

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

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## I. INTRODUCTION

On September 24, 1998, the Virginia State Bar Association filed a petition with the Supreme Court of Virginia, seeking the promulgation of the Virginia Rules of Professional Conduct (Virginia Rules).<sup>1</sup> The submission was the culmination of an intensive six-year period of drafting and redrafting in an effort to create an updated, user-friendly set of standards while generally retaining the substance of the Virginia Code of Professional Responsibility (Virginia CPR).<sup>2</sup>

On January 25, 1999, the Virginia Supreme Court adopted the Virginia Rules and set January 1, 2000, as the effective date.<sup>3</sup>

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<sup>1</sup> See Petition to Adopt the Virginia Rules of Professional Conduct (Va. filed Sept. 24, 1998) [hereinafter Petition]; see also Paul Fletcher, *VSB Sends New Ethics Rules to the High Court*, VA. LAW. WKLY., Oct. 5, 1998, at A1.

<sup>2</sup> See Conference Call with Dennis W. Dohnal, Chair, Virginia State Bar Special Committee to Study the Code of Professional Responsibility; Thomas E. Spahn, Reporter, Virginia State Bar Special Committee to Study the Code of Professional Responsibility; Joe A. Tucker, Associate Dean of Academic Affairs and Professor of Law, Regent University School of Law; Daniel Miller, Research Assistant, Regent University School of Law; and the authors (July 8, 1998) (tape on file with the authors) [hereinafter Conference Call]; see also Robert Smithmidford, *Prosecutors: New PR Code Ties Our Hands*, VA. LAW. WKLY., Feb. 20, 1995, at A1 (noting that the new Virginia Rules often simply adapt the Virginia CPR's "disciplinary rules into Model Rule format, rather than taking Model Rule content or developing an entirely new standard").

<sup>3</sup> See Virginia State Bar, *Virginia Rules of Professional Conduct: Table of Contents* (visited Sept. 21, 2000) <<http://www.vsb.org/profguides/modrules.html>>. The Virginia State Bar recommended a "substantial lead time" between the adoption of the rules and the date of implementation to allow practitioners time to become familiar with the new provisions.

This article introduces some of the more significant Virginia Rules provisions.<sup>4</sup> Part II gives a brief synopsis of the process involved in the development of the Virginia Rules. Part III provides the text of selected rules and compares those rules with the provisions of the former Virginia CPR and the American Bar Association's Model Rules of Professional Conduct (Model Rules) as amended in 1998. Part IV concludes by considering the practical impact these changes will have on Virginia practitioners.

## II. AN OVERVIEW OF THE PROCESS

In 1993, then Virginia State Bar (VSB) President R. Edwin Burnette, Jr., appointed a Special Committee to Study the Code of Professional Responsibility (Special Committee).<sup>5</sup> The original charge to

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Petition, *supra* note 1, at 9; see also James M. McCauley, *Recent Developments in Legal Ethics*, VA. LAW. REG., May 1998, at 6, 7.

<sup>4</sup> Specifically, this article addresses Virginia Rules 1.2, 1.5, 1.6, 2.1, 2.2, 2.3, 2.10, 2.11, 3.1, 3.3, 3.4, 3.5, 3.6, 3.7, 4.2, 5.1, and 5.6. On June 25, 1997, co-author Charles H. Oates discussed these particular rules as part of a Virginia Continuing Legal Education (CLE) segment presented at the Norfolk and Portsmouth Bar Association's Ethics Extravaganza. Joe A. Tucker, Regent University Associate Dean of Academic Affairs and Professor of Law, addressed selected portions of the then-proposed Virginia Rules. An article discussing those provisions is forthcoming.

<sup>5</sup> See Petition, *supra* note 1, at 1. The Special Committee membership reflected the diversity of the Virginia Bar. In a 1994 *President's Page* article, President R. Edwin Burnette, Jr., characterized the Special Committee as

a cross-section of the Virginia Bar, each of whom brings a distinct perspective and expertise to the process: present and past members of the district disciplinary committees, a past member of the Disciplinary Board, a prosecutor, a litigator, a judge, a mediator, a law school professor, an in-house counsel, the chair of the previous study committee, a county attorney, and present and past presidents of local bar associations. They come from general solo practices, small firms and large specialized firms. They include men, women and minorities who practice in many different areas of substantive law.

R. Edwin Burnette, Jr., *Planting the Seeds for Updating the Virginia Code of Professional Responsibility*, VA. LAW., May 1994, at 15, 15.

The members of the Special Committee and their years of service were as follows: Hon. Donald W. Lemons, Richmond (1993-98, Chair 1993-96); Dennis W. Dohnal, Richmond (1995-98, Chair 1996-98); John M. Levy, Williamsburg (1993-98, Vice-Chair 1996-98); Thomas E. Spahn, Richmond (1994-98, Reporter 1996-98); James M. McCauley, Richmond (1996-98, Bar Liaison 1996-98); Michael L. Rigsby, Richmond (*Ex Officio* 1993-96); Matthew J. Calvert, Richmond (1993-94); Edward L. Chambers, Jr., Yorktown (1994-98); Wilhelm H. Den Hartog, Richmond (1993-94); Bernard J. DiMuro, Alexandria (1995-98); Helen F. Fahey, Alexandria (1995-98); Benjamin R. Gardner, Martinsville (1993-95); Grayson P. Hanes, Falls Church (1993-98); Paula L. Hannaford, Williamsburg (1995-98); Hon. Robert L. Harris, Sr., Richmond (1993-95); Lawrence H. Hoover, Jr., Harrisonburg (1993-98); Arelia S. Langhorne, Lynchburg (1993-96); Roderick B. Mathews, Richmond (1993-94); David A. Melesco, Rocky Mount (1993-94); Sharon E. Pandak, Prince William (1994-98); Gary M. Pearson, Warrenton (1996-98); and David R. Rosenfeld, Alexandria

the Special Committee was much less grandiose than its final product would indicate.<sup>6</sup> The Special Committee initially focused on potential changes to the Virginia CPR, to which no significant changes had been made in more than a dozen years.<sup>7</sup> To aid in the endeavor, the Special Committee turned to the Model Rules. Impressed with the “user-friendly” format of the Model Rules,<sup>8</sup> the Special Committee asked the VSB Council to consider adopting the Model Rules format.<sup>9</sup>

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(1994-98). See Petition, *supra* note 1, at app. (listing the membership roster of the Special Committee).

<sup>6</sup> See Conference Call, *supra* note 2. According to Committee Chairman Dohnal, President Burnette at first gave the Special Committee very “general marching orders.” *Id.* The original intent was to simply “fine tune” those DRs that required updating and to address those areas on which the Virginia CPR was silent. *Id.*; see also Paula Hannaford et al., *The Model Rules of Professional Conduct: The “Pro” and the “Con,”* VA. LAW., Apr. 1996, at 40, 40 (noting that the Special Committee was charged with reviewing the Virginia CPR and suggesting revisions and additions).

<sup>7</sup> See Petition, *supra* note 1, at 1. A brief overview of the historical development of ethics codes in Virginia is warranted. Though Alabama enacted the country’s first code of ethics in 1887, the American Bar Association did not publish an ethics model until 1908. See Roderick B. Mathews, *The Virginia Code of Professional Responsibility*, 19 U. RICH. L. REV. 467, 467 (1985). The ABA model and its subsequent revisions were voluntarily subscribed to by Virginia lawyers until 1938, when the newly organized Virginia State Bar (VSB) formally adopted the 1908 model, as amended. See *id.* at 468. Thirty-one years later, the ABA Canons were superseded by the 1969 Model Code of Professional Responsibility, which featured nine Canons, mandatory Disciplinary Regulations, and aspirational Ethical Considerations. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969). The Model Code was adopted as the Virginia CPR by the Virginia Supreme Court and became effective January 1, 1971. See VA. CODE OF PROFESSIONAL RESPONSIBILITY (1971). By the end of the 1970s, significant changes in the law necessitated a comprehensive review of both the Model Code and the Virginia CPR. In 1977, the ABA created a Commission on Evaluation of Professional Standards and named Robert J. Kutak as chairman. See Robert W. Messerve, *Chair’s Introduction to ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* (4th ed. 1999). Simultaneously, the VSB authorized a committee to undertake a comprehensive review of the Virginia CPR. See Mary Madigan, Note, *Confidentiality and Conflicts of Interest: New Guidelines for Virginia Attorneys under the Revised Virginia Code of Professional Responsibility*, 41 WASH. & LEE L. REV. 1577, 1577 n.4 (1984). Both undertakings were completed in 1983. However, while the Kutak Commission ultimately developed a new format for rules governing lawyer conduct, Virginia chose to retain the Model Code format. Compare MODEL RULES OF PROFESSIONAL CONDUCT (1983) (adopting a restatement format that constituted a complete departure from the 1969 Model Code) with REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY (1983) (following the structure of both the Model Code and the 1971 Virginia CPR). Ironically, even as Virginia relinquishes its hold on the Model Code and embraces the Model Rules format, the American Bar Association’s Commission on the Evaluation of Rules of Professional Conduct is in the midst of a comprehensive review of the Model Rules. The Commission began its activities in August 1997 and plans to submit recommendations to the ABA House of Delegates in the year 2000. See ABA Center for Professional Responsibility, *Ethics 2000* (visited Aug. 21, 2000) <<http://www.abanet.org/cpr/ethics2k.html>>.

<sup>8</sup> The Special Committee viewed the Model Rules format as more “user friendly” in the sense that mandatory rules are followed immediately by interpretive comments and it is not necessary to “cross reference from Disciplinary Rule to Ethical Consideration to

Three considerations in particular prompted the request.<sup>10</sup> First, “the ABA Model Rules format follows the familiar pattern of the Uniform Commercial Code and other laws.”<sup>11</sup> Mandatory rules are followed by interpretive comments.<sup>12</sup> This new format is a substantial improvement over the tripartite system of axiomatic Canons, mandatory Disciplinary Regulations, and aspirational Ethical Considerations.<sup>13</sup>

Second, the Model Rules format organizes ethical rules according to the “functions that lawyers serve.”<sup>14</sup> The Model Rules recognize the multifunctional roles that lawyers play as advisors, advocates, negotiators, legal evaluators, and intermediaries between and among clients. This logical arrangement not only makes it easier for practitioners to determine which rules are relevant in any given situation, but also remedies the Virginia CPR’s tendency to focus almost exclusively on lawyers as litigators within the adversary system.

Legal Ethics Opinion.” Conference Call, *supra* note 2; see also *The Continuing Saga of the Proposed Model Rules*, VA. LAW., Oct. 1997, at 10, 12.

<sup>9</sup> In 1994, the Special Committee submitted a discussion draft of the Virginia Rules with the request that the VSB Council first address the threshold issue of whether to use the ABA Model Rules format or simply to revise the Virginia CPR. See *Council Meeting Highlights*, VA. LAW., June/July 1996, at 32, 32. At its October 1996 meeting, the VSB Council “overwhelmingly endorsed” the new format. Petition, *supra* note 1, at 4. Specifically, the vote was 45 to 14 in favor of adopting the restatement format. See *Council Actions October 1996 Meeting*, VA. LAW., Oct. 1996, at 9, 9.

<sup>10</sup> See Petition, *supra* note 1, at 2-3. Although only three reasons for the transition to the Model Rules format were cited in the Petition ultimately filed with the Virginia Supreme Court, numerous reasons for the switch were offered during the comment period. For example, in a 1994 article, Richmond attorney Donald W. Lemons, who initially chaired the Special Committee, discussed two additional concerns that the revision was designed to address. See Robert Smithmidford, *New Ethics Code Unveiled*, VA. LAW. WKLY., Oct 17, 1994, at 1. First, tighter rules might address a public perception that the bar is ineffective at policing itself, especially in light of several publicized attorney-malefeasance cases in the 1990s. See *id.* Second, some members of the Virginia State Bar’s legal ethics committee had complained that the Virginia CPR “mandated legal ethics opinions with inappropriate outcomes.” *Id.* In fact, in his capacity as Chair of the Standing Committee on Legal Ethics, Frank “Bunky” Miller, III, admitted that, at times, “the Committee had ‘held its nose’ because the disciplinary rules contained in the Code dictated a foul result.” Burnette, Jr., *supra* note 5, at 15.

<sup>11</sup> Petition, *supra* note 1, at 2.

<sup>12</sup> See *id.* The Scope section explains that the Virginia Rules of Professional Conduct are “rules of reason.” VA. RULES OF PROFESSIONAL CONDUCT Preamble (2000). Some of the Rules are imperatives, the violation of which subjects the lawyer to discipline. See *id.* Others are permissive, leaving certain areas within the lawyer’s discretion. See *id.* The Comments are best described as “interpretive.” *Id.* They do not add obligations to the Rules, but rather provide additional guidance. See *id.*

<sup>13</sup> See Hannaford et al., *supra* note 6, at 40; see also *The Continuing Saga of the Proposed Model Rules*, *supra* note 8, at 12 (noting that the new format “will make the ‘rules of the road’ easier to find, interpret, and enforce”).

