰ (e) record-keeping requirements,⁸¹ and (f) escrow accounting procedures.⁸² The last section also includes definitions of terms.⁸³

Rule 1.15 imposes several obligations on the lawyer: (1) *Duty to segregate* -- there is a duty not to commingle personal or firm funds with

⁷⁵ *Motley v. Virginia State Bar*, 536 S.E.2d 101 (Va. 2000) (holding it was no defense that the lawyer engaged in no deliberate conduct, did not violate any court order, and did not steal client funds or cause harm to client -- but could be considered in mitigation of penalty); *In re Anonymous*, 698 N.E.2d 808, 809 (Ind. 1998) (In "determining whether a violation of the 'anti-commingling' rule has occurred, it is irrelevant that the misconduct was not part of a scheme to conceal income, was not the product of selfish or dishonest motives, or that client funds were never in fact at risk.").

⁷⁶ *In re Darnell*, 940 P.2d 171, 174 (N.M. 1997) ("Misappropriation of client funds is a most egregious breach of an attorney's fiduciary duties and generally results in disbarment."). This is probably because of the high degree of trust reposed in the legal profession.

⁷⁷ Compare REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 9-102(A) (1983) (containing substantially the same language as in Virginia Rules paragraph (a)) with MODEL RULES OF PROF'L CONDUCT R. 1.15 (1998) (omitting the language of paragraph (a)).

⁷⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.15(c) (1998) (containing the language of Virginia Rules paragraph (b) verbatim).

⁷⁹ Compare REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 9-102(B) (1983) (containing the identical language as in Virginia Rules paragraph (c)) with MODEL RULES OF PROF'L CONDUCT R. 1.15 (1998) (omitting the language of paragraph (c)).

⁸⁰ VA. RULES OF PROF'L CONDUCT R. 1.15(d)(2)(iii) (2000) (restricting the definition of "fiduciary" to personal representative, trustee, receiver, guardian, committee, custodian or attorney-in-fact). But see BLACK'S LAW DICTIONARY 625 (6th ed. 1990) (defining "fiduciary capacity" also to include attorney at law, broker, director of a corporation, executor, and public officer).

Paragraph (d) is new and has no counterpart in the Virginia Code or Model Rules. VA. RULES OF PROF'L CONDUCT R. 1.15 *Virginia Code Comparison* (2000).

⁸¹ Compare REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 9-103(A) (1983) (containing substantially the same language as in paragraph (e)(1)) with MODEL RULES OF PROF'L CONDUCT R. 1.15 (1998) (omitting the language of paragraph (e)(1)). Paragraph (e)(2) is new, adding requirements for lawyers as fiduciaries. VA. RULES OF PROF'L CONDUCT R. 1.15 *Virginia Code Comparison* (2000).

⁸² Compare REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 9-103(B) (1983) (containing nearly identical language as in paragraph (f)) with MODEL RULES OF PROF'L CONDUCT R. 1.15 (1998) (omitting the language of paragraph (f)).

⁸³ VA. RULES OF PROF'L CONDUCT R. 1.15(f) (2000). Terms defined are "Lawyer", "escrow account" or "Lawyer escrow account", "Client", "Dishonored", "Financial institution", "bank", "Insufficient Funds", "Law firm", "Notice of Dishonor", and "Properly payable". These terms are particularly helpful because of the high degree of specificity detailed in the Rule.

money or property belonging to clients and third persons;⁸⁴ (2) *Duty to acknowledge receipt promptly* when money or property is received in which clients or third persons have an interest;⁸⁵ (3) *Duty to identify and label* securities and properties of a client promptly upon receipt, and secure in a safe place as soon as practicable;⁸⁶ (4) *Duty to maintain records* -- lawyers must keep complete records as to client money and property received;⁸⁷ and (5) *Duty to deliver promptly* -- the lawyer is required to pay or deliver promptly to the client or another the funds, securities or other properties that the other person is entitled to receive.⁸⁸

Several of these requirements are new for the Virginia practitioner. Paragraph (b) directs that property held by a lawyer in which the lawyer and another person both claim ownership is to be segregated until there is an accounting and severance of the respective interests.⁸⁹ Specific guidelines for lawyers acting as fiduciaries are provided in paragraphs 1.15(d) and (e)(2).⁹⁰ A lawyer should hold property of others with the care

⁸⁴ *El-Amin v. Virginia State Bar*, 514 S.E.2d 163 (Va. 1999) (disciplining lawyer for failure to deposit client funds in an identifiable trust account); *Motley v. Virginia State Bar*, 536 S.E.2d 101, 108 (Va. 2000) (disciplining lawyer for failure to preserve the identity of funds and property of a client). Compare VA. RULES OF PROF'L CONDUCT R. 1.15(a), (b) (2000) with REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 9-102(A) (1983) (containing substantially the same language). Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 44 (2000) (imposing similar duties).

⁸⁵ See, e.g., VA. RULES OF PROF'L CONDUCT R. 1.15(c)(1) (2000) (requiring prompt notification to the client of receipt of funds, securities, or other properties).

⁸⁶ *Id.* R. 1.15(c)(2).

⁸⁷ See, e.g., VA. RULES OF PROF'L CONDUCT R. 1.15(e)(1)(v) (2000) (requiring escrow account records to be maintained and preserved for at least five years). See also *El-Amin*, 514 S.E.2d at 167 (disciplining lawyer for failure to maintain "complete records of all funds, securities, and other property of a client coming into the possession of the lawyer"); *Motley*, 536 S.E.2d at 108 (quoting REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 9-102(B)(3) (1983)) (disciplining lawyer for "incompleteness in subsidiary ledgers and cash disbursement journals").

⁸⁸ VA. RULES OF PROF'L CONDUCT R. 1.15(c)(4) (2000).

⁸⁹ *Id.* R. 1.15(b). "If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved." *Id.* For example, a client's creditors may have claims against funds or other property in a lawyer's possession. The lawyer may have a duty to protect such third-party claims against wrongful interference by the client, and therefore refuse to surrender the property to the client. *Id.* cmt.3. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person. *Id.*

⁹⁰ *Id.* R. 1.15(d), (e)(2). The guidelines direct that funds, securities or other properties held by a lawyer as a fiduciary are to be maintained in separate fiduciary accounts and shall not be commingled in a common account except in certain enumerated cases. *Id.* R. 1.15(d). Required books and records include an annual summary comparable to an accounting, and original source documents to explain the annual summary. *Id.* R. 1.15(e)(2).

expected of a professional fiduciary.⁹¹ The term "escrow account" is normally associated with fiduciaries. However, "escrow account" is defined in the new Rules as "an account maintained . . . by a lawyer . . . on behalf of a client."⁹²