<sup>14</sup> Petition, *supra* note 1, at 2.

Finally, the number of states still regulating lawyers under the American Bar Association's 1969 Model Code of Professional Responsibility (Model Code) is dwindling.<sup>16</sup> With Virginia's defection, only a handful of states still pattern their professional standards after the Model Code.<sup>16</sup> Though the practices of foreign jurisdictions usually have little influence on decisions regarding how things will be done in Virginia,<sup>17</sup> adopting a format so widely accepted has a number of advantages. As the Committee noted, ABA legal ethics opinions, as well as most case law and scholarly works, discuss ethical principles within the context of the Model Rules.<sup>18</sup> In addition, the majority of law schools focus on the Model Rules in teaching professional responsibility.<sup>19</sup> Thus, adopting the Model Rules format allows Virginia lawyers to operate within a widely accepted and readily understandable set of standards.<sup>20</sup>

In October 1996, two years after it first received a draft copy of the proposed changes, the VSB Council overwhelmingly approved the Model

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<sup>16</sup> See *id.* at 3. Over forty states and the District of Columbia based their disciplinary codes on some version of the Model Rules. See *id.*; see also ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY: RULES AND STANDARDS 526 (1999).

<sup>16</sup> Only Iowa, Nebraska, New York, Ohio, and Oregon continue to cling to the Model Code format exclusively. See IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1999); NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (2000); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1995); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1999); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1996). On March 5, 1999, the Georgia State Bar's Board of Governors approved the adoption of a disciplinary code that follows the Model Rules format while integrating elements of the Model Code, the Restatement of the Law Governing Lawyers, and Georgia variations. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xxi (2000 ed.). On January 15, 2000, the Tennessee Bar Association Board of Governors approved proposed new ethics rules and comments patterned after the ABA Model Rules and authorized the filing of a petition for approval with the Tennessee Supreme Court. See Tennessee Bar Association, *Proposed Ethics Rules and Comments Approved by TBA Board of Governors* (visited Aug. 19, 2000) <<http://www.tba.org/Committees/Conduct/index.html>>. As Professor Sisk recently observed, with a whole new batch of states jumping on the Model Rules bandwagon, the outdated Model Code may indeed be "on its last legs." Gregory C. Sisk, *Iowa's Legal Ethics Rules—It's Time to Join the Crowd*, 47 DRAKE L. REV. 279, 280 (1999).

<sup>17</sup> The introductory section of the Virginia Rules declares that other states' court and bar interpretations of the ABA Model Rules, while possibly helpful in understanding Virginia's Rules, should not be binding in Virginia. See VA. RULES OF PROFESSIONAL CONDUCT Preamble (2000).

<sup>18</sup> See Petition, *supra* note 1, at 3.

<sup>19</sup> See *id.*; see also *An Interview with Don Lemons*, VA. LAW., May 1994, at 16, 16.

<sup>20</sup> See *id.* "The Virginia Bar Association endorse[d] the format change because it [brought] Virginia in line with the majority of other jurisdictions that use the Model Rules." Smithmidford, *supra* note 2, at A1. As the Richmond attorney who chaired a Virginia Bar Association committee that reviewed a draft version of the Rules put it, "It's like joining the rest of the world." *Id.*

Rules format.<sup>21</sup> With the completion of the threshold matter of determining the conceptual structure of the rules, the VSB Council turned its attention to reviewing the substance of the proposed revisions drafted by the Special Committee.<sup>22</sup> To aid in this endeavor and to foster public debate, the Special Committee divided the Proposed Rules into three groups.<sup>23</sup> Each group was presented to the VSB Council at one meeting but was not acted upon until the next meeting to allow the Council members time to consider the provisions and to seek comments from constituents before casting their votes.<sup>24</sup>

The initial twenty-one Rules were submitted in February of 1997.<sup>25</sup> At the June 1997 meeting, the VSB Council approved Rules 1.1-1.4, 1.7,

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<sup>21</sup> See Petition, *supra* note 1, at 4; discussion *supra* note 9. As implied by the lengthy period of time that it took the VSB Council to adopt the new format, the idea of abandoning the Model Code structure was the subject of considerable debate. "To say that it generated a great deal of response is to put it mildly," noted Chairman Dohnal in June of 1995 when the Special Committee tabled the revision for a time to consider more fully the arguments made both in favor of and in opposition to the changes. Robert Smithmidford, *Revision to Code of P.R. Tabled for Time Being*, VA. LAW. WKLY., June 26, 1995, at 5. For an interesting presentation by three Special Committee members of various arguments raised by those on both sides of the issue, see Hannaford et al., *supra* note 6, at 40-41. Six arguments against the Model Rules format were propounded by Thomas E. Spahn on behalf of the "con" side. "First, totally altering the format of the Code obscures the debate over the significant substantive changes the committee has recommended." *Id.* at 41. "Second, implementing a completely new set of rules may be costly and difficult." *Id.* "Third, every Virginia lawyer would need to become familiar with the brand-new format." *Id.* "Fourth, there seems to be no inherent advantage to the new format." *Id.* "Fifth, by maintaining its current Code, Virginia will not become some deviant state." *Id.* Spahn notes that there are no "standard" ethics rules and that "every state has its own unique variations." *Id.* "Sixth, now may be a bad time to make such a dramatic change" with so many other important issues facing the Bar, including IOLTA and JLARC. *Id.*

<sup>22</sup> See Petition, *supra* note 1, at 6; see also Dennis W. Dohnal, *The Proposed Rules of Professional Conduct: Part I Analysis*, VA. LAW., Feb. 1997, at 49, 49.

<sup>23</sup> See Petition, *supra* note 1, at 5.

<sup>24</sup> See *id.* Draft versions of the Virginia Rules were widely circulated. Both the *Virginia Lawyer Register* and the *Virginia Lawyer's Weekly* presented the full text of the Proposed Rules in segments. See *id.*; see also, e.g., VA. RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft Part I 1997), reprinted in VA. LAW. REG., March 1997, at 38; VA. RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft Part II 1997), reprinted in VA. LAW. REG., Aug./Sept. 1997, at 64; VA. RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft Part III 1997), reprinted in VA. LAW. REG., Nov. 1997, at 38. The proposed Virginia Rules were also the subject of discussion in local bar association publications. See Petition, *supra* note 1, at 4; see also Baker McClanahan, *VSB Floats Switch to Model Rules*, VA. LAW. WKLY., Aug. 26, 1996, at 4 (discussing various methods employed to publicize proposed provisions).

<sup>25</sup> Specifically, Part I included proposed Virginia Rules 1.1-2.5. See Telephone Interview with Thomas E. Spahn, Reporter, Virginia State Bar Special Committee to Study the Code of Professional Responsibility (June 24, 1998) [hereinafter Spahn Interview]; see also Dohnal, *supra* note 22, at 49-50. Mr. Spahn is a partner at McGuire, Woods, Battle, & Boothe, L.L.P., in Richmond, Virginia. He has served on the Special Committee since 1994.

1.9-1.13, 1.15, and 2.1-2.5 as submitted.<sup>26</sup> At the same meeting, Special Committee Chairman Dennis W. Dohnal presented the second group of Rules to the VSB Council for discussion and comment.<sup>27</sup> All but three of the rules were adopted at the October 1997 meeting.<sup>28</sup> The final group of Rules, as well as the Preamble, Scope, and Terminology sections, were introduced at the October meeting.<sup>29</sup> On June 18, 1998, the VSB Council approved two provisions carried over from the October meeting.<sup>30</sup> In September 1999, the last of the proposed provisions was adopted.<sup>31</sup>

### III. TEXT OF SELECTED RULES AND COMPARISONS

#### A. Rule 1.2, Scope of Representation

##### 1. Text of Virginia Rule 1.2

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

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

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

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<sup>26</sup> See Dennis W. Dohnal, *Status Report on the Proposed Rules of Professional Conduct: Part 2 Analysis*, VA. LAW., June/July 1997, at 6, 6. A number of other proposed Virginia Rules were adopted at the June meeting after some modification, including Rules 1.5, 1.6, and 1.8. See *id.* Rules 1.14 and 1.16 were tabled for further discussion. See *id.*

<sup>27</sup> The second group included Rules 3.1-5.6. See Spahn Interview, *supra* note 25.

<sup>28</sup> See *id.*; see also Baker McClanahan, *Lawyer Must Disclose Adverse Precedent*, VA. LAW. WKLY., Nov. 3, 1997, at A1.

<sup>29</sup> See Spahn Interview, *supra* note 25. The Preamble, Scope, and Terminology sections were submitted to the VSB Council with the final group of proposed Virginia Rules so that any revisions to the main body of provisions could be reflected in the introductory sections. See Dohnal, *supra* note 26, at 7-8.

<sup>30</sup> See Petition, *supra* note 1, at 7. The two provisions, Virginia Rules 1.16 and 7.3, were quite controversial. See McCauley, *supra* note 3, at 6. Four versions of Rule 1.16(d), which concerns the copying of client files after a lawyer has been discharged, were submitted to the VSB Council before approval was finally obtained. See *id.* Rule 7.3 addresses the contentious topic of lawyer "specialization." *Id.*

<sup>31</sup> See Petition, *supra* note 1, at 7. After the June 18 meeting of the VSB Council, it was discovered that one provision had been overlooked. See *id.* This was remedied by the Special Committee at its September 17-18, 1998, meeting. See *id.*

faith effort to determine the validity, scope, meaning, or application of the law.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.<sup>32</sup>

## 2. Summary

Virginia Rule 1.2 sets forth the scope of the relationship between lawyer and client.<sup>33</sup> Paragraph (a) offers a succinct statement of the authority and obligations of both the lawyer and the client in determining the objectives and means of representation.<sup>34</sup> The client, in essence, has the final authority in determining the "objectives" of representation or the "purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations."<sup>35</sup> Conversely, while clients are to be consulted, decisions involving the "means" of representation, such as legal strategy and technical matters, generally rest with the lawyer.<sup>36</sup>

Perhaps the most interesting twist to Rule 1.2 is the inclusion of the Alternative Dispute Resolution (ADR) requirement. Comment 1 states that in the context of consulting with a client regarding the means of representation, "a lawyer *shall* advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing [the objectives of representation]."<sup>37</sup>

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<sup>32</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 1.2 (2000).

<sup>33</sup> *See id.*

<sup>34</sup> *See id.* Rule 1.2(a). A comparison of the concise statement of obligations set forth in Rule 1.2(a) with the relevant provisions of the Virginia Code reveals the piecemeal approach of the former system. *See, e.g.,* REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 to 7-8 (1983). Because paragraph (a) has no counterpart in the Disciplinary Rules, the practitioner is obliged to consider a number of Ethical Considerations and at least one Disciplinary Regulation to garner some idea of where the lines dividing the responsibilities of the lawyer and the client ultimately rest. For example, EC 7-7 provides that "[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, the lawyer is entitled to make decisions on his own." *Id.* EC 7-7. EC 7-8 states that the "decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client." *Id.* EC 7-8.

<sup>35</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 1 (2000).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (alteration in original) (emphasis added). According to Lawrence H. Hoover, the Special Committee member who drafted all the Alternative Dispute Resolution (ADR) provisions included in the Virginia Rules, the requirement that a lawyer discuss ADR possibilities with the client was included in the comment to 1.2, rather than the text of the Rule, only after much thought. *See* Telephone Interview with Lawrence H. Hoover, Member, Virginia State Bar Special Committee to Study the Code of Professional Responsibility (June 24, 1998) [hereinafter Hoover Interview]. The notion of ADR seemed



While mandatory rules are often cast in terms of “shall” and “shall not,” the use of the word “shall” in a comment is a bit of an oddity. According to the Scope section, comments are “interpretive” and “do not add obligations to the Rules.”<sup>38</sup> This seeming disparity begs the question of whether lawyers who fail to inform clients of ADR alternatives will be subject to disciplinary action.<sup>39</sup> If the answer is “no,” questions arise about the use of the imperative “shall.” If the answer is “yes,” the question becomes one of enforceability. Just how much information must the lawyer provide to satisfy the requirement? While it might be possible to bring a disciplinary case against a lawyer who utterly fails to mention ADR alternatives in a situation that clearly dictates doing so, it seems doubtful that those charged with the formidable task of meting out lawyer discipline will concern themselves with assessing the adequacy of information provided.<sup>40</sup> Despite the fact that Comment 1 might ultimately prove to be a toothless tiger, Virginia Rule 1.2 is a notable improvement over the piecemeal manner in which the scope of a lawyer’s representation of a client was handled under the Virginia CPR. First, the provisions of Rule 1.2 set forth the obligations and responsibilities of both the lawyer and the client in a concise, logical manner. Second, the importance placed on informing the client of the availability of options and alternatives<sup>41</sup> in the means of representation is more in keeping with the fact that the lawyer-client relationship is a joint undertaking.

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inherent in Rule 1.2, and putting the requirement in the Rule seemed to impose a heavy burden on practitioners unfamiliar with the ADR process. *See id.*

<sup>38</sup> VA. RULES OF PROFESSIONAL CONDUCT Preamble (2000).

<sup>39</sup> According to Virginia State Bar Ethics Counsel James M. McCauley, the answer is “[y]es.” Baker McClanahan, *Failure to Discuss ADR May Bring Ethics Charge*, VA. LAW. WKLY., Feb. 2, 1998, at A1.

<sup>40</sup> *See id.*

<sup>41</sup> The obligation to discuss ADR alternatives with a client is not necessarily a one-time event. According to comment 1(a) of Virginia Rule 1.4, the continuing duty to keep the client informed includes “a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client’s goals than the initial process chosen.” For example, in the course of representation, a lawyer may discover that a process, such as mediation, that allows the parties themselves to become “more directly involved in resolving the dispute” is appropriate. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. 1(a) (2000).

By not restricting ADR obligations to the block of ADR provisions covered in Rules 2.1-2.11, the Special Committee is “telling the legal profession that not only is ADR here but it is becoming a standard way of resolving disputes.” McClanahan, *supra* note 39, at A1 (quoting VSB Ethics Counsel James M. McCauley. For examples of Virginia Rules outside of the “ADR block” that make reference to dispute resolution processes, see Rules 1.2 comment 1 (Scope of Representation); 1.4 (Communication); 6.1 comment 1 (Voluntary Pro Bono Service); and 8.3(c) and comment 3(a)-(b) (Reporting Professional Misconduct).

*B. Rule 1.5, Fees*

## 1. Text of Virginia Rule 1.5

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

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

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

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

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

(2) for representing a defendant in a criminal case.

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

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

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

- (3) the total fee is reasonable; and  
 (4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.<sup>42</sup>

## 2. Summary

The process of drafting a rule governing lawyer's fees generated substantial debate.<sup>43</sup> So vigorous was the opposition to a draft version of Rule 1.5 requiring written fee agreements that one Special Committee member described the proposal as a "lightning rod" for controversy.<sup>44</sup> Attorneys with high-volume practices claimed that "a detailed fee agreement in each case would be impractical,"<sup>45</sup> while those in smaller settings feared that clients accustomed to doing business by handshake would be "put on edge" by the formality of a written agreement.<sup>46</sup> Special Committee members countered by claiming that the rule was intended to "protect lawyers from themselves"<sup>47</sup> and noting that the requirement could be satisfied by the use of a standard rate statement.<sup>48</sup> Ultimately, the VSB Council rejected the written fee arrangement requirement. Instead, fees must simply be "reasonable"<sup>49</sup> and "adequately explained to the client."<sup>50</sup>

For an already existing requirement, the Virginia Rules fee-splitting provision stirred up a good deal of discussion. The CPR permitted a division of fees between lawyers of different firms only if "1) [t]he client consents to the employment of additional counsel; 2) [b]oth attorneys expressly assumed responsibility to the client; and 3) [t]he terms of the division of the fee are disclosed to the client and the client consents."<sup>51</sup> Despite these earlier provisions, VSB Council members were divided in their support for the fee-splitting provision.<sup>52</sup> One argued that clients had "every right in the world" to know how fees would be split.<sup>53</sup> Another contended that clients in a personal injury case "need to know

<sup>42</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 1.5 (2000).

<sup>43</sup> See Baker McClanahan, *Rule Requiring Fees in Writing Rejected*, VA. LAW. WKLY., June 30, 1997, at A4.

<sup>44</sup> *Id.*

<sup>45</sup> Robert Smithmidford, *What New PR Code Would Mean*, VA. LAW. WKLY., Feb. 20, 1995, at A1.

<sup>46</sup> Baker McClanahan, *All Fee Arrangements Would Be in Writing*, VA. LAW. WKLY. Feb. 24, 1997, at A1.

<sup>47</sup> Smithmidford, *supra* note 45, at A1.

<sup>48</sup> See McClanahan, *supra* note 43, at A4 (noting that a disproportionate number of disciplinary complaints arise as a result of "a basic misunderstanding of what a particular representation was intended to include").

<sup>49</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (2000).

<sup>50</sup> *Id.* Rule 1.5(b).

<sup>51</sup> REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(D) (1983).

<sup>52</sup> See McClanahan, *supra* note 43, at A4.

<sup>53</sup> *Id.*

only that the attorneys would get one-third.<sup>54</sup> Ultimately, the fee-splitting provision adopted in Virginia Rule 1.5(e) is less stringent than either its Virginia CPR or Model Rules counterparts.<sup>55</sup> Although clients must still consent to the participation of all lawyers, the Virginia Rules provision eliminates the former Virginia CPR requirement that each lawyer involved in a fee-splitting arrangement expressly assume responsibility to the client.<sup>56</sup> Additionally, paragraph (e) also rejects the Model Rules requirement that a division of fees must be in proportion to the services performed by each lawyer, unless other arrangements are approved by the client in writing.<sup>57</sup>

### C. Rule 1.6, Confidentiality of Information

#### 1. Text of the Virginia Rule

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

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

- (1) such information to comply with law or a court order;
- (2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
- (4) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program; or
- (5) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other

<sup>54</sup> *Id.*

<sup>55</sup> See VA. RULES OF PROFESSIONAL CONDUCT 1.5(e) (2000).

<sup>56</sup> Compare *id.* with REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(D)(2) (1983). The requirement was deleted in order to encourage appropriate referrals by not requiring the referring lawyer to "automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement." VA. RULES OF PROFESSIONAL CONDUCT Rule 1.5 Committee Commentary (2000).

<sup>57</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1999).

similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

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

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

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3, but only if the client consents after consultation. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client. Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney.<sup>58</sup>

## 2. Summary

The duty of the attorney to protect client confidences stands as one of the basic tenets of the legal profession. Inevitably, any attempt to impose categorical boundaries on the lawyer's duty to maintain confidentiality and the countervailing right of the attorney to reveal certain confidences to protect other implicated interests invites debate. The controversy that has surrounded Model Rule 1.6 from its inception thus comes as no surprise. Of the states that have adopted some form of the Model Rules, the vast majority have either modified or rejected 1.6 outright.<sup>59</sup> The Virginia version of 1.6 differs from its ABA counterpart in several respects.<sup>60</sup>

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<sup>58</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000).

<sup>59</sup> See ALA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); ARIZ. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); ARK. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); COLO. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); CONN. RULES OF PROFESSIONAL CONDUCT Rule

First, the definition of "client information" set forth in the Model Rules was rejected as too broad.<sup>61</sup> Rather than relying on a single standard protecting all information about a client "relating to representation,"<sup>62</sup> the Committee retained the two-part definition of information subject to the duty of confidentiality set forth under the Virginia CPR.<sup>63</sup> The Virginia CPR distinguished between "confidences" and "secrets," and sought to protect both, subject to certain exceptions.<sup>64</sup>

Second, Virginia Rule 1.6(b)(3) allows a lawyer to disclose client information clearly indicating that the client has perpetrated a fraud related to the subject matter of the representation.<sup>65</sup> The text of Model Rule 1.6 is silent on the subject of client fraud. Though the ABA comments explain that a lawyer may not knowingly assist the client in conduct that is criminal or fraudulent,<sup>66</sup> the obvious implication is that disclosure of client information to prevent a fraud is prohibited. Thus,

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1.6 (1997); DEL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-1.6 (1997); HAW. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Supp. 1997); IND. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000); KAN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); KY. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); LA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); MASS. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); MISS. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); MO. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); MONT. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000); NEV. RULES OF PROFESSIONAL CONDUCT Rule 156 (1995); N.H. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000); N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-106 (2000); N.C. RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1999); N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000); PA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); R.I. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); S.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); S.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995); TEX. RULES OF PROFESSIONAL CONDUCT Rule 1.05 (2000); UTAH RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000); VT. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); WASH. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999); W. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000); WIS. RULES OF PROFESSIONAL CONDUCT SCR 20:1.6 (2000); *see also* Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 122 (1998).

<sup>60</sup> Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999) with VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000).

<sup>61</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 Virginia Code Comparison (2000).

<sup>62</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1999).

<sup>63</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 Virginia Code Comparison (2000).

<sup>64</sup> REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) & (B) (1983).

<sup>65</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (2000).

<sup>66</sup> *See id.* Rule 1.6 cmts. 9-12.

the Virginia version affords the lawyer more discretion and more protection in that “it allows a lawyer to reveal confidential information to rectify the consequences of a client’s fraud if the lawyer’s services were used in the commission of the fraud.”<sup>67</sup>

Third, Virginia Rule 1.6(c)(1) rejects the narrowly drawn Model Rules exception requiring that the lawyer reasonably believe that the intended criminal act will “result in imminent death or substantial bodily harm” before revealing client information.<sup>68</sup> Instead, the Virginia provision, which is substantially similar to DR 4-101(3)(1),<sup>69</sup> mandates disclosure to the extent necessary to prevent the commission of a crime.<sup>70</sup>

Though requiring disclosure to prevent criminal acts is laudable, the positive impact of this protection of public interest is neutralized by the requirement that the intention of the client to commit the crime be *stated* by the client.<sup>71</sup> Rare is the client who enters his attorney’s office and proclaims a criminal intent. If this unlikely scenario does indeed unfold, the attorney must, “where feasible, advise the client of the possible legal consequences” of the intended criminal act, “urge the client” to abandon the intended course of action, and explain the duty of the lawyer to reveal the criminal intention if the client persists.<sup>72</sup>

Finally, Virginia Rule 1.6(c)(3) *requires* an attorney who learns of another attorney’s misconduct during the course of representing a client to seek the client’s permission to disclose that information necessary to report the violation to disciplinary authorities.<sup>73</sup> Thus, lawyers may no longer unilaterally protect their colleagues from or subject them to discipline. The client now possesses the sole power to prevent or insist upon reporting another attorney’s misconduct.

Undoubtedly, the provision was meant to alleviate public concern about the apparent inability of the legal profession to “police” itself. However, as former William & Mary Law School Dean Thomas G. Krattenmaker observed, it would seem that “advising a client of the possible consequences of disclosure and then asking for permission to report malfeasance might itself create a conflict.”<sup>74</sup>

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<sup>67</sup> Alice N. Moseley et al., *An Overview of the Revised North Carolina Rules of Professional Conduct: An Examination of the Interests Promoted and Subordinated*, 32 WAKE FOREST L. REV. 939, 980 (1997).

<sup>68</sup> Compare VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (2000) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1999).

<sup>69</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 Virginia Code Comparison (2000).

<sup>70</sup> See *id.* Rule 1.6(c)(1).

<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *id.* Rule 1.6(c)(3).

<sup>74</sup> Smithmidford, *supra* note 2, at 1.

### D. Rule 2.1, Advisor

#### 1. Text of Virginia Rule 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.<sup>76</sup>

#### 2. Summary

Virginia Rule 2.1 is the first in a series of rules examining the role of the non-litigation lawyer.<sup>76</sup> Canon 5 of the Virginia CPR noted that a lawyer should “exercise independent professional judgment on behalf of a client.”<sup>77</sup> That admonition is preserved in Virginia Rule 2.1. The Rule declares that, in rendering candid advice, the lawyer is not limited to the law, but is free to refer to “other considerations such as moral, economic, social and political factors.”<sup>78</sup> A verbatim replica of Model Rule 2.1,<sup>79</sup> the Virginia Rule endorses a holistic approach to resolving legal conflicts. As the Comment states, “Advice couched in narrowly legal terms may be of little value to a client.”<sup>80</sup> When a client asks for advice, even purely technical advice, the lawyer has the discretion to consider practical or

<sup>76</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 2.1 (2000).

<sup>77</sup> Rules 2.1-2.11 give rise to what some call “collaborative lawyering.” McClanahan, *supra* note 39, at A1. “Collaborative lawyering” was the focus of a presentation at the VBA winter meeting in January 1998. *Id.* The ethical obligation of *zealous* representation does not mean that lawyers have to resort to “scorched-earth litigation or negotiation” tactics. *Id.* “Woven into zealous advocacy are other ethical strands lawyers need to know about,” said Barbara L. Hulburt, a seminar panelist who works with the McCammon Mediation Group in Richmond. *Id.* Rules 2.1-2.11 describe lawyers as “[a]dvisor” (2.1), “[i]ntermediary” (2.2), “[e]valuator” (2.3), “[t]hird [p]arty [n]eutral” (2.10), and “[m]ediator” (2.11). VA. RULES OF PROFESSIONAL CONDUCT Rules 2.1-2.3, 2.10-2.11 (2000).