Lawyers regularly come into possession of funds to be used for the payment of costs, as an advance to pay expenses, or for legal fees when earned.⁹³ In real estate matters, lawyers routinely receive funds for disbursement following the closing. In personal injury matters, lawyers receive settlement or judgment proceeds for later disbursement. Special retainers and expense advances are often received in criminal defense cases. The lawyer must use the advanced funds for the purpose intended.⁹⁴ To do otherwise subjects the lawyer to charges of misappropriation, conversion, or commingling.⁹⁵

Lawyers sometimes receive funds from third persons from which the lawyer's fee is to be paid. According to a comment, the lawyer is not required to remit the portion from which the fee is to be paid if there is a risk that the client may divert the funds without paying the fee.⁹⁶

⁹¹ *Id.* R. 1.15 cmt. 1. For example, securities should normally be kept in a safe deposit box. All property belonging to clients or third persons should be segregated; monies should be placed in trust accounts. Separate trust accounts may be appropriate when administering estate monies or acting in similar fiduciary capacities. *Id.* An additional justification for not commingling clients' funds with the lawyers', other than protecting the client, is to avoid the appearance of impropriety. *Id.* R. 1.15 cmt. 1(a). *Cf.* 1 *Thessalonians* 5:22 (King James) (abstain from all appearance of evil).

⁹² VA. RULES OF PROF'L CONDUCT R. 1.15(f)(1)(vi) (2000). "Escrow account" is synonymous with "Lawyer escrow account." *Id.*

⁹³ A leading cause of lawyer misconduct is the misappropriation of client funds in violation of Rule 1.15. *Cf.* ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, *CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION* 262 (1996) (noting that "[t]he requirement that lawyers keep client funds in a separate account is a common source of lawyer discipline"); JAMES E. MOLITERNO & JOHN M. LEVY, *ETHICS OF THE LAWYER'S WORK* 194 (1993) (noting that the safekeeping of money and property of others is one area where the special status and trust of the legal profession has been jealously safeguarded and rigorously enforced).

⁹⁴ *See generally* Lester Brickman, *The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account?*, 10 *CARDOZO L. REV.* 647 (1989).

⁹⁵ *See State ex rel. Okla. Bar Ass'n v. Farrant*, 867 P.2d 1279 (Okla. 1994) (disciplining lawyer for all three offenses: misappropriation by intentionally depriving client of money by fraud and deceit, simple conversion by applying client's money to purpose other than intended, and commingling by combining client's money with lawyer's).

⁹⁶ VA. RULES OF PROF'L CONDUCT R. 1.15 cmt. 2 (2000). However, the lawyer may not withhold funds to coerce a client into accepting the lawyer's contention. The lawyer should retain the undisputed portion in trust and suggest means for a speedy resolution, such as arbitration. The lawyer shall promptly distribute the undisputed portion. *Id.*

E. Rule 1.16, Declining Or Terminating Representation

1. Text of Virginia Rule 1.16

(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) 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.

(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 shall be returned to the client 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. Upon request, the client must also be provided 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); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared 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.

2. Summary

This Rule was one of the most widely discussed of all of the proposed new Virginia Rules.⁹⁷ The discussion centered on the query "Who owns the client file?" This is an important question when legal representation terminates. What documents is the client entitled to receive from the lawyer's file? What if the client still owes lawyer's fees? Can the lawyer withhold a client's papers to secure payment of the fee? These are some of the difficult questions that arise when a lawyer's roles as counselor and businessperson conflict. The challenge is to strike a balance between these competing interests.

The Special Committee grappled with these issues extensively before agreeing on a proposed Rule 1.16.⁹⁸ The Committee generally adopted the ABA Model Rule, with certain modifications.⁹⁹ The major

⁹⁷ See Dawn Chase, *VSB Again Mulls Who Owns the Client's File*, VA. LAW. WKLY., June 1, 1998, at A1.

⁹⁸ See *id.* There were five alternatives submitted for proposed Rule 1.16, addressing "who owns which parts of a client's file, who pays copying costs and whether a lawyer can hold the file hostage when the client hasn't paid the fee." *Id.* According to Richmond lawyer Thomas E. Spahn, "the current struggle over proposed Rule 1.16 is a continuation of two decades of the VSB's grappling, through its Legal Ethics Opinions, with the thorny questions that arise when a lawyer's role as counselor conflicts with the lawyer's role as businessperson." *Id.* Earlier versions described the documents in terms of prejudice, a somewhat subjective standard derived from LEO opinions. *Id.* at A12. "If you would be hurt if you didn't get it, then you get it," Spahn said. *Id.* This standard yielded in later versions to a more objective standard – a specific listing of "what the client is entitled to and what the lawyer can withhold." *Id.* See also VA. RULES OF PROF'L CONDUCT R. 1.16 cmt. 10 (2000) ("Paragraph (e) eschews a 'prejudice' standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files.").

⁹⁹ VA. RULES OF PROF'L CONDUCT R. 1.16 *Comm. Commentary* (2000). However, the Committee substituted the "illegal or unjust" language from DR 2-108(B)(2) for the "criminal or fraudulent" language used in the Model Rule. The Committee also substituted

change is that the Virginia Rule spells out in detail how different categories of documents must be handled upon termination of representation.¹⁰⁰

F. Rule 1.17, Sale Of Law Practice

1. Text of Virginia Rule 1.17

A lawyer or a law firm may sell or purchase a law practice, partially or in its entirety, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted.

the language of DR 2-108(C) for paragraph (c) of the Model Rule "to make it clear that a lawyer, in circumstances involving court proceedings, has an affirmative duty to request leave of court to withdraw." *Id.* Finally, the Committee added a new paragraph (e) that explains in detail the respective rights of the lawyer and client regarding delivery of file contents and payment of fees and costs, as opposed to the former "prejudice" standard. *Id.* Paragraph (a) is substantially the same as DR 2-108(A), and is identical to the Model Rule. *Compare* REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 2-108(A) (1983) *with* MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (1998). Paragraph (b) is substantially similar to DR 2-108(B) which provided that a lawyer "may withdraw from representing a client if: (1) Withdrawal can be effected without material prejudice to the client; or (2) The client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; or (3) The client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client." *See* REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 2-108(B) (1983). Paragraph (c) is identical to DR 2-108(C), and adds a sentence not found in the Model Rule. *Compare* REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 2-108(C) (1983) *with* MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (1998). Paragraph (d) is patterned after DR 2-108(D), but excludes addressing ownership of documents (covered in paragraph (e), which is new). *See* VA. RULES OF PROF'L CONDUCT R. 1.16 *Virginia Code Comparison* (2000). Model Rule (d) is contained within paragraph (d), except for references to surrendering and retaining papers. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (1998). The Model Rule adopts still a third standard – whatever is "permitted by law". The Model Rule uses the language "surrendering papers and property to which the client is entitled," and "retain[ing] papers relating to the client to the extent permitted by . . . law." *Id.*