<sup>77</sup> REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1983).

<sup>78</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 2.1 (2000). This provision of the rule is permissive and resembles the “aspirational goals” of the earlier Model Code more than the Model Rules. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (4th ed. 1999). It is surprising that this somewhat toothless provision has been cited in at least two cases. One court, while invalidating a prenuptial contract for being economically unfair, admonished the lawyer who prepared the agreement to “seriously consider implications” of the ethical rule permitting lawyers rendering advice to refer to moral, economic, social, and political factors relevant to the client's situation. *In re Marriage of Foran*, 834 P.2d 1081 (Wash. Ct. App. 1992). In another case, a lawyer represented a client charged with DWI. *See Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991). The court stated that a lawyer in such a case has an affirmative duty to be a counselor to his client. *See id.* Referring to these four non-legal factors, the court suggested that “[t]he lawyer may be able to persuade a problem drinker to seek treatment.” *Id.* at 835.

<sup>79</sup> *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1999).

<sup>80</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 2 (2000).



emotional factors as well as the sophistication of the client in framing a response.<sup>81</sup>

The Rule also offers a word of caution, reminding lawyers that some matters fall “in the domain of another profession.”<sup>82</sup> If the lawyer feels that a consultation with a psychologist would help resolve a family matter, for instance, the lawyer should recommend such a consultation.<sup>83</sup> In the same vein, the lawyer should recognize that relational and emotional factors sometimes drive disputes. Where appropriate, the lawyer may offer advice regarding the advantages, disadvantages, and availability of ADR processes.<sup>84</sup>

Although the Virginia Rule may in practice be more instructive than enforceable, it is a laudable attempt to encourage lawyers to pause and focus on their clients as people before simply seeking the most expedient legal solution.

### *E. Rule 2.2, Intermediary*<sup>85</sup>

#### 1. Text of Virginia Rule 2.2

(a) Except as prohibited in paragraph (d), a lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client’s consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients’ best interests, that

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<sup>81</sup> See *id.* Rule 2.1 cmt. 3.

<sup>82</sup> *Id.* Rule 2.1 cmt. 4. The comment offers several examples. Family matters may suggest consultation with professionals in the fields of psychiatry, clinical psychology, or social work. Business dealings may present problems within the professional expertise of accountants or financial specialists. See *id.* If a competent lawyer would recommend consultation with a professional in another field, the lawyer should do so. See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* Rules 2.1 cmt. 2; 1.2 cmt. 1 (admonishing lawyer to discuss ADR alternatives with clients).

<sup>85</sup> The concept of an intermediary was only implicit in the Virginia CPR. See *id.* Rule 2.2 Committee Commentary. The Committee adopted the Model Rule because it specifically addressed a role for lawyers that was lacking in the Virginia CPR. See *id.*

The ABA Commission is recommending the deletion of Model Rule 2.2 and moving any discussion of joint representation to Rule 1.7 (Conflicts of Interest). See ABA Center for Professional Responsibility, *Model Rule 2.2—Reporter’s Explanation of Changes* (visited Aug. 21, 2000) <<http://www.abanet.org/cpr/e2k/rule22memo.html>>. The rationale for the recommended deletion is that there is less resistance to joint representation today than in 1983 when the Model Rules were adopted; thus, there appears to be insufficient reason to retain a separate rule that was created to establish the propriety of joint representation. See *id.*

each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) A lawyer shall not act as intermediary between clients in certain matters relating to divorce, annulment or separation--specifically child custody, child support, visitation, spousal support and maintenance or division of property.<sup>86</sup>

## 2. Summary

The Virginia CPR provided little guidance for the lawyer "caught" between two or more clients with potentially adverse interests. Virginia Rule 2.2(a) explicitly allows a lawyer to act as an intermediary between clients so long as certain conditions are met.<sup>87</sup> First, each client must consent after consultation about the advantages and disadvantages of common representation and the effect of the arrangement on attorney-client privilege.<sup>88</sup> Second, the lawyer must reasonably believe that each client will be able to make adequately informed decisions, that the resolution will protect the best interests of each client, and that each client's interests will not suffer material prejudice if such a resolution cannot be reached.<sup>89</sup> Finally, the lawyer must reasonably believe that he

<sup>86</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 2.2 (2000).

<sup>87</sup> Compare REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20, DR 5-105(A)-(B) (1983) with VA. RULES OF PROFESSIONAL CONDUCT Rule 2.2 (2000). Virginia Rule 2.2 does not permit a lawyer to act as an intermediary in domestic relations matters. See VA. RULES OF PROFESSIONAL CONDUCT Rule 2.2(d) (2000). The Committee added this provision because of the "heightened antagonism which frequently accompanies domestic relations matters." *Id.* Rule 2.2 Committee Commentary. Model Rule 2.2 contains no similar restriction. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1999).

<sup>88</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 2.2(a)(1) (2000).

<sup>89</sup> See *id.* Rule 2.2(a)(2).

can act impartially and without improper effect on his duty to either client.<sup>90</sup>

Paragraph (b) requires the attorney to consult with each client throughout the course of the intermediation so as to allow the clients to make informed decisions.<sup>91</sup> Information relating to the representation must be treated as confidential.<sup>92</sup> If an actual conflict develops, the lawyer must withdraw from all representation related to the subject matter of the intermediation.<sup>93</sup> Withdrawal is also required if any of the clients so requests or if any of the three conditions set forth in paragraph (a) are no longer met.<sup>94</sup>

#### F. Rule 2.3, Evaluation for Use by Third Persons<sup>95</sup>

##### 1. Text of Virginia Rule 2.3

(a) A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

(b) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(c) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.<sup>96</sup>

<sup>90</sup> See *id.* Rule 2.2(a)(3).

<sup>91</sup> See *id.* Rule 2.2(b). Consultation requires communication. The requirement to communicate with clients is mandated by Rule 1.4. See *id.* Rule 1.4. Specifically, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* Rule 1.4(b).

<sup>92</sup> See *id.* Rule 2.2 cmt. 6. In a common representation, the lawyer is required to maintain a delicate balance between keeping each client adequately informed and maintaining confidentiality. See *id.* If the balance cannot be maintained, the joint representation is improper. See *id.*

<sup>93</sup> See *id.* Rule 2.2(c).

<sup>94</sup> See *id.*

<sup>95</sup> There was no counterpart to this rule in the Virginia CPR. See *id.* Rule 2.3 Virginia Code Comparison.

<sup>96</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 2.3 (2000). According to the Committee Commentary, "This Rule generally follows ABA Model Rule 2.3, but the Committee added subparagraph (c) in recognition of the statutory requirement of confidentiality in the dispute resolution process." *Id.* Rule 2.3 Committee Commentary. However, Model Rule 2.3 contains the same provision verbatim as Rule 2.3(b). Compare *id.* Rule 2.3(b) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1999). There is no Model Rule 2.3(c). See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1999). The mistake is probably due to the Committee's adding a new subparagraph (a) to Virginia Rule 2.3 that does not exist in Model Rule 2.3. Compare VA. RULES OF PROFESSIONAL

## 2. Summary

Lawyers are sometimes asked to make a legal evaluation of the affairs of a client for the benefit of a third party. For example, a potential purchaser of a client's property might request an opinion on the title, or a government agency might require an opinion of the legality of securities registered for sale.<sup>97</sup> Such evaluations of matters affecting a client are permitted if the lawyer reasonably believes that making the evaluation is in keeping with the lawyer's relationship with the client and the client consents after consultation.<sup>98</sup>

Paragraph (c) of Virginia Rule 2.3 notes that "except as . . . required in connection with a report of an evaluation," information relating to the evaluation is protected by the duty of confidentiality set forth in Virginia Rule 1.6.<sup>99</sup> Thus, it is *essential* that all involved in the process understand where the lawyer's loyalty rests.

### *G. Rule 2.10, Third Party Neutral*<sup>100</sup>

#### 1. Text of Virginia Rule 2.10

(a) A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.

(b) A lawyer who serves as a third party neutral

(1) shall inform the parties of the difference between the lawyer's role as third party neutral and the lawyer's role as one who represents a client;

(2) shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and

(3) may encourage and assist the parties in reaching a resolution of their dispute; but

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CONDUCT Rule 2.3(a) (2000) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1999).

<sup>97</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 2.3 cmt. 2 (2000).

<sup>98</sup> See *id.* Rule 2.3(b).

<sup>99</sup> *Id.* Rule 2.3(c).

<sup>100</sup> There was no counterpart to this rule in the Virginia CPR. See *id.* Rule 2.10 Virginia Code Comparison. The Committee adopted this rule, which was not part of the Model Rules, to provide guidelines for lawyers who serve as neutrals and who do not represent any party. See *id.* Committee Commentary.

The ABA Ethics 2000 Commission is proposing to add a new third-party neutral rule. See ABA Center for Professional Responsibility, *Proposed Rule 2.8—Public Decision Draft* (visited Aug. 21, 2000) <<http://www.abanet.org/cpr/rule2x.html>>. The Commission's rationale for this proposal is that lawyers are increasingly serving in third-party neutral roles and may experience unique ethical problems as neutrals. See *id.* The Committee particularly noted that there is a proliferation of codes of ethics for neutrals, but they typically do not address the special ethical considerations of lawyers. See *id.*

(4) may not compel or coerce the parties to make an agreement.

(c) A lawyer may serve as a third party neutral only if the lawyer has not previously represented and is not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding.

(d) A lawyer may serve as a third party neutral in a dispute resolution proceeding involving a client whom the lawyer has represented or is representing in a matter unrelated to the dispute resolution proceeding, provided:

(1) there is full disclosure of the prior or present representation;

(2) in light of the disclosure, the third party neutral obtains the parties' informed consent;

(3) the third party neutral reasonably believes that a prior or present representation will not compromise or adversely affect the ability to act as a third party neutral; and

(4) there is no unauthorized disclosure of information in violation of Rule 1.6.

(e) A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.

(f) A lawyer shall withdraw as third party neutral if any of the requirements stated in this Rule is no longer satisfied or if any of the parties in the dispute resolution proceeding so requests. If the parties are participating pursuant to a court referral, the third party neutral shall report the withdrawal to the authority issuing the referral.

(g) A lawyer who serves as a third party neutral shall not charge a fee contingent on the outcome of the resolution proceeding.

(h) This Rule does not apply to intermediation, which is covered by Rule 2.2.<sup>101</sup>

## 2. Summary

Virginia Rule 2.10 is unique to Virginia. In 1996, the Joint VSB-VBA Committee on Alternative Dispute Resolution appointed a sub-committee to review the draft versions of the collaborative lawyering rules.<sup>102</sup> Discussion between the sub-committee and Special Committee member Larry Hoover resulted in the inclusion of Virginia Rule 2.10.<sup>103</sup> Two critical factors influenced the decision to include a separate rule directed at lawyers acting as neutrals.<sup>104</sup> First, because of the increase in

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<sup>101</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 2.10 (2000).

<sup>102</sup> See Hoover Interview, *supra* note 37.

<sup>103</sup> See *id.* The inspiration for the rule came from an unfinished draft of a similar provision that an ABA Special Committee considered in 1990. See *id.*

<sup>104</sup> See Telephone Interview with Paula Hannaford, Member, Virginia State Bar Special Committee to Study the Code of Professional Responsibility (June 24, 1998) [hereinafter Hannaford Interview].

the popularity of the ADR process and the subsequent increase in the frequency of attorney involvement in that area, the Committee concluded that providing lawyers with guidance in this growing area was critical.<sup>106</sup> Second, the Committee wanted the Virginia Rules to be in agreement with the Virginia Supreme Court's Rules governing mediation.<sup>106</sup>

The Rule defines a "third party neutral" as a lawyer who "assists parties in reaching a voluntary settlement of a dispute through a process known as dispute resolution."<sup>107</sup> The neutral does not represent any party.<sup>108</sup> Indeed, though the neutral is providing a "law-related service that may involve the application of a lawyer's particular legal expertise and skills,"<sup>109</sup> Virginia Rule 2.10 does not offer any assistance in determining whether a lawyer who serves as a neutral is engaged in the practice of law.<sup>110</sup>

The lawyer who acts as a neutral is required to inform the parties as to the nature of his role and to encourage unrepresented parties to seek legal counsel before executing any agreement.<sup>111</sup> While the neutral may encourage or assist the parties in reaching a resolution, the neutral cannot compel the parties to enter into any agreement.<sup>112</sup> Examples of alternative "dispute resolution proceedings that are conducted by third party neutrals include mediation, conciliation, early neutral evaluation, non-binding arbitration, and non-judicial settlement conferences."<sup>113</sup>

"A lawyer may serve as a third party neutral only if he has not represented any party in connection with the subject matter of the dispute resolution proceeding."<sup>114</sup> The Rule does not preclude a lawyer from acting as a neutral in a dispute involving a current or former client so long as the subject matter of the dispute is unrelated to the representation and certain conditions are met.<sup>115</sup> First, there must be "full disclosure of the prior or present representation."<sup>116</sup> Second, the neutral must obtain the parties' informed consent after disclosing the

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<sup>106</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 2.10(a) (2000).

<sup>108</sup> *See id.*

<sup>109</sup> *Id.* Rule 2.10 cmt. 2.

<sup>110</sup> *See id.* ("The determination whether a particular activity constitutes the practice of law is beyond the scope and purpose of the Virginia Rules."). The Rule does go so far as to state that a third-party neutral may not offer legal advice to the parties but may offer neutral evaluations, if requested by the parties. *See id.* Rule 2.10 cmt. 3.

<sup>111</sup> *See id.* Rule 2.10(b)(1)-(b)(2).

<sup>112</sup> *See id.* Rule 2.10(b)(3)-(b)(4).

<sup>113</sup> *Id.* Rule 2.10 cmt. 1.

<sup>114</sup> *Id.* Rule 2.10(c).

<sup>115</sup> *See id.* Rule 2.10(d).

<sup>116</sup> *Id.* Rule 2.10(d)(1).

representation.<sup>117</sup> Third, the neutral must reasonably believe that the representation will not limit his ability to act as a neutral.<sup>118</sup> Finally, there must be no unauthorized disclosure of confidential information in the course of the dispute resolution process.<sup>119</sup> Once the neutral undertakes the dispute resolution process, later representation of either party relating to the same subject matter is precluded.<sup>120</sup>

### H. Rule 2.11, Mediator<sup>121</sup>

#### 1. Text of Virginia Rule 2.11

(a) A lawyer-mediator is a third party neutral (See Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

(b) Prior to agreeing to mediate and throughout the mediation process a lawyer-mediator should reasonably determine that:

- (1) mediation is an appropriate process for the parties;
- (2) each party is able to participate effectively within the context of the mediation process; and
- (3) each party is willing to enter and participate in the process in good faith.

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by legal counsel about the importance of reviewing the lawyer-mediator's legal information with legal counsel.

(d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.

(e) Prior to the mediation session a lawyer-mediator shall:

- (1) consult with prospective parties about
  - (i) the nature of the mediation process;

<sup>117</sup> See *id.* Rule 2.10(d)(2).

<sup>118</sup> See *id.* Rule 2.10(d)(3).

<sup>119</sup> See *id.* Rule 2.10(d)(4).

<sup>120</sup> See *id.* Rule 2.10(e).

<sup>121</sup> "There was no counterpart to this rule in the Virginia CPR." *Id.* Rule 2.11 Virginia Code Comparison. "The Committee adopted this rule, [which was] not part of the [ABA] Model Rules, to give further guidance to lawyers who serve as mediators." *Id.* Although Legal Ethics Opinions permitted lawyers to serve as mediators, there were "different approaches to and styles of mediation . . . being offered." *Id.* Rule 2.11 Committee Commentary. "This rule requires lawyer-mediators to consult with prospective parties about the lawyer-mediators' approach, style and subject matter expertise and to honor the parties' choice and expectations." *Id.*

- (ii) the limitations on the use of evaluation, as set forth in subparagraph (d) above;
  - (iii) the lawyer-mediator's approach, style and subject matter expertise; and
  - (iv) the parties' expectations regarding the mediation process; and
- (2) enter into agreement to mediate which references the choice and expectations of the parties, including whether the parties have chosen, permit or expect the use of neutral evaluation or evaluative techniques during the course of the mediation.
- (f) A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties' choice and expectations.<sup>122</sup>

## 2. Summary

Virginia Rule 2.11 defines mediator as "a third party neutral who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute."<sup>123</sup> The Rule then requires the mediator to determine that mediation is an appropriate process and that each party is willing to participate effectively and in good faith.<sup>124</sup>

The heart of the Virginia Rule is informed consent. Before beginning the mediation, the lawyer-mediator should discuss the nature of the mediation process with the parties.<sup>125</sup> The discussion should include an explanation of the limits on the use of evaluation, the lawyer-mediator's approach, style and subject matter expertise, and the parties' expectations regarding the mediation process.<sup>126</sup> The choices and expectations of the parties, including the parties' preference regarding the use of evaluative techniques, must then be incorporated into an agreement that will control the mediation process.<sup>127</sup>

During the course of the mediation, the lawyer-mediator may offer legal information that will allow the parties to make informed decisions.<sup>128</sup> Further, the lawyer-mediator may evaluate the "strengths and weaknesses of positions, assess the value and cost of alternatives, [and so on, so long as the] evaluation is incidental to the facilitative role and does not interfere" with the mediation process.<sup>129</sup>

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<sup>122</sup> *Id.* Rule 2.11.

<sup>123</sup> *Id.* Rule 2.11(a).

<sup>124</sup> *See id.* Rule 2.11(b). Rule 2.11(b) incorporates the second paragraph of the Standards of Ethics and Professional Responsibility for Certified Mediators. *See* Hoover Interview, *supra* note 37.

<sup>125</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 2.11(e)(1) (2000).

<sup>126</sup> *See id.*

<sup>127</sup> *See id.* Rule 2.11(e)(2).

<sup>128</sup> *See id.* Rule 2.11(c).

<sup>129</sup> *Id.* Rule 2.11(d).



In drafting the collaborative lawyering rules, the Committee was very aware of the difference between the facilitative and the evaluative styles of mediation.<sup>130</sup> The terms are probably best defined by describing how the two different mediator types view their respective roles. "Facilitative" neutrals are ultimately concerned with helping the parties analyze litigation options for themselves, while "evaluative"<sup>131</sup> mediators focus on evaluating the respective cases from a litigation perspective.<sup>132</sup> A mediation purist who espouses the facilitative approach would argue that evaluation by the lawyer-mediator has no place in the mediation process. Conversely, the evaluative mediator would consider evaluation a vital part of the mediation process. As one might expect, neither approach exists in a pure form. The terms are often blurred in application and combined in practice.<sup>133</sup> Because of this dichotomy of approaches and because practice varies so widely, the Special Committee chose to adopt a broad definition that emphasizes the importance of informed consent.<sup>134</sup>

### *I. Rule 3.1, Meritorious Claims and Contentions*

#### 1. Text of Virginia Rule 3.1

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>135</sup>

#### 2. Summary

Virginia Rule 3.1 seeks to strike a balance between the advocate's duty to represent a client zealously within the bounds of the law and the duty not to abuse legal procedure in so doing. Although the advocate is

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<sup>130</sup> See Hannaford Interview, *supra* note 104.

<sup>131</sup> Neutral "evaluation" is defined in the new Virginia Rules as "opining as to the strengths and weaknesses of positions, assessing the value and costs of alternatives to settlement or assessing the barriers to settlement." VA. RULES OF PROFESSIONAL CONDUCT Rule 2.11 cmt. 7 (2000).

<sup>132</sup> For an excellent discussion of these contrasting styles, see DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 22 (1996).

<sup>133</sup> For example, a "facilitator" may also deal with the merits of the respective cases in a broader, less focused way, while an "evaluator" also seeks to assist the parties in settling their differences. *Id.*

<sup>134</sup> See *id.*

<sup>135</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.1 (2000).

forbidden from asserting a “frivolous” claim, it is clear that an action “is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.”<sup>136</sup> The heart of this rule is the “good faith” requirement. The lawyer need not believe that the client’s position will ultimately prevail, but must be able to make a good-faith argument on the merits of the action or to support the action by making a good-faith argument for a change in existing law.<sup>137</sup>

Virginia Rule 3.1 differs from the former Virginia CPR in three ways.<sup>138</sup> First, under Rule 3.1 the test for improper litigation rests upon a consideration of whether the action is “frivolous” in nature,<sup>139</sup> rather than on the Virginia CPR’s test of whether the action serves “merely to harass or maliciously injure another.”<sup>140</sup> Second, the test set forth in Rule 3.1 is objective,<sup>141</sup> while the Virginia CPR’s standard was subjective. It faulted the lawyer only when “he knows or when it is obvious” that such action would serve merely to harass or maliciously injure another.<sup>142</sup> Finally, Rule 3.1 creates an exception allowing a lawyer in any case, civil or criminal, that may result in incarceration of his client to require proof of every element, even if there is no nonfrivolous basis for defense.<sup>143</sup> This new objective standard is preferable to the former subjective one. The practitioner is now better able to judge the merits of his or her pleading or motion before filing on the basis of what a “reasonable lawyer” would do in similar circumstances, rather than proceed under the uncertainty of a subjective standard.

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<sup>136</sup> *Id.* Rule 3.1 cmt. 2.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.* Disciplinary Rule 7-102(A)(1) provides that a lawyer shall not “file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1983).

<sup>139</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 2 (2000).

<sup>140</sup> REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1983).

<sup>141</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 3.1 Virginia Code Comparison (2000). The Committee concluded that the objective standard of the ABA Model Rule was preferable and more closely paralleled Section 8.01-271.1 of the Code of Virginia, dealing with lawyer sanctions. *See id.* Rule 3.1 Committee Commentary.

<sup>142</sup> REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1983).

<sup>143</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 3.1 Virginia Code Comparison. This exception is not without limits, however. *See, e.g.,* United States v. Rico, 51 F.3d 495, 511 (5th Cir. 1995) (“Current professional standards do not require a defense counsel to assert every potential defense, regardless how farfetched or implausible. To the contrary, attorneys are routinely cautioned against advancing frivolous positions.”).

*J. Rule 3.3, Candor Toward the Tribunal*<sup>144</sup>

1. Text of Virginia Rule 3.3

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;
- (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.<sup>145</sup>

2. Summary

The task of the lawyer is to represent a client with persuasive force; yet that zeal must be tempered by a corresponding duty of candor to the court.<sup>146</sup> Thus, there is a tension between the duties of zealous advocacy and candor to the court. Rule 3.3 seeks to aid the practitioner in resolving those tensions.

Virginia Rule 3.3(a) prohibits a lawyer from knowingly engaging in dishonesty toward the tribunal.<sup>147</sup> Paragraph (a)(1) declares that a lawyer shall not “knowingly make a false statement of fact or law to a tribunal.”<sup>148</sup> “Knowingly” denotes actual knowledge of the fact in question. Knowledge may be inferred from the circumstances.<sup>149</sup> Additionally, paragraph (a)(4) prohibits the offering of “evidence that the lawyer knows to be false.”<sup>150</sup> If the lawyer later learns in the course of a proceeding that evidence offered earlier is actually false, the lawyer is

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<sup>144</sup> See *supra* Part III.A. for a discussion of the reasons for omitting Rule 3.2 as well as two other rules.

<sup>145</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (2000).

<sup>146</sup> See *id.* Rule 3.3 cmt. 1.

<sup>147</sup> See *id.* Rule 3.3(a).

<sup>148</sup> *Id.* Rule 3.3(a)(1).

<sup>149</sup> See *id.* Terminology.

<sup>150</sup> *Id.* Rule 3.3(a)(4).

required to take remedial steps.<sup>151</sup> Strangely, the Committee declined to adopt any Comment relating to remedial measures,<sup>152</sup> although Virginia Rule 1.6(c)(2) makes it clear that such measures could include disclosure to the tribunal.<sup>153</sup>

Unfortunately, the Virginia Rules give little guidance to the practitioner who discovers that perjured testimony or false evidence has been offered. The Committee's failure to adopt the remedial measures of the Model Rules leaves the trial lawyer with no lesser remedy than disclosure to the court. However, the burden of taking appropriate action is then shifted from the lawyer to the tribunal. Once the lawyer discloses this information, it would then be for the court to determine what action should be taken—making some appropriate statement to the trier of fact, ordering a mistrial, or possibly doing nothing.<sup>154</sup>

Rule 3.3(a)(3) is significant in that it imposes on Virginia lawyers the duty to disclose adverse controlling legal authority to the tribunal.<sup>155</sup> The Virginia CPR had no corresponding provision, though EC 7-20 stated that lawyers should inform the tribunal of directly adverse legal authority.<sup>156</sup> The VSB Council's decision to raise EC 7-20 to the level of a

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<sup>151</sup> *See id.*

<sup>152</sup> Comments relating to 3.3(a)(4) appeared in earlier proposed drafts, but were excluded from the final draft submitted to the Virginia Supreme Court. *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 3.2 cmt. (Proposed Draft Aug. 1998) (later renumbered to 3.3). The Model Rules offer a series of remedies where false evidence or perjured testimony has been offered. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 11 (1999). The lawyer's remedies are to (1) remonstrate with the client confidentially. *See id.* If that fails, then (2) seek to withdraw. *See id.* If that is impossible or will not remedy the situation, then (3) make disclosure to the court. *See id.* The Virginia lawyer is left without much guidance in this situation.