¹⁰⁰ *See* VA. RULES OF PROF'L CONDUCT R. 1.16(e) (2000). Whether or not there are any outstanding fees, lawyers must provide the following documents to their former client upon request: (1) "original client-furnished documents and any originals of legal instruments or official documents" (lawyers must pay for any copies they wish to retain); (2) "lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents; pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney-work product . . . research material; and bills previously submitted to the client" (lawyers may charge the client for a copy of these documents, but may not withhold the documents until the client pays for the copies). *See* Spahn, *supra* note *. Lawyers are *not* required to give a former client "copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/client relationship." *Id.*

(b) Actual written notice is given by the seller to each of the seller's clients (as defined by the terms of the proposed sale) regarding:

- (1) the proposed sale and the identity of the purchaser;
- (2) any proposed change in the terms of the future representation including the fee arrangement;
- (3) the client's right to consent or to refuse to consent to the transfer of the client's matter, and that said right must be exercised within ninety (90) days of receipt of the notice;
- (4) the client's right to retain other counsel and/or take possession of the file; and
- (5) the fact that the client's refusal to consent to the transfer of the client's matter will be presumed if the client does not take any action or does not otherwise consent within ninety (90) days of receipt of the notice.

(c) If a client involved in a pending matter cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

2. Summary

The practice of law is more than a business – it is also a profession. Clients are not commodities that can be purchased and sold at will.¹⁰¹ Until recently, the Virginia Code has prohibited the sale of a law practice.¹⁰² The Committee was persuaded to allow the sale of a practice by several arguments.¹⁰³ One was that solo and small-firm practitioners were being unfairly penalized.¹⁰⁴ A second persuasive argument was that some attorneys "sell" their practices by utilizing various strategies to

¹⁰¹ VA. RULES OF PROF'L CONDUCT R. 1.17 cmt. 1 (2000).

¹⁰² REVISED VA. CODE OF PROF'L RESPONSIBILITY EC 4-6 (1983). The primary reason was to preserve client confidences after the termination of employment. "[A] lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets." *Id.*

¹⁰³ VA. RULES OF PROF'L CONDUCT R. 1.17 *Comm. Commentary* (2000). See also Dennis W. Dohnal, *Update on Model Rules and Part 2 Analysis*, VA. LAW., Dec. 1997, at 8 (noting that the sale of a law practice is allowed in more than a dozen states "in apparent recognition of our fluid professional society and the realities of retirement" and that no other profession prohibits such activity).

¹⁰⁴ *Id.* A firm lawyer who desires to retire can usually achieve a smooth transition of clients to other members of the firm. But a solo practitioner has a more difficult time making the transition, especially in the face of the restriction against selling an ongoing practice. See Paul Fletcher, *Lawyers could buy or sell a practice*, VA. LAW. WKLY., Mar. 9, 1998, at A1.

circumvent the restriction.¹⁰⁵ Another argument was that Virginia law should not be inconsistent with its standards of professional conduct. In a divorce, a professional practice is subject to equitable distribution.¹⁰⁶ This created the potential paradox of a lawyer having to pay a spouse the value of the law practice, but not being able to sell it.

Allowing the sale of a law practice created several troubling issues. Could only part of a practice be sold? Could there be more than one purchaser? Do clients have to consent to the sale? May the buyer increase clients' fees? Each of these questions was resolved in favor of the client. Doing what is in the clients' best interest was evidently the guiding principle in resolving these issues.

There are certain conditions on the sale of a law practice; several requirements must be met.¹⁰⁷ The selling lawyer must cease practicing in the geographic area of the practice;¹⁰⁸ notice must be given to all clients with an opportunity to consent or not;¹⁰⁹ and fees must not be increased as a result of the sale.¹¹⁰

¹⁰⁵ See VA. RULES OF PROF'L CONDUCT R. 1.17 *Comm. Commentary* (2000).

For example, firm members sometimes receive payments from their firm pursuant to retirement agreements that have the effect of rewarding the lawyer for the value of his/her practice. Sole practitioners contemplating leaving the practice of law may sell their tangible assets at an inflated price or bring in a partner prior to retirement, then allow the partner to take over the practice pursuant to a compensation agreement. Such arrangements do not always involve significant client participation or consent.

Id.

¹⁰⁶ *Id.* See also *Russell v. Russell*, 11 Va. App. 411, 399 S.E.2d 166 (1990) (allowing equitable distribution award of husband's medical practice to wife). "Therefore, under the Virginia Code, an attorney in a divorce proceeding may be required to compensate his/her spouse for the value of the practice, yet be forbidden to sell it." VA. CODE OF PROF'L CONDUCT R. 1.17 *Comm. Commentary* (2000).

The Committee recommended, after considering all of these factors that adopting a carefully crafted rule allowing such sales without resort to these alternate methods would be preferable and would assure maximum protection of clients. This recommended Rule is based on the ABA Model Rule 1.17 with several significant changes, the chief ones relating to consent and fees. *Id.*

¹⁰⁷ See generally VA. RULES OF PROF'L CONDUCT R. 1.17 (2000).

¹⁰⁸ VA. RULES OF PROF'L CONDUCT R. 1.17(a) (2000). This Rule does not prohibit employment "as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business." *Id.* R. 1.17 cmt. 3.

¹⁰⁹ *Id.* R. 1.17(b). The notice must be actual notice in writing to each of the seller's clients. The notice must contain among other things (1) the purchaser's identity, (2) any proposed change in future representation, including fees, (3) the right to consent or refuse to consent within 90 days, (4) the right to retain other counsel and/or take possession of the file, and (5) the fact that non-action by the client will be presumed to be a refusal to consent. *Id.* A client who cannot be given actual notice is treated differently. A court will determine whether the absent client's best interest will be served by authorizing the transfer of the file to the purchaser *Id.* R. 1.17 cmt. 7. A client's autonomy is not abrogated

Lawyers participating in the sale of a law practice are subject to additional ethical standards applicable where another lawyer becomes involved in the representation of a client.¹¹¹ For example, the seller is obligated to assure that the purchaser is qualified to assume the practice, and the purchaser is responsible for undertaking the representation competently;¹¹² both attorneys are obligated to avoid disqualifying conflicts, and to secure client consent for conflicts which can be agreed to;¹¹³ and both are required to protect client confidences.¹¹⁴

The fact that some clients decide not to be represented by the purchaser does not result in a violation of the Rule; and the seller's subsequent return to private practice as a result of an unanticipated change in circumstances does not violate the Rule.¹¹⁵

G. Rule 6.1, Voluntary Pro Bono Publico Service

1. Text of Virginia Rule 6.1

(a) A lawyer should render at least two percent per year of the lawyer's professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.

by the sale. Clients still retain the absolute right to discharge a lawyer and transfer the representation to another. *Id.* R. 1.17 cmt. 8.