<sup>153</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2) (2000). The rule provides that a lawyer shall promptly reveal

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

*Id.*

<sup>154</sup> *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 11 (1999). The comment to the Model Rules explains the alternatives after disclosure has been made to the court. *See id.*

<sup>155</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (2000).

<sup>156</sup> Virginia CPR Ethical Consideration 7-20 provides:

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in

rule generated considerable criticism.<sup>157</sup> Some argued that the new rule would “reward the ‘lazy’ adversary.”<sup>158</sup> Paragraph (a)(3) is significant in two respects. First, disclosure of controlling adverse legal authority is now mandatory under the Virginia Rules of Professional Conduct.<sup>159</sup> Second, the adverse authority need not be *directly* adverse in order to trigger the duty to disclose.<sup>160</sup> This is a positive provision. Lawyers may not now withhold adverse legal authority upon the justification that it is not *directly* adverse, as it was with the duty of confidentiality. The problem is particularly acute when the lawyer only has “reasonable belief” that false evidence is about to be offered. Only when the lawyer “knows” that the evidence is false does the duty of candor to the court override the duty of confidentiality.<sup>161</sup> What happens when a lawyer does not have the requisite “knowledge” of false evidence, but “reasonably believes” certain evidence to be false? Paragraph 3.3(b) confers on the lawyer the discretion to refuse to offer such evidence.<sup>162</sup> Conversely, the lawyer may also *offer* such evidence. Thus, the course of action is clearer for the lawyer who “knows” of false evidence than for the lawyer who “reasonably believes” of its falsity.

Virginia Rule 3.3(c) mandates extraordinary candor in *ex parte* matters.<sup>163</sup> In an *ex parte* proceeding, the lawyer is under a heightened duty to disclose material facts,<sup>164</sup> even those adverse to the client’s position.<sup>165</sup> For example, when a lawyer is seeking an *ex parte* hearing for

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the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-20 (1983).

<sup>157</sup> See McClanahan, *supra* note 28, at A1.

<sup>158</sup> *Id.* The VSB Council wisely approved this new duty over minor criticism. On balance, the duty of candor outweighs this rather insignificant objection.

<sup>159</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (2000). The Ethical Considerations found in the Virginia CPR were aspirational in character and represented the objectives toward which lawyers should strive. See REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1983). The only mandatory part of the CPR was the Disciplinary Rules. See *id.*

<sup>160</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.3 Virginia Code Comparison (2000).

<sup>161</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

<sup>162</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.3(b) (2000).

<sup>163</sup> See *id.* Rule 3.3(c). The Virginia Code had no counterpart to 3.3(c). See *id.* Rule 3.3 Virginia Code Comparison.

<sup>164</sup> See *id.*

<sup>165</sup> See *In re Mullins*, 649 N.E.2d 1024 (Ind. 1995) (disciplining lawyer for seeking emergency guardianship over client in persistent vegetative state but not divulging to the court the existence of contemporaneous proceedings to withdraw client’s nourishment and hydration).

a temporary restraining order, there is no balance of presentation by opposing advocates. Because there is no opposing counsel to expose deficiencies in the claimant's case or to present contrary considerations, the duty of candor is paramount; the lawyer seeking the restraining order is required to disclose all material facts known to the lawyer which will enable the tribunal to make an informed decision.<sup>166</sup>

The Committee recognized the need to distinguish between adversarial and non-adversarial *ex parte* matters, and wisely restricted application of the rule to the former.<sup>167</sup> Excluded from the scope of the rule are grand jury proceedings and various administrative proceedings such as social security hearings before an Administrative Law Judge.<sup>168</sup> The reason for the exceptions is obvious: in such non-adversarial matters there is no contrary position to be represented and, therefore, no need for opposing advocates.

The requirement of candor before the tribunal is refreshing in a legal system where the search for truth is often obscured by an emphasis on evidentiary rules and fair trials. Rule 3.3(d) is a beacon in the search for truth and justice in our sometimes flawed adversarial system.<sup>169</sup>

### *K. Rule 3.4, Fairness to Opposing Party and Counsel*

#### 1. Text of Virginia Rule 3.4

A lawyer shall not:

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

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<sup>166</sup> See Louisiana State Bar Ass'n v. White, 539 So.2d 1216 (La. 1989) (suspending lawyer for confirming default judgment against former client for more than amount due while concealing from court the receipt of prior partial payment).

<sup>167</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 15 (2000). The comment cautions that

a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding. If so, the lawyer must comply with a disclosure demand by the tribunal or challenge the action by available legal means. The failure to disclose information as part of a legal challenge to a demand for disclosure will not constitute violation of this Rule.

*Id.*

<sup>168</sup> See VA. RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft Part II 1997), *supra* note 24, at:68. Rule 3.2(c) (later renumbered 3.3) specifically mentioned Social Security hearings as examples of non-adversarial *ex parte* proceedings, but this specificity was excluded from the final language of Rule 3.3 comment 15. See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 15 (2000).

<sup>169</sup> See Jill M. Dennis, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(D)*, 8 GEO. J. LEGAL ETHICS 157 (1994).

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

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

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(h) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(i) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.<sup>170</sup>

## 2. Summary

Virginia Rule 3.4 seeks to secure fair competition in an adversarial system by prohibiting destruction or concealment of evidence, attempts to improperly influence witnesses, obstructive discovery tactics, and the

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<sup>170</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.4 (2000).

like. The Rule is a hybrid of the Virginia CPR and Model Rule 3.4.<sup>171</sup> For example, paragraph (a) adopts the broader obligation imposed on lawyers by the language of Model Rule 3.4(a),<sup>172</sup> but DR 7-108(B), which explicitly prohibits conduct only implicitly addressed in paragraph (a), was added to the Virginia Rule as paragraph (b).<sup>173</sup>

Although paragraph (c) is similar to Model Rule 3.4(b),<sup>174</sup> language from DR 7-108(C) was added to make it clear that certain witness compensation is allowed.<sup>175</sup> First, a lawyer may pay, guarantee, or advance reasonable expenses that a witness incurs in attending the proceeding or testifying.<sup>176</sup> Second, reasonable compensation may be paid to compensate the witness for earnings lost as a result of attending and testifying.<sup>177</sup> Finally, an expert witness may be paid a reasonable fee for professional services.<sup>178</sup>

The Committee elected to include language substantially similar to DR 7-105(A) in paragraph (d) rather than adopting the language of Model Rule 3.4(c).<sup>179</sup> The resulting rule clearly explains that while a lawyer has an obligation to obey the rulings of a tribunal, a good faith test of the validity of such rulings is proper. Virginia Rule 3.4(c) provides more flexibility to the practitioner in challenging a court order or rule and, therefore, seems preferable to the "obey-or-disregard" limitations imposed by the Model Rules.

Paragraph (g) has no counterpart in the Virginia CPR.<sup>180</sup> The exceptions in paragraph (g) were limited to civil matters because of concerns about the potential for allegations of obstruction of justice in criminal matters.<sup>181</sup> These concerns would appear to be unfounded.<sup>182</sup>

<sup>171</sup> See *id.* The Committee described this Rule as an attempt "to join the best of both the Virginia Code and ABA Model Rule 3.4." *Id.* Rule 3.4 Committee Commentary.

<sup>172</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1999).

<sup>173</sup> Disciplinary Rule 7-108(B) provides that a lawyer "shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein." REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(B) (1983).

<sup>174</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999).

<sup>175</sup> See REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(C) (1983).

<sup>176</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.4(c)(1) (2000).

<sup>177</sup> See *id.* Rule 3.4(c)(2).

<sup>178</sup> See *id.* Rule 3.4(c)(3).

<sup>179</sup> Compare REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105(A) (1983) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c) (1999). Model Rule 3.4(c) allows only "an open refusal [to disobey knowingly an obligation under the rules of a tribunal] based on an assertion that no valid obligation exists." *Id.*

<sup>180</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.4 Virginia Code Comparison (2000).

<sup>181</sup> See *id.* Rule 3.4 cmt. 4.

<sup>182</sup> A search of the Annotated Model Rules revealed no criminal cases in which obstruction of justice was an overriding concern. See generally ANNOTATED MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 3.4(f) (4th ed. 1999) and cases relating to



The meritorious-claim-or-contention provision found in paragraph (i) does not appear in the Model Rules. The Committee determined that the existing language of DR 7-102(A)(1) should appear as paragraph (i); however, paragraph (i) differs from DR 7-102(A)(1) in at least two ways.<sup>183</sup> First, under the Virginia Rule, a basis for an action exists so long as the litigation is “not frivolous.”<sup>184</sup> Under the Code, conduct was improper if the litigation was intended “merely to harass or maliciously injure another.”<sup>185</sup> Second, Virginia Rule 3.4 sets forth an objective test rather than relying on the “when it is obvious” standard.<sup>186</sup>

Three additional provisions merit attention. First, in Virginia Rule 3.4(e), the provisions governing discovery requests apply at all stages in a proceeding.<sup>187</sup> This is in direct contrast with Model Rule 3.4(d), which specifically limits the prohibitions against making frivolous discovery requests and failing to make reasonable efforts to comply with discovery requests during the pretrial period.<sup>188</sup> Second, under paragraph (h) of Virginia Rule 3.4, a lawyer is no longer prohibited from “participat[ing] in presenting criminal charges.”<sup>189</sup> Thus, advice about the client’s rights under the criminal law may now be freely offered. Finally, paragraph (i) is a verbatim adoption of DR 7-102(A)(1).<sup>190</sup>

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subparagraph (f). In one case, *In re Alcantara*, 676 A.2d 1030 (N.J. 1995), the lawyer for a co-defendant was reprimanded (due to mitigating circumstances) for violating Rule 3.4(f). Mention was made that the lawyer engaged in conduct prejudicial to the administration of justice, but that offense was not elevated to a greater transgression than violation of Rule 3.4(f). *See id.* The Ethics 2000 Commission apparently is not concerned about obstruction of justice because it is recommending no changes in the text of Model Rule 3.4. *See* ABA Center for Professional Responsibility, *Proposed Rule 3.4—Public Discussion Draft* (visited Aug. 21, 2000) <<http://www.abanet.org/cpr/rule34.html>>.

<sup>183</sup> Disciplinary Rule 7-102(A)(1) states that in representing a client, “a lawyer shall not: [f]ile a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1983).

<sup>184</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.4 Virginia Code Comparison (2000).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *See id.* Rule 3.4(e).

<sup>188</sup> *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) (1999).

<sup>189</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.4(h) and Virginia Code Comparison (2000).

<sup>190</sup> *See id.* Rule 3.4(i) and Virginia Code Comparison.

### *L. Rule 3.5, Impartiality and Decorum of The Tribunal*

#### 1. Text of Virginia Rule 3.5

(a) A lawyer shall not:

(1) before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law;

(2) after discharge of the jury from further consideration of a case, ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service; or

(3) conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.

(b) All restrictions imposed by paragraph (a) upon a lawyer also apply to communications with or investigations of members of the immediate family or household of a juror or a member of a venire.

(c) A lawyer shall reveal promptly to the court improper conduct by a member of a venire or a juror, or by another toward a venireman or a juror or a member of the juror's family, of which the lawyer has knowledge.

(d) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

(e) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) in the course of official proceedings in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer; or

(4) as otherwise authorized by law.

(f) A lawyer shall not engage in conduct intended to disrupt a tribunal.<sup>191</sup>

#### 2. Summary

Virginia Rule 3.5 retains much of the language and character of the Virginia CPR. Paragraphs (a)-(c), which are substantially the same as DR 7-107(A)-(F), provide detailed guidance on communication between lawyers and veniremen or jurors.<sup>192</sup> Before or during trial, extrajudicial

<sup>191</sup> *Id.* Rule 3.5.

<sup>192</sup> *See id.* Rule 3.5(a)-(c).

contact is forbidden by or on behalf of any lawyer connected with the case.<sup>193</sup> Even lawyers who are in no way connected with the proceeding seem to be forbidden from communicating with jurors about the subject matter of the case. After the trial, lawyers may communicate with discharged jurors, so long as the communication is not meant to harass, embarrass, or to influence the juror in future jury service.<sup>194</sup>

Paragraph (d), which has no counterpart in the Model Rules, is identical to DR 7-109(A).<sup>195</sup> The provision prohibits giving or lending anything of value to a judge, official, or court employee under circumstances which make it seem that the lawyer's intent is to influence judicial action improperly.<sup>196</sup>

That all litigants and lawyers should have equal access to the tribunal is axiomatic. With limited exceptions, paragraph (e) forbids communications between a lawyer and judge relating to the merits of a pending action.<sup>197</sup> Unless the communication occurs in the course of official proceedings in the cause or is otherwise authorized by law, copies of written communication and adequate notice of oral communication must be provided to opposing counsel or to the adverse party who is not represented.<sup>198</sup>

In paragraph (f), the Committee adopted the language of the Model Rules.<sup>199</sup> According to the Committee Commentary, the general admonition against "conduct prejudicial to the administration of justice" was considered vague.<sup>200</sup> Instead, paragraph (f) prohibits "conduct intended to disrupt a tribunal."<sup>201</sup>

### *M. Rule 3.6, Trial Publicity*

#### 1. Text of Virginia Rule 3.6

(a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.