¹¹⁰ *Id.* R. 1.17(d). However, "the sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of work must be honored by the purchaser, unless the client consents after consultation." *Id.* R. 1.17 cmt. 9.

But see MODEL RULES OF PROF'L CONDUCT R. 1.17(d) (1998) (permitting fee increases with the consent of the client). The Ethics 2000 Commission proposes to revise the Rule by deleting that language. Ethics 2000, *supra* note 52, R. 1.17(d). Model Rule 1.17(d) presently permits the buyer of a practice to tell the seller's clients that the buyer will not handle their cases unless they agree to pay a higher fee than they agreed to pay the seller. MODEL RULES OF PROF'L CONDUCT R. 1.17(d) (1998). The Commission felt that this result is problematical "because the seller could not unilaterally abrogate the fee agreement as a matter of contract law." Ethics 2000, *supra* note 52, R. 1.17(d). The proposed change is in accord with the rules of several jurisdictions, including Florida, California and New York. *Id.* And now Virginia.

¹¹¹ VA. RULES OF PROF'L CONDUCT R. 1.17 cmt. 11 (2000).

¹¹² *Id.* R. 1.1 (dealing with competence).

¹¹³ *Id.* R. 1.7 (dealing with conflicts of interest generally).

¹¹⁴ *Id.* R. 1.6, 1.9 (dealing with confidentiality and conflict of interest with former client, respectively).

¹¹⁵ *Id.* R. 1.17 cmt. 2. For example, a lawyer who has sold the practice to accept a judicial appointment does not violate the Rule if the lawyer later resumes private practice upon leaving office. *Id.* For further discussion of Rule 1.17, see generally Gayle L. Coy, *Permitting the Sale of a Law Practice: Furthering the Interests of Both Attorneys and Their Clients*, 22 HOFSTRA L. REV. 969 (1994); Scott M. Schoenwald, *Model Rule 1.17 and the Ethical Sale of Law Practices: A Critical Analysis*, 7 GEO. J. LEGAL ETHICS 395 (1993).

(b) A law firm or other group of lawyers may satisfy their responsibility collectively under this Rule.

(c) Direct financial support of programs that provide direct delivery of legal services to meet the needs described in (a) above is an alternative method for fulfilling a lawyers responsibility under this Rule.

2. Summary

Black's Law Dictionary defines "pro bono publico" as "for the public good; for the welfare of the whole."¹¹⁶ In the book of Proverbs, we are admonished to "plead the cause of the poor and needy."¹¹⁷ According to the Virginia Bar Special Committee, "pro bono legal services consist of any professional services for which the lawyer would ordinarily be compensated, including dispute resolution as a mediator or third party neutral."¹¹⁸ According to new Rule 6.1, a Virginia "lawyer should render at least two percent per year of the lawyer's professional time to pro bono publico legal services".¹¹⁹ Eligible services include poverty law,¹²⁰ civil rights law,¹²¹ public interest law,¹²² and volunteer activities designed to increase availability of pro bono legal services.¹²³ Services not qualifying for pro bono publico are those for which fees go uncollected.¹²⁴

Alternative provisions allow some flexibility in complying with the Rule. For example, the responsibility may be fulfilled collectively. A group of two or more lawyers may pool their resources to insure that

¹¹⁶ BLACK'S LAW DICTIONARY 1203 (6th ed. 1990).

¹¹⁷ *Proverbs* 31:9 (King James).

¹¹⁸ VA. RULES OF PROF'L CONDUCT R. 6.1 cmt. 1 (2000). The definition of pro bono legal services would more correctly read ". . . any professional services for which the lawyer would ordinarily *otherwise* be compensated. . . ." Without the word "otherwise," the definition is at best ambiguous and could include all professional services for which the lawyer is compensated.

¹¹⁹ *Id.* R. 6.1(a).

¹²⁰ *Id.* R. 6.1 cmt. 2. Pro bono services in poverty law consist of free or nominal fee services for clients who do not have the resources to pay counsel. Legal aid referral programs are examples. *Id.*

¹²¹ *Id.* R. 6.1 cmt. 3. Pro bono publico legal services in civil rights law consists of free or nominal fee services involving rights of individuals which society has an interest in protecting. Typical examples would include legal services for victims of discrimination based on race, sex, age or handicap. *Id.*

¹²² *Id.* R. 6.1 cmt. 4. "Public interest law" includes free or nominal fee legal services to religious, charitable or civic groups. Examples include establishing a shelter for the homeless, operating a battered spouse hotline, or providing public service information. *Id.*

¹²³ *Id.* R. 6.1 cmt. 5. Examples of such volunteer activities include "training and mentoring lawyers who have volunteered to take legal aid referrals or helping recruit lawyers for pro bono referral programs." *Id.*

¹²⁴ *Id.* R. 6.1 cmt. 6. The lawyer's intent *ab initio* must be to render free or nominal fee legal services. Therefore, contingent fees for which there is no recovery do not qualify. *Id.*

individuals in need of such assistance receive needed legal services.¹²⁵ Another alternative in lieu of direct pro bono services is the contributing of money to programs that provide pro bono publico services.¹²⁶

Rule 6.1 differs somewhat from the ABA Model Rule. For example, the Virginia Rule refers to a percentage of total hours; whereas the Model Rule contemplates a specific number of hours as a minimum.¹²⁷ Another difference is that Virginia allows a "nominal fee" to qualify as pro bono in any of the designated areas of pro bono service; while the Model Rule suggests that lawyers provide a substantial majority of the fifty (50) hour requirement without fee or expectation of fee.¹²⁸

Pro bono publico service is a tradition, not an enforceable duty. Lawyers have traditionally accepted a responsibility to provide legal services to those who cannot afford to pay for them. Rather than a legal duty, the obligation is viewed as a moral responsibility, as well as a benefit to society that enhances public confidence in our legal system.¹²⁹

The issue of mandatory pro bono legal services was raised recently in Virginia by the General Assembly.¹³⁰ After several years of study and

¹²⁵ *Id.* R. 6.1(b). Included in this category are lawyers in a firm or other group. Pro bono work by some lawyers within a firm or group may be attributed to other lawyers within the firm or group who support the representation. *Id.* R. 6.1 cmt. 7.

¹²⁶ *Id.* R. 6.1(c). "Lawyers who are unable to fulfill their pro bono publico obligation through direct, legal representation should support programs that provide [such] legal services . . . through financial contributions in proportion to their professional income." *Id.* R. 6.1 cmt. 9. "For example, some lawyers (e.g., some government lawyers) are prohibited by the terms of their employment from engaging in any outside practice. Other lawyers lack the experience and access to resources necessary to provide competent legal assistance." *Id.* cmt. 8.