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<sup>193</sup> See *id.* Rule 3.5(a)(1).

<sup>194</sup> See *id.* Rule 3.5(a)(2).

<sup>195</sup> See *id.* Rule 3.5(d) cmt. 2 and Virginia Code Comparison.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* Rule 3.5(e).

<sup>198</sup> See *id.*

<sup>199</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(f) (1999).

<sup>200</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.5 Committee Commentary (2000).

<sup>201</sup> *Id.* Rule 3.5(d).

(b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.<sup>202</sup>

## 2. Summary

Virginia Rule 3.6 prohibits a lawyer involved in the investigation, prosecution, or defense of a criminal case from making “an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication” if he knows, or should know, that such a statement has a “substantial likelihood of interfering with the fairness of the trial by a jury.”<sup>203</sup> Virginia Rule 3.6 is substantially the same as DR 7-106 but differs in that the “clear and present danger”<sup>204</sup> language of DR 7-106 is abandoned in favor of the “substantial likelihood of material prejudice.”<sup>205</sup>

In *Gentile v. Nevada State Bar*,<sup>206</sup> the United States Supreme Court examined prior restraints imposed on the First Amendment free speech rights of lawyers by codes governing professional conduct. The Nevada State Bar disciplined Gentile, a lawyer, for statements made at a press conference in violation of a Nevada ethics rule.<sup>207</sup> The rule prohibited an attorney from making extrajudicial statements having “a substantial likelihood of materially prejudicing” a proceeding.<sup>208</sup> The Nevada Supreme Court affirmed, rejecting Gentile’s contention that the ethics rule violated his right to free speech.<sup>209</sup> The United States Supreme Court considered whether the “clear and present danger test” is the proper standard for judging the constitutionality of restraints upon a lawyer’s speech, but a divided court in a 5-4 decision did not directly resolve the issue.<sup>210</sup> The majority concluded that the “substantial likelihood” standard is a constitutionally permissible balance between the First

<sup>202</sup> *Id.* Rule 3.6.

<sup>203</sup> *Id.* Rule 3.6(a).

<sup>204</sup> *Id.* Rule 3.6 cmt. 1 and Virginia Code Comparison. Disciplinary Rule 7-106 (A) provides that

[a] lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication that he knows, or should know, constitutes a clear and present danger of interfering with the fairness of the trial by a jury.

REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A) (1983).

<sup>205</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 Virginia Code Comparison (2000).

<sup>206</sup> 501 U.S. 1030 (1991).

<sup>207</sup> See *id.* at 1033.

<sup>208</sup> *Id.*

<sup>209</sup> See *id.*

<sup>210</sup> *Id.*

Amendment rights of attorneys in pending cases and the States' interest in fair trials.<sup>211</sup> The United States Supreme Court upheld the "substantial likelihood of material prejudice" standard of Model Rule 3.6,<sup>212</sup> but reversed on other grounds.<sup>213</sup>

The Committee opted for the arguably broader standard in *Gentile* but adopted the succinct language of DR 7-106 in an attempt to minimize constitutional challenges.<sup>214</sup> Society undoubtedly has a legitimate interest in the free dissemination of information about legal proceedings. The standard set forth in Virginia Rule 3.6 seems to facilitate the achievement of this goal. Whether the liberalization of rules governing lawyer speech will ultimately advance the interests of the judicial system, or simply make it more difficult to impanel an impartial jury, remains to be seen.<sup>215</sup>

### N. Rule 3.7, Lawyer as Witness

#### 1. Text of Virginia Rule 3.7

(a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *See id.* at 1081-82. The court reversed on the ground that Rule 3.6 did not give *Gentile* fair notice that he would be subject to discipline. *See id.*

<sup>214</sup> *See* VA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 Committee Commentary (2000). The Committee Commentary ascribes [erroneously, probably due to a scrivener's error] to Model Rule 3.6 a specific list of prohibited statements by lawyers. In fact, Model Rule 3.6 lists a significant number of statements *permitted* by lawyers as exceptions to this Rule. These exceptions offer guidance to lawyers concerning what statements are allowable. However, Model Rule 3.6 has been criticized as unduly restrictive of First Amendment rights of lawyers. Professor Joel Swift, for example, argues that Model Rule 3.6 unduly restricts a lawyer's First Amendment freedom of speech and posits that the only justification for restrictions on trial publicity is jury impartiality. *See* Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984). Virginia Rule 3.6 seems to strike a balance between protecting the right to a free trial and safeguarding the right of free expression while avoiding the constitutional issues raised by Model Rule 3.6.

<sup>215</sup> *See generally* Moseley et al., *supra* note 67, at 990.

may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

(c) A lawyer may act as advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.<sup>216</sup>

## 2. Summary

The Virginia CPR prohibited a lawyer from serving as an advocate in situations where the lawyer "knows or it is obvious that he . . . ought to be called as a witness."<sup>217</sup> The disqualification was imputed to all members of the lawyer's firm.<sup>218</sup> In drafting Virginia Rule 3.7, the Committee created a rule that not only permits greater flexibility but also addresses two significant flaws in the current provision. First, the vague "it is obvious he ought to be called" test is set aside in favor of the more instructive "likely to be a necessary witness" standard.<sup>219</sup> Second, the prohibition on accepting representation where another member of the lawyer's firm is likely to be called was eliminated.<sup>220</sup> Under the Virginia Rule, disqualification is imputed only when the testimony is likely to be adverse to the client under Virginia Rule 1.7 or 1.9,<sup>221</sup> which is consistent with the Model Rule.<sup>222</sup> This change is likely to achieve three positive results. First, the client retains the power to hire the attorney of his choice.<sup>223</sup> Second, if a client's attorney is disqualified, the client need not bear the financial burden of turning his representation over to a firm unfamiliar with his case.<sup>224</sup> Finally, recognition that calling an opposing attorney as a witness is likely to result in only minor inconvenience for the opposing party will likely dissuade improper tactics.<sup>225</sup> An opposing party whose lawyer has been disqualified under this rule need no longer look beyond the lawyer's firm to seek a replacement.

There is an additional noteworthy difference between the Model Rule and the Virginia CPR. The Model Rule limits its application to "a trial,"<sup>226</sup> while the Virginia Rule is broadened to include "an adversarial proceeding."<sup>227</sup>

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<sup>216</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.7 (2000).

<sup>217</sup> REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1983).

<sup>218</sup> *See id.* DR 5-102(A).

<sup>219</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (2000).

<sup>220</sup> *See id.* Rule 3.7(c).

<sup>221</sup> *See id.*

<sup>222</sup> *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(b) (2000).

<sup>223</sup> *See Moseley et. al., supra* note 67, at 967-68.

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a)-(b) (1999).

<sup>227</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 3.7(a), (c) (2000).

*O. Rule 4.2, Communication with Persons Represented by Counsel*

1. Text of Virginia Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.<sup>228</sup>

2. Summary

The text of Virginia Rule 4.2 is a verbatim adoption of Model Rule 4.2.<sup>229</sup> The familiar prohibition against unauthorized communication appears substantially similar to that set forth in the Virginia CPR, but differs in one significant way.<sup>230</sup> The Virginia CPR provision prevented communication “with a *party* the [lawyer knows] to be represented.”<sup>231</sup> The Virginia Rule prohibits communication with any represented “*person*.”<sup>232</sup> The change was made to “emphasize that the prohibition on certain communications with a represented person applies outside the litigation context.”<sup>233</sup> The term “person” is broader and more comprehensive than “party” and is more in keeping with the intent of the rule.<sup>234</sup>

Comment 4 of Rule 4.2 limits communications with employees of an organization. The Model Rule prohibits communications by a plaintiff’s lawyer with persons (1) in management, or (2) whose act or omission may be imputed to the organization, or (3) whose admission may bind the organization.<sup>235</sup> The Virginia Rule simply imposes a “control group” test that prohibits *ex parte* communications with any employee who has authority to bind the organization.<sup>236</sup> “Such employees may only be contacted with the consent of the organization’s counsel [or their own separate counsel], through formal discovery, or as authorized by law.”<sup>237</sup>

<sup>228</sup> *Id.* Rule 4.2.

<sup>229</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1999).

<sup>230</sup> REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A)(1) (1983); see also Dennis W. Dohnal, *The Final Chapter— Maybe*, VA. LAW., Apr. 1998, at 9, 9-10.

<sup>231</sup> *Id.* (emphasis added).

<sup>232</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 4.2 (2000) (emphasis added).

<sup>233</sup> *Id.* Rule 4.2 Virginia Code Comparison.

<sup>234</sup> Model Rule 4.2 originally contained the word “party.” An amendment in 1995 changed the word to “person” in order to clarify that the rule applies to anyone known to be represented regarding the subject matter, not just to named parties. See ANNOTATED MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 4.2 (4th ed. 1999).

<sup>235</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 4 (1999).

<sup>236</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 4 (2000). For an interesting hypothetical fact situation and discussion of this subject, see Baker McClanahan, *Making Contact*, VA. LAW. WKLY., Mar. 9, 1998, at B-1.

<sup>237</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 4 (2000).

Rule 4.2 makes no attempt to address the question of when a lawyer “knows” another person to be represented by counsel, contrary to the Model Rule.<sup>238</sup> This is an important shortcoming because the prohibition against communications with a represented person only applies where the lawyer “knows” that the person is in fact represented in the matter to be discussed.

### *P. Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer*

#### 1. Text of Virginia Rule 5.1

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

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

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.<sup>239</sup>

#### 2. Summary

Rule 5.1 is new to Virginia. The rule is intended to govern ethical conduct of law firms by exposing a partner or other supervisory lawyer to discipline for failure to take reasonable remedial steps to avoid or mitigate the effects of a subordinate lawyer’s known misconduct.<sup>240</sup> Three

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<sup>238</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 5 (1999). The Model Rules require that there be actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. *See id.* Such inference may arise where there is substantial reason to believe that the person is represented in the matter. *See id.* “Thus, a lawyer cannot evade the requirement of obtaining consent of counsel by closing eyes to the obvious.” *Id.*

<sup>239</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 5.1 (2000).

<sup>240</sup> The rule was adopted “because lawyers who practice in firms should have an affirmative obligation to assure adherence to the Rules of Professional Conduct by those with whom they professionally associate.” *Id.* Rule 5.1 Committee Commentary (2000); *see generally* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) (advocating allowing disciplinary authorities to proceed directly against law firms). Model Rule 5.1 reflects the changing character of legal representation from a single lawyer/client relationship to a multiple lawyer/client representation. *See* ANNOTATED MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 5.1 Legal Background: Introduction:



aspects of supervisory responsibility are set forth in the provisions of Virginia Rule 5.1. First, paragraph (a) is designed to govern the ethical infrastructure of a law firm by requiring that a partner in a firm “make reasonable efforts” to guarantee that the firm’s policies and procedures encourage compliance with the Rules of Professional Conduct.<sup>241</sup> Second, paragraph (b) seeks to impose a duty to supervise by providing that any lawyer having direct supervisory authority over another lawyer must “make reasonable efforts” to ensure that each lawyer under his supervision conforms to the Rules.<sup>242</sup> Paragraph (b) applies regardless of whether the supervising lawyer is a partner or not.<sup>243</sup> The “measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm’s structure and the nature of its practice.”<sup>244</sup> For example, in a small firm occasional admonitions might be sufficient, while in a large firm formal procedures for handling ethical questions might need to be established.

Finally, paragraph (c) sets forth the circumstances under which a lawyer may be disciplined for the acts of another.<sup>245</sup> A lawyer is responsible for the ethical misconduct of another lawyer if the lawyer orders or knowingly ratifies the ethical violation.<sup>246</sup> Partners in a firm and lawyers directly supervising the performance of legal work by another lawyer are subject to discipline if they have knowledge of the ethical violation at a time when the consequences of the conduct could be mitigated, but they fail to take remedial action.<sup>247</sup> Supervisory lawyers should be aware that it is possible for them to be in violation of Rule 5.1(b) through lack of adequate oversight, even without any direction, ratification, or knowledge of the subordinate’s violation.<sup>248</sup>

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Supervisory Responsibility Without Vicarious Liability (4th ed. 1999) (citing GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 765 (2d ed. 1990)).

<sup>241</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (2000).