¹²⁷ Compare VA. RULES OF PROF'L CONDUCT R. 6.1(a) (2000) (suggesting "at least two percent of the lawyer's professional time") with MODEL RULES OF PROF'L CONDUCT R. 6.1 (1998) (suggesting "lawyer should aspire to render at least (50) hours of pro bono publico legal services per year").

¹²⁸ Compare VA. RULES OF PROF'L CONDUCT R. 6.1 cmt. 2-4 (2000) (permitting a "nominal fee" to satisfy the entire ethical obligation) with MODEL RULES OF PROF'L CONDUCT R. 6.1(b)(1)-(2) (1998) (allowing a "substantially reduced fee" in only an amount less than a substantial portion of the total qualifying hours).

¹²⁹ See ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 6.1 *Mandatory Pro Bono* (4th ed. 1999). The issue of mandatory pro bono legal service has received a considerable amount of scholarly discussion. A generous listing of articles and a book are provided. *Id.*

¹³⁰ See Paul Fletcher, *Mandatory Pro Bono? Fax Poll: Lawyers Strongly Oppose Making it Required, but They Embrace Their Duty to do Pro Bono Work*, VA. LAW. WKLY., Sept. 15, 1997, at B1. Senator Joseph V. Gartlan, D-Mason Neck, proposed mandatory pro bono work for Virginia lawyers during the summer of 1997, which became known as the "play or pay" proposal – lawyers should "play" by participating in pro bono programs, or alternatively "pay" a fee to fund legal aid programs. A poll of lawyers by Virginia Lawyers Weekly revealed overwhelming opposition to mandatory pro bono publico – 96 to 4 percent. Objections included: "The very concept of mandating 'volunteer' work or work done gratis is self-contradictory and repugnant"; "[a]re you going to force doctors to perform free medical services or lose their licenses?"; "[a]s a constitutional matter, . . . laws which force this type of activity violate due process and equal protection of the laws"; "[t]his is another example

discussion, the initiative was tabled, and the new Virginia Rule 6.1 retains the voluntary nature of pro bono services.

Periodically, efforts have been made elsewhere to require pro bono publico services. All such efforts to mandate pro bono in any state have failed to date.¹³¹ The ABA Ethics 2000 Commission considered the question of mandatory pro bono service, but elected to recommend that pro bono service remain voluntary.¹³²

This Rule had no direct counterpart in the Disciplinary Rules of the Virginia Code. It was generally influenced, however, by several of the Ethical Considerations in the former Code,¹³³ although it varied in one significant respect. The Code was more aspirational; the Rule is more obligatory and establishes a minimum number of hours.¹³⁴ The language also differed from the ABA Model Rule in order to align the Rule with

of 'feel-good' regulation which frankly is unnecessary and is akin to additional taxation"; and "[t]he government should not be in the business of legislating charity work." Comments favoring the proposal included: "We owe a professional obligation to provide legal services to the indigent" and "[i]t is a shame that a mandatory system must be considered to force lawyers to perform the work their consciences should have required." *Id.*

The Virginia Bar is promoting plans to involve more lawyers in pro bono. Planned activities include CLE and new professionalism courses covering pro bono responsibilities and opportunities, and including pro bono issues on future bar exams. Dawn Chase, *The VSB and Pro Bono: The Bar Responds to the General Assembly*, VA. LAW. WKLY., Dec. 7, 1998, at B1.

¹³¹ CRYSTAL, *supra* note 25, at 486. Cf. ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 6.1 *Constitutional Challenges to Mandatory Services* (4th ed. 1999) (stating that the majority of courts addressing the issue have held that mandatory pro bono violates the due process, equal protection, involuntary servitude, and Fifth Amendment "taking" clauses of the Constitution).

¹³² Ethics 2000, *supra* note 52, R. 6.1. This issue was discussed at length. After receiving public comment, the Commission voted to recommend that the voluntary nature of pro bono service be retained. "However, in order to emphasize that pro bono publico service is a time-honored ethical obligation. . . the Commission voted to add. . . a provision now in commentary stating that 'Every lawyer has a professional responsibility to provide legal services to those unable to pay.'" *Id.*

¹³³ VA. RULES OF PROF'L CONDUCT R. 6.1 *Virginia Code Comparison* (2000). EC 2-27 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." *Id.* EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services." *Id.*

¹³⁴ Compare VA. RULES OF PROF'L CONDUCT R. 6.1(a) (2000) (stating that a lawyer "should render at least two percent. . .") with REVISED VA. CODE OF PROF'L RESPONSIBILITY EC 2-28 (1994) (stating that a lawyer "should aspire to render two percent. . .").

other more specific Ethical Considerations formerly approved by the Virginia Supreme Court.¹³⁵

H. Rule 6.3, Membership in Legal Services Organization

1. Text of Virginia Rule 6.3

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

2. Summary

One of the goals of the organized bar is to encourage lawyers to support and participate in legal service organizations.¹³⁶ Rule 6.3 recognizes that participation and seeks to prevent conflicts between interests of clients and interests of the legal services organization. The Rule permits a lawyer to serve as director, officer or member of a legal services organization while concurrently representing clients privately with interests adverse to those of clients represented by the legal services organization.¹³⁷ It is not unusual for opposing parties to be represented by a legal services agency lawyer and a lawyer who participates as a director, officer, or member of that organization.¹³⁸

There is no presumption of a lawyer-client relationship in such situations. A participating lawyer is not presumed to represent persons served by the legal services organization.¹³⁹ There is only a potential

¹³⁵ VA. RULES OF PROF'L CONDUCT R. 6.1 *Comm. Commentary* (2000). The Virginia Rule and Comments were influenced considerably by EC 2-27 through 2-32, according to the Committee Commentary. See REVISED VA. CODE OF PROF'L RESPONSIBILITY EC 2-28, 2-29 (1994).

¹³⁶ See VA. RULES OF PROF'L CONDUCT R. 6.3 cmt. 1 (2000) ("Lawyers should be encouraged to support and participate in legal service organizations.").

¹³⁷ VA. RULES OF PROF'L CONDUCT R. 6.3 (2000).

¹³⁸ ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 6.3 *When Participating Lawyers Represent the Persons Served by the Legal Services Organization* (4th ed. 1999). A series of conflicting ethics opinions are cited on whether such a situation presents a conflict and imputed disqualification under Rule 1.10. *Id.*

¹³⁹ VA. RULES OF PROF'L CONDUCT R. 6.3 cmt. 1 (2000).

conflict.¹⁴⁰ Otherwise, frequent conflicts would deter lawyers from serving in such organizations.

The Virginia Code contained no counterpart to this Rule.¹⁴¹ The Committee adopted this Rule to address a problem that was ignored by the Virginia Code – the potential tension between private clients and their lawyers who participate in legal services organization.¹⁴² Rule 6.3 follows the Model Rule verbatim.¹⁴³

I. Rule 8.1, Bar Admission And Disciplinary Matters

1. Text of Virginia Rule 8.1

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact;
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter;
- (c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or
- (d) obstruct a lawful investigation by an admissions or disciplinary authority.

2. Summary

Rule 8.1 imposes a duty of candor in bar admission applications and disciplinary matters.¹⁴⁴ This duty extends to persons seeking admission

¹⁴⁰ *Id.* "It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies . . . can enhance the credibility of such assurances." *Id.* cmt. 2.

¹⁴¹ *Id.* R. 6.3 *Virginia Code Comparison*.

¹⁴² *Id.* R. 6.3 *Comm. Commentary*.

¹⁴³ See MODEL RULES OF PROF'L CONDUCT R. 6.3 (1998).

¹⁴⁴ VA. RULES OF PROF'L CONDUCT R. 8.1(a) (2000) ("An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not: (a) knowingly make a false statement of material fact."). There appears to be some ambiguity in the rule. Compare *id.* with MODEL RULES OF PROF'L CONDUCT R. 8.1 (1998). The Virginia Rule uses the phrase "in connection with" three times in the rule. VA. RULES OF PROF'L CONDUCT R. 8.1(a) (2000). The last usage leaves the reader in doubt whether it is used in the conjunctive or disjunctive. If it is meant to be used in the disjunctive (as the text would seem to indicate), there should be a comma immediately preceding the last "in connection with" phrase. On the other hand, the Model Rules place the word "or" immediately preceding the last "in connection with"; thus reading "or in connection with . . ." MODEL RULES OF PROF'L CONDUCT R. 8.1 (1998). This latter usage makes it clear that the last phrase is used in the

to the bar as well as to lawyers. Thus, a person who makes a materially false statement in connection with an application for admission or a certification necessary for license renewal, may be subject to disciplinary action once that person has been admitted to the Bar.¹⁴⁵ The Rule also requires clarification of any material misstatement that could mislead the admissions or disciplinary authority.¹⁴⁶ These portions of the Rule were adopted from the Virginia Code.¹⁴⁷

The Rule imposes some additional duties not found in the former Code. There is now an affirmative duty to comply with lawful demands for information,¹⁴⁸ and a prohibition against obstructing investigations of a disciplinary or admissions authority.¹⁴⁹ The Model Rule is less restrictive.¹⁵⁰

disjunctive, that is, not relating to the previous phrase. The reader is unsure whether this omission in the Virginia Rule is intentional or negligent.

¹⁴⁵ VA. RULES OF PROF'L CONDUCT R. 8.1 cmt. 1 (2000). The duty applies to the admission or discipline of others as well as the lawyer himself. *Id.*

¹⁴⁶ VA. RULES OF PROF'L CONDUCT R. 8.1(b), cmt. 1 (2000).

¹⁴⁷ See REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 1-101(A) and (B) (1983) (containing substantially the same language).

¹⁴⁸ VA. RULES OF PROF'L CONDUCT R. 8.1(c) (2000). *But see* VA. RULES OF PROF'L CONDUCT R. 8.1 cmt. 2 (2000) (clarifying that this requirement is subject to protections conferred by the Fifth Amendment to the United States Constitution, its counterpart in the Virginia Constitution, and "other lawfully recognized matters of privilege"). See also Dennis W. Dohnal, *Update on Model Rules and Part 2 analysis*, VA. LAW. REG., Dec. 1997, at 8 (noting that the reason for requiring cooperation with a disciplinary investigation "is that there is, unfortunately, a segment of the profession who ignore disciplinary inquiries, thereby forcing such matters to the hearing stage even though they may be ultimately determined to be frivolous").

¹⁴⁹ VA. RULES OF PROF'L CONDUCT R. 8.1(d) (2000). A lawyer who is undergoing such an investigation *must* cooperate; failure to do so will constitute a new, separate offense. See also VA. RULES OF PROF'L CONDUCT R. 8.1 cmt. 4 (2000) (defining "obstruction" to include "among other intentional acts, purposeful delay, attempts to improperly influence others who are requested to provide information, and the falsification or destruction of relevant documentation"); *id.* R. 8.1 *Comm. Commentary* (the obstruction of any such investigation is now a separate violation).

An article in the Virginia Lawyers Weekly observes that "[t]his new Rule sets out yet another way lawyers can get in trouble: by failing to cooperate with a bar investigation." Paul Fletcher, *New Rules You Should Be Revisiting*, VA. LAW. WKLY., Dec. 13, 1999, at A18. The article quotes Richmond lawyer Thomas E. Spahn, a member of the Committee, observing that "[a]lthough lawyers generally were prohibited from making misrepresentations to bar investigators, there was no positive duty to cooperate." *Id.*

¹⁵⁰ Compare VA. RULES OF PROF'L CONDUCT R. 8.1(c), (d) (2000) with MODEL RULES OF PROF'L CONDUCT R. 8.1 (1998) (omitting subsections (c) and (d)). The opening sentence in the Virginia Rule is also broader than the Model Rule by including language covering required certifications and license renewal. VA. RULES OF PROF'L CONDUCT R. 8.1 *Comm. Commentary* (2000). The Committee was prudent in broadening the Model Rule and the former Virginia Code to include provisions that address related problems.

J. Rule 8.3, Reporting Professional Misconduct

1. Text of Virginia Rule 8.3

(a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate professional authority.

(b) A lawyer having reliable information that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) If a lawyer serving as a third party neutral receives reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.

(d) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.

2. Summary

Lawyers are required to "blow the whistle" on their fellow practitioners.¹⁵¹ And lawyers have a similar obligation with respect to judicial misconduct.¹⁵² The requirement is probably honored more in the breach than in the observing.¹⁵³ Ratting on their professional colleagues rates with lawyers somewhere on a par with having a root canal. As distasteful as that is, self-regulation of the legal profession requires that a lawyer report professional or judicial misconduct when there is knowledge of a violation of the ethics rules in order that a disciplinary investigation may be initiated.¹⁵⁴

¹⁵¹ *Id.* R. 8.3(a); *id.* Rule 8.3 cmt. 1.

¹⁵² *Id.* R. 8.3(b); *id.* R. 8.3 cmt. 1.

¹⁵³ See Michael J. Burwick, *You Dirty Rat! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO. J. LEGAL ETHICS 137 (1994) (addressing relative ineffectiveness of reporting requirements and difficulties with interpretation and enforcement).