<sup>242</sup> *Id.* Rule 5.1(b).

<sup>243</sup> *See id.*

<sup>244</sup> *Id.* Rule 5.1 cmt. 2.

<sup>245</sup> *See id.* Rule 5.1(c).

<sup>246</sup> *See id.* Rule 5.1(c)(1).

<sup>247</sup> *See id.* Rule 5.1(c)(2).

<sup>248</sup> *See id.* Rule 5.1 cmt. 5.

*Q. Rule 5.6, Restrictions on Right to Practice*<sup>249</sup>

1. Text of Virginia Rule 5.6

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a broad restriction on the lawyer's right to practice is part of the settlement of a controversy, except where such a restriction is approved by a tribunal or a governmental entity.<sup>250</sup>

2. Summary

Virginia Rule 5.6(a) prohibits employment agreements that broadly restrict a lawyer's right to practice after leaving a firm.<sup>251</sup> Non-compete agreements would be an example of proscribed employment agreements. Such restrictions not only limit the professional autonomy of lawyers, but also adversely impact the ability of clients to select the lawyer of their choice.<sup>252</sup> Courts have overwhelmingly considered such practices unethical and unenforceable violations of public policy—the rationale being that every client has the right to choose his or her own lawyer.<sup>253</sup> Restrictive covenants concerning retirement benefits are specifically excepted from the general prohibition.<sup>254</sup> Such agreements are permissible on the rationale that a departing lawyer's receipt of full retirement benefits from a firm creates the presumption that he or she is actually retiring from practice.<sup>255</sup> Attempts to circumvent the prohibition by characterizing a lawyer's departure from a firm as a "retirement" in order to restrict his or her subsequent right to practice law have been rejected by the courts.<sup>256</sup>

Virginia Rule 5.6(b) is similar to DR 2-106,<sup>257</sup> although the Virginia Rule permits an exception if the restriction on practice is approved by a

<sup>249</sup> See *infra* Part IV.A. for a discussion of the reasons for omitting Rule 5.2 as well as two other rules.

<sup>250</sup> VA. RULES OF PROFESSIONAL CONDUCT Rule 5.6 (2000).

<sup>251</sup> See *id.* Rule 5.6(a).

<sup>252</sup> See *id.* Rule 5.6 cmt. 1.

<sup>253</sup> See ANNOTATED MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 5.6 Impermissible Restrictions on Practice (4th ed. 1999).

<sup>254</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (2000).

<sup>255</sup> See ANNOTATED MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 5.6 Retirement Benefits (4th ed. 1999).

<sup>256</sup> See *id.*; see also *Gray v. Martin*, 633 P.2d 1285 (Or. Ct. App. 1983) (holding that otherwise the disciplinary rule has no meaning, and every termination from a firm would be a "retirement" and restrictive covenants would always be allowed).

<sup>257</sup> Disciplinary Rule 2-106(A) states that "[a] lawyer shall not be a party to a partnership or employment agreement that restricts the right of a lawyer to practice law

tribunal (such as in the settlement of a mass tort case<sup>268</sup> where the restriction is approved by the court) or government entity.<sup>269</sup> This exception is not contained in the Model Rules.<sup>260</sup> The effect of Virginia Rule 5.6(b) is to permit restrictions on a lawyer's right to practice that are part of the settlement of a controversy where the restrictions are approved by a tribunal or government entity. Such agreements attempt to prevent the plaintiffs' lawyer from representing future claimants with similar claims against the same defendant and are particularly common in class actions and mass product liability cases.<sup>261</sup> This provision would seem to nullify the intent of Model Rule 5.6(b) in such cases where, for one reason or another, the court approves the settlement containing such restrictions. Courts have often upheld such provisions on contractual grounds, leaving the ethical issues up to the state disciplinary authorities.<sup>262</sup> Virginia has imposed an additional requirement. The lawyer against whom limitations have been imposed must fully disclose to any future clients the extent of any such restrictions and refer them to other counsel if so requested.<sup>263</sup>

#### IV. CONCLUSION

##### A. Unexplained Omissions

A particularly noteworthy oversight is the glaring omission of three Model Rules,<sup>264</sup> without any explanation.<sup>265</sup> The puzzled reader is left to wonder whether the omissions are due to scrivener's error, inadvertence, perceived unimportance, or merger with other rules. Unfortunately, no explanation is offered in the Virginia Rules as to the reasons.<sup>266</sup>

after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits." REVISED VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1983). In addition, DR 2-106(B) prohibits a lawyer from entering "an agreement that broadly restricts his right to practice law." *Id.* DR 2-106(B).

<sup>263</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 5.1 Committee Commentary (2000).

<sup>269</sup> See *id.* Rule 5.1(b).

<sup>260</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(b) (1999).

<sup>261</sup> See ANNOTATED MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 5.6(b) Restrictions as Part of Settlement of Private Disputes (4th ed. 1999).

<sup>262</sup> See *id.*

<sup>263</sup> See VA. RULES OF PROFESSIONAL CONDUCT Rule 5.6(b) cmt. 2 (2000).

<sup>264</sup> Model Rules 3.2, 5.2, and 7.2, all covering presumably important subjects, do not appear in the Virginia Rules. Model Rule 3.2 deals with expediting litigation; 5.2 covers responsibilities of a subordinate lawyer; and 7.2 addresses the subject of advertising. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.2, 5.2, 7.2 (1999).

<sup>265</sup> Virginia Rules 3.1, 5.1, and 7.1 are followed immediately by Rules 3.3, 5.3, and 7.3 respectively.

<sup>266</sup> Telephone conversations with two members of the Special Committee to Study the Code of Professional Responsibility revealed explanations ranging from relative unimportance ("not really an ethics issue" and "not perceived as a problem in Virginia") to

### B. Retaining the Substance of the Virginia CPR

After examining the Virginia Rules, practitioners will likely conclude that there is little substantive difference between the new provisions and the former Virginia CPR, despite the dramatic differences in packaging. The primary reason for this result is the presumption of the Special Committee that well-established Virginia ethics principles should be "disturbed only for good reason."<sup>267</sup> In drafting the Virginia Rules, the Committee apparently kept this proposition firmly in mind as it approached its substantive review.

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coverage by other rules. Telephone Interview with John M. Levy, Chair, Transition Task Force, Virginia State Bar Special Committee to Study the Code of Professional Responsibility (March 23, 2000); Telephone Interview with Thomas E. Spahn, Reporter, Virginia State Bar Special Committee to Study the Code of Professional Responsibility (March 24, 2000). There is no known record available to the authors that shows Model Rule 3.2 (Expediting Litigation) was ever proposed. However, the full text of the Proposed Rules in Part II included a Rule 3.2 (Candor Toward the Tribunal). See VA. RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft Part II 1997), *supra* note 24, at 67. This rule is actually Rule 3.3 in the Model Rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1999). Obviously, this shifting of rules between the two standards could foster considerable confusion. Apparently, the decision was made in the final draft of the Virginia Rules to leave the omitted rules blank and skip over them without explanation rather than shift subsequent Model Rules into the voids in order to avoid the confusion. The Committee seems to have traded one ambiguity for another.

Proposed Rule 5.2(b) contained a safe harbor for subordinate lawyers. It provided that a "subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of a question of professional duty." VA. RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft Part II 1997), *supra* note 24, at 77. It is interesting to note that the Model Rules include the word "arguable" in the rule that the proposed Virginia Rules omitted. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) (1999) ("reasonable resolution of an arguable question of professional duty"). The Council refused to pass proposed Rule 5.2 that would have given subordinate lawyers some ethical leeway when acting under the guidance of a supervisory lawyer. See McClanahan, *supra* note 28, at A1. A persuasive criticism of the safe harbor provision was made by Council member Michael A. Glasser of Norfolk to the effect that all lawyers who have "Esquire" behind their names should be held to the same ethical standard. See *id.* They should be treated the same whether they are twenty-five years old or seventy. See *id.*

Rule 7.2 is entitled "Advertising" in the Model Rules. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1999). Model Rule 7.1 is called "Communications Concerning a Lawyer's Services." *Id.* Rule 7.1. Proposed Virginia Rule 7.2 was entitled "Recommendation or Solicitation of Professional Employment." VA. RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft Part III 1997), *supra* note 24, at 49. The approved draft of the Virginia Rules does not contain a Rule 7.2. See VA. RULES OF PROFESSIONAL CONDUCT (2000). However, Virginia Rule 7.1 is entitled "Communications and Advertising Concerning a Lawyer's Services." *Id.* Rule 7.1. Therefore, it appears that Model Rules 7.2 and 7.1 are merged into Virginia Rule 7.1. It would have been helpful to the reader of the Virginia Rules to have been offered a brief explanation of what has occurred in the merger and omission.

<sup>267</sup> Petition, *supra* note 1, at 3.

Where the substance of the Model Rules differed from the Virginia CPR, substance of the Virginia CPR provision was generally retained but was translated into the Model Rules format.<sup>268</sup> Doing so allowed the Committee to preserve familiar Virginia ethics principles but in an updated, user-friendly format. If the language of the Model Rules matched the substance of a Virginia CPR provision, the Special Committee generally adopted the Model Rules language.<sup>269</sup> Although the substance of the Virginia CPR provisions is retained, "Virginia practitioners will [now be able to] tap into the law and commentary illuminating the rule."<sup>270</sup> Where the Model Rules addressed areas of practice on which the Virginia CPR was silent, the Committee adopted the new provision, provided that the approach was "consistent with the general Virginia ethical framework and heritage."<sup>271</sup> In a few instances, the Special Committee recommended the adoption of provisions found in neither the Virginia CPR nor the Model Rules.<sup>272</sup>

### C. Making the Transition

In an effort to minimize uncertainty during the transition period, the Special Committee established a Transition Task Force, chaired by William & Mary law professor John Levy.<sup>273</sup> Rather than requiring a mandatory Continuing Legal Education (CLE) course,<sup>274</sup> the Special Committee opted to enlist the assistance of the Bar's Young Lawyers Conference in revising the Professionalism Course material.<sup>275</sup> These

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<sup>268</sup> See *id.* Decisions to prefer certain Virginia CPR provisions over their Model Rules counterparts were usually "made either because the former, although substantively similar to the latter, generally offered clearer guidance, or because the Committee, as a policy matter, preferred the specific provisions of the Disciplinary Rule." Donald Lemons, *Executive Summary of the Preliminary Report of the Virginia State Bar to Study the Virginia Code of Professional Responsibility*, VA. LAW., Dec. 1994, at 10, 10.

<sup>269</sup> See Petition, *supra* note 1, at 2; see also Lemons, *supra* note 268, at 10.

<sup>270</sup> Petition, *supra* note 1, at 3.

<sup>271</sup> *Id.* at 4.

<sup>272</sup> The third-party neutral provision found in Rule 2.10 is an example of completely unique innovation of the Special Committee. See VA. RULES OF PROFESSIONAL CONDUCT Rule 2.10 (2000).

<sup>273</sup> See Petition, *supra* note 1, at 8; see also Paul Fletcher, *VSB Begins Transition to Its New Ethics Rules*, VA. LAW. WKLY., Feb. 8, 1999, at A1. Apparently, the long drafting-and-approval process did not rob Special Committee Chair Dennis W. Dohnal of his sense of humor. "In what he described as his last act as chair, Dohnal passed the baton to Levy—literally. It was wrapped in shiny blue paper and festooned with a big bow. For the record—Levy accepted." *Id.* at A1.

<sup>274</sup> See Petition, *supra* note 1, at 9; see also Dohnal, *supra* note 230, at 10 (noting that voluntary CLE courses will be used to "phase in" substantive changes during the transition period).

<sup>275</sup> See Petition, *supra* note 1, at 8.

revisions have allowed practitioners to become familiar with both the new format and the substantive changes.

The Young Lawyers Conference has also compiled an annotation of sorts that allows Virginia practitioners the continued guidance of Legal Ethics Opinions, the vast majority of which will continue to apply under the Rules.<sup>276</sup> In addition, Richmond attorney Thomas E. Spahn prepared and made available charts depicting the substantive changes.<sup>277</sup>

#### *D. Final Summary*

In spite of a few shortcomings, the six years of effort that the Special Committee poured into drafting and redrafting the provisions of the Virginia Rules are reflected in the final product. The switch to the Model Rules format will simplify access to Virginia's ethics standards, making them more understandable, and ultimately encouraging more frequent consultation of the provisions.

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<sup>276</sup> See *id.* at 9. According to Virginia State Bar Ethics Counsel James M. McCauley, approximately ninety percent of the more than 1700 Legal Ethics Opinions issued under the Virginia CPR will survive the transition to the Virginia Rules. See Fletcher, *supra* note 273, at A1.

<sup>277</sup> 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* (last modified Jan. 25, 1999) <<http://www.vsb.org/profguides/chart.html>>.