¹⁵⁴ VA. RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2000). The Comment goes on to provide a rationale. "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense." *Id.*

Reporting professional misconduct is so difficult to observe in practice probably due to a tension between the duty to keep a client's secrets and the duty to report misconduct.¹⁵⁵ Expressed another way, you cannot serve two masters.¹⁵⁶

The obligation to report misconduct runs into a confidentiality obstacle in some Alternative Dispute Resolution (ADR) settings. A lawyer serving as either a third party neutral or a mediator is barred by confidentiality from reporting another lawyer's misconduct discovered during the dispute resolution process.¹⁵⁷ Rule 8.3 seeks to solve this problem (regarding third party neutrals only) by requiring the lawyer to attempt to obtain the parties' consent to waive confidentiality and permit disclosure.¹⁵⁸

Not all misconduct must be reported. Divulging misconduct is not required by a lawyer who represents a lawyer or judge whose professional conduct is in question,¹⁵⁹ or where the information is gained through an approved lawyer's assistance program, such as the Virginia Bar Association's Committee on Substance Abuse.¹⁶⁰

¹⁵⁵ See Richard W. Burke, *Where Does My Loyalty Lie?:* In re Himmel, 3 GEO J. LEGAL ETHICS 643 (1990) (discussing confusion resulting from failure to recognize such tension).

¹⁵⁶ *Matthew* 6:24 (Revised Standard) ("No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to the one and despise the other.").

¹⁵⁷ VA. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3a (2000). See VA. CODE ANN. §§ 8.01-576.9-10, 581.22 (Michie 2000) (governing confidentiality of information revealed in the dispute resolution process).

¹⁵⁸ VA. RULES OF PROF'L CONDUCT R. 8.3(c) (2000); *id.* R. 8.3 cmt. 3b ("The Rule requires a third party neutral lawyer to attempt to obtain the parties' written consent to waive confidentiality as to professional misconduct, so as to permit the lawyer to reveal information regarding another lawyer's misconduct which the lawyer would otherwise be required to report.").

¹⁵⁹ *Id.* R. 8.3 cmt. 4. "Such a situation is governed by the rules applicable to the client-lawyer relationship." *Id.* See *id.* R. 8.3(d) (not requiring disclosure of confidential information otherwise protected by Rule 1.6); *id.* R. 8.3 cmt. 2. Rule 1.6 protects confidential information gained during the course of the lawyer-client relationship. *Id.* R. 1.6. Thus, professional misconduct by a lawyer who is also the client may be protected under Rule 1.6. *But see id.* R. 1.6(c)(3) (requiring misconduct to be divulged to the client where the reporting lawyer learns about another lawyer's misconduct); *id.* R. 8.3 cmt. 21(b) (declaring that Rule 1.6(c)(3) imposes a duty to report such misconduct promptly, provided the client consents after consultation). Although paragraph (c)(3) requires prompt disclosure, the rule is not violated by delaying the report for the time necessary to protect a client's interests. *Id.* R. 8.3 cmt. 21(b). "For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests." *Id.*

¹⁶⁰ *Id.* R. 8.3(d). The rationale for this exception to Rule 8.3 is that providing for such confidentiality encourages lawyers and judges to seek needed treatment; otherwise, lawyers and judges may hesitate to seek assistance. *Id.* R. 8.3 cmt. 5. A lawyer's confidences and secrets are to be afforded the same protection as those of a lawyer's client. *Id.* Here, the comment takes a strange turn by *requiring* a lawyer to report misconduct

Subparagraphs (b) and (c) were not addressed in the Virginia Code.¹⁶¹ In other regards, the reporting requirements of Rule 8.3 do not differ substantially from the former Code.¹⁶² Both standards require information "that raises a *substantial* question."¹⁶³ A noteworthy difference between the two standards is that under the Rule, information received as to misconduct must be *reliable*.¹⁶⁴ The Model Rule requires merely *knowledge*.¹⁶⁵

K. Rule 8.5, Disciplinary Authority; Choice Of Law

1. Text of Virginia Rule 8.5

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction,

under Rule 8.3 "if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to personal use." *Id.* The comment equates this situation with a lawyer-client relationship, even though none exists, apparently in order to trigger the crime exception to Rule 1.6. *See id.* at R. 1.6(c)(1) (requiring a lawyer to reveal a client's intention to commit a crime).

¹⁶¹ VA. RULES OF PROF'L CONDUCT R. 8.3 *Comm. Commentary* (2000). The only rationale given for including these two subparagraphs in Rule 8.3 is that "the Committee believed them to be appropriate additions." *Id.*

¹⁶² *Id.*

¹⁶³ VA. RULES OF PROF'L CONDUCT R. 8.3(a)-(b) (2000); REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 1-103(A) (1983). The term "[s]ubstantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance." VA. RULES OF PROF'L CONDUCT *Terminology* (2000). The rule uses the term "substantial" to refer to "the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." VA. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2000).

¹⁶⁴ *Compare* VA. RULES OF PROF'L CONDUCT R. 8.3(a)-(c) (2000) (using the term "reliable information" in all three subparagraphs) *with* REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 1-103(A) (1983) (using the term "[a] lawyer having information").

¹⁶⁵ MODEL RULES OF PROF'L CONDUCT R. 8.3(a)-(b) (1998). "[T]he Committee believed that the phrase 'reliable information' indicated more clearly than the ABA Model Rule's 'knowledge' the sort of information which should support a report of attorney misconduct." VA. RULES OF PROF'L CONDUCT R. 8.3 *Comm. Commentary* (2000). No further explanation was provided. *Compare* MODEL RULES OF PROF'L CONDUCT R. 8.3(a)-(b) (1998) ("a lawyer having knowledge") *with* Ethics 2000, *supra* note 52, R. 8.3(a)-(b) ("a lawyer who knows"). The proposed Model Rule modifies the scienter requirement to conform to the Terminology section found in new Rule 1.0. The definition is not changed. The term is changed from a phrase not found ("having knowledge") in either the former or new Terminology section to a word that is defined there ("knows"). *Id.* R. 1.0. The definition is unchanged in both versions of the Model Rule. *See id.*; MODEL RULES OF PROF'L CONDUCT *Terminology* (1998).

The terms "substantial" and "knowledge" are defined in the respective standards in an attempt to create a degree of objectivity in their application to specific fact situations. Unfortunately, the term "reliable information" (used three places in this rule) is not defined in the Terminology section. *See* VA. RULES OF PROF'L CONDUCT *Terminology* (2000). Even where these terms are defined, there are difficulties of interpretation and application. *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 8.3 "Knowledge" and "Substantial Question" *about Honesty, Trustworthiness, or Fitness* (4th ed. 1999) (providing for a helpful discussion of the various interpretations placed on these terms by court decisions and ethics opinions, and a listing of law review articles).

regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

2. Summary

Rule 8.5 recognizes the ethics problems associated with multistate practice. A lawyer may be potentially subject to more than one set of standards of professional conduct which impose conflicting obligations. The lawyer may be licensed to practice in multiple jurisdictions with differing rules, or may be admitted to practice before a particular court or agency with different rules than those of the jurisdiction(s) in which the lawyer is licensed to practice.¹⁶⁶ Which ethics code controls? The Rule addresses the conflict-of-ethics-standards difficulties that arise and attempts to resolve the conflict by allowing concurrent multi-jurisdictional *disciplinary authority*,¹⁶⁷ but limiting the applicable *choice of law* to one,¹⁶⁸ and making the determination of which jurisdiction's rules apply as objective as possible.¹⁶⁹

¹⁶⁶ *Id.* R. 8.3 cmt. 2 (noting that past decisions have not been clear or consistent as to which rules apply).

¹⁶⁷ VA. RULES OF PROF'L CONDUCT R. 8.5(a) (2000) (allowing a lawyer to be subject to the disciplinary authority of multiple jurisdictions where the lawyer is admitted to practice for the same conduct).

¹⁶⁸ *Id.* R. 8.5(b) (limiting the choice of law to only one set of ethical rules, whether in connection with a court proceeding or any other conduct); *see also id.* R. 8.5 cmt. 3. *But cf. In re Stormont*, 873 S.W.2d 227 (Mo. 1994) (noting that lawyer was suspended in Illinois and disbarred in Missouri for assisting client perjury); *see* VA. RULES OF PROF'L CONDUCT

Virginia lawyers will always be subject to the authority of the Virginia Ethics Rules, and the ethics code of any other state in which a Virginia lawyer is admitted.¹⁷⁰ If a lawyer has a multistate practice, the choice of law to be applied is that of the jurisdiction where the lawyer principally practices.¹⁷¹ However, another standard will control if the questioned conduct has a "predominant effect" in the other jurisdiction in which the lawyer is also licensed to practice.¹⁷² If the questionable conduct occurs in a court proceeding, that court's ethics rules apply.¹⁷³

The choice of law provision of Rule 8.5 is not intended to apply to transnational practice. The governing ethical standard in such cases should be determined by agreements between jurisdictions or appropriate international law.¹⁷⁴

The new Rule is more restrictive than its counterpart in the Code. The latter provided a "safe harbor" for lawyers practicing in multiple jurisdictions.¹⁷⁵ Paragraph (a) removes the "safe harbor" provision of the prior *Code*, and clarifies that Virginia lawyers are to comply with the Virginia Rules regardless where they practice (subject, however, to paragraph (b)).¹⁷⁶ The Committee adopted this Rule because it provides

R. 8.5 cmt. 5 (2000) (addressing the question: What happens when two admitting jurisdictions pursue action against a lawyer for the same conduct?) They should, applying this Rule, agree on the same governing ethics rules. They should then seek to apply the same rule to the same conduct, and "in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.").

¹⁶⁹ *Id.* R. 8.5(b)(2)(i), (ii). *But cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-360 (1991) (resolving an unusual choice-of-law issue that arose out of the District of Columbia). The District permitted non-lawyers to be partners in law firms. Other jurisdictions forbade such partnerships. Which ethics standards should apply to District lawyers who are also licensed in other jurisdictions that prohibit non-lawyer partners? The Opinion concluded that the District's rules apply to a lawyer who practices only in D.C. But, if the lawyer opens a branch office in another jurisdiction, that jurisdiction's rule prevails. The result is that a lawyer may practice in partnership with a nonlawyer only in the District of Columbia.

¹⁷⁰ VA. RULES OF PROF'L CONDUCT R. 8.5(a) (2000).

¹⁷¹ *Id.* R. 8.5(b)(2)(ii).

¹⁷² *Id.* For example, Paragraph (b) would be appropriately applied "to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B". *Id.* R. 8.5 cmt. 4.

¹⁷³ *Id.* R. 8.5(b)(1).

¹⁷⁴ *Id.* R. 8.5 cmt. 6.

¹⁷⁵ REVISED VA. CODE OF PROF'L RESPONSIBILITY DR 1-102(B) (1983) (subjecting Virginia lawyers to discipline by the Virginia Bar wherever they practice, unless another jurisdiction permits the activity). *See also* Spahn, *supra* note *.

¹⁷⁶ VA. RULES OF PROF'L CONDUCT R. 8.5 *Virginia Code Comparison* (2000).

"more specific guidance" than the *Virginia Code* regarding controlling ethical authority for lawyers practicing in multiple jurisdictions.¹⁷⁷

III. CONCLUSION

A. Recommendation for Change

To better assist Virginia practitioners (as well as track major revisions of the Model Rules), at least one noteworthy change in the Virginia Rules should be made. Where the Virginia Rules use the term "consent after consultation," the more common legal equivalent "informed consent" should be adopted.¹⁷⁸ The former term is used throughout the Rules, although awkward and without precise legal meaning. This modification would enable Virginia lawyers to be more instep with well-established legal terminology.

B. The Practical Impact on Virginia Practitioners

In the relatively brief period of time since the adoption of the Virginia Rules, only one disciplinary action applying the new Rules has been reported to date.¹⁷⁹ Likewise, no articles have appeared in print discussing the application of the new Virginia Rules.

There is every reason to believe that the switch to the Model Rules format has simplified access to Virginia's standards of professional conduct, made them more understandable, and encouraged more frequent consultation of its provisions, and will continue to do so into the future.¹⁸⁰

¹⁷⁷ *Id.* R. 8.5 *Comm. Commentary*.

¹⁷⁸ This is in keeping with the Ethics 2000 proposals. See Ethics 2000, *supra* note 52, *Terminology*. The Commission stated its intention "to make clear a lawyer's obligations in connection with obtaining client consent" by replacing the concept of "consent after consultation" with the somewhat more familiar concept of "informed consent." The latter term "denotes agreement 'after the lawyer has communicated adequate information and explanation about the material risks . . . and . . . alternatives . . .'" *Id.*

¹⁷⁹ Disciplinary Actions Taken by the Virginia State Bar, July 2000 – December 2000, August 2, 2000, Thomas Eugene Burks, *VSB Docket Nos. 00-053-3085, 00-053-3086, 01-053-0003*, available at <http://www.vsb.org/disciplinary.html> (last visited Jan. 8, 2000) (revoking license for violation of Rule 1.15(a)(1),(2) and (c)(1), (2), (3) and (4); Rule 8.4(b) and (c) and Rule 1.4(a), (b) and (c) for embezzling client funds, failing to keep clients reasonably informed, failing to preserve the identity of client funds and properly account for trust assets, and for intentional wrongful acts, dishonesty, and deceit). The case also involved the violation of several Disciplinary Rules from the former Virginia Code. The lawyer was disciplined under both standards because his improper conduct commenced prior to the year 2000 and continued into the year 2000. *Id.*

¹⁸⁰ This has doubtless been facilitated by the extensive charts prepared by Richmond attorney, Thomas Spahn to aid the practitioner in understanding the substantive changes. See Spahn, *supra* note *. The charts are user-friendly and provide an excellent summary of the changes.