

PROFESSIONAL RESPONSIBILITY

James M. McCauley *

I. AMENDMENTS TO THE VIRGINIA RULES OF PROFESSIONAL CONDUCT

A. *Multijurisdictional Practice*

The growing ease of interstate and international travel, the advancements in electronic communications and the resulting globalization of economic activity have made it ever more necessary for lawyers to expand the geographic scope of their practices. Both law firms and their clients increasingly conduct business on a nationwide and even worldwide scale. As the Commission on Multijurisdictional Practice recognized in 2002, “the geographic scope of a lawyer’s practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy.”¹ Thus lawyers need to be more able than previously to practice in multiple jurisdictions.

To this end, the Supreme Court of Virginia adopted new provisions to permit limited practice by foreign lawyers in the Commonwealth. These provisions included the adoption of a foreign legal consultant rule for lawyers admitted to practice in a foreign nation and a temporary practice rule for lawyers admitted in a foreign country or in a territory or state in the United States other than Virginia.

1. Foreign Legal Consultant

Effective January 1, 2009, the Supreme Court of Virginia adopted Rule 1A:7 allowing lawyers admitted to the bar of a for-

* Ethics Counsel, Virginia State Bar. J.D., 1982, University of Richmond School of Law; B.A., 1978, James Madison University.

1. AM. BAR ASS’N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 2 (2002), available at <http://www.abanet.org/cpr/mjp/intro-cover.pdf>.

foreign country to become certified in Virginia as “foreign legal consultants” (“FLCs”).² In 1993, the American Bar Association (“ABA”) House of Delegates approved the Model Rule for the Licensing and Practice of Foreign Legal Consultants (“Model Rule”),³ which addresses the work of foreign lawyers in United States jurisdictions.⁴ The Model Rule responded, in part, to the concern of foreign lawyers that, while American lawyers enjoyed a broad right of practice in other countries (or sought such a right in countries that did not afford it), foreign lawyers generally could not engage in the practice of law in the United States.⁵ Even if their practice is limited to advising on the law of their own countries, foreign lawyers must first attend an accredited American law school, sit for the bar examination, and become a full member of the Virginia State Bar.⁶ The ABA identified both a need for a streamlined admissions process for foreign lawyers seeking to establish a law practice providing limited legal services and a need for greater uniformity.⁷ Currently, thirty-one jurisdictions have an FLC rule.⁸

The new Virginia FLC rule, effective January 1, 2009,⁹ carves out a rather limited role for the FLC permitting her to render legal services only with regard to matters involving the law of the foreign nation(s) in which the person is admitted to practice, or international law.¹⁰ They are not authorized to appear in court.¹¹ Finally, an FLC cannot hold herself out as a member of the bar.¹²

2. See VA. SUP. CT. R. pts. 1A, 1A:7 (Repl. Vol. 2010).

3. MODEL RULE FOR THE LICENSING AND PRACTICE OF FOREIGN LEGAL CONSULTANTS annot. (1993) (amended 2006).

4. *Id.* § 1.

5. See Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126, 1127 (1998).

6. See AM. BAR ASS'N, *supra* note 1, at 2–3 (discussing “unauthorized practice of law” provisions that prohibit a lawyer “from engaging in the practice of law except in states in which they are licensed or otherwise authorized”).

7. *Id.* at 8.

8. See AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMM., FOREIGN LEGAL CONSULTANT RULES (2009), available at http://www.abanet.org/cpr/mjp/for_legal_consultants.pdf

9. VA. SUP. CT. R. pts. 1A, 1A:7(l) (Repl. Vol. 2010).

10. *Id.* R. 1A:7(d) (Repl. Vol. 2010).

11. *Id.*

12. *Id.* pt. 6, § II, R. 5.5(d)(2)(ii) (Repl. Vol. 2010).

2. Temporary Practice by U.S. Lawyers Not Admitted to the Virginia State Bar

The amendments to Rules 5.5 and 8.5 are the work product of the Virginia State Bar's Task Force on Multijurisdictional Practice ("MJP Task Force").¹³ These amendments became effective March 1, 2009.¹⁴ The MJP Task Force was created to study foreign attorney practice in Virginia and make recommendations concerning the requirements under which non-Virginia lawyers should be permitted to practice in Virginia.¹⁵ One of the foremost tasks of the MJP Task Force was to develop rules that define and regulate temporary practice in Virginia by lawyers who are not members of the Virginia State Bar.¹⁶ The amendment to Rule 5.5 addresses criteria for temporary practice and unauthorized practice of law in Virginia by foreign attorneys in Virginia.¹⁷ The amendment to Rule 8.5 addresses the disciplinary authority and jurisdiction of the Virginia State Bar over foreign attorneys practicing in Virginia.¹⁸

a. Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Virginia's Rule 5.5 is patterned after ABA Model Rule 5.5.¹⁹ As of January 25, 2010, forty-three states have adopted rules identical or similar to the ABA rule.²⁰ Rule 5.5 regulates the unauthorized practice of law in Virginia by non-Virginia licensed attorneys, both those from other U.S. jurisdictions and those licensed in foreign countries.²¹ Prior to the adoption of the amendment to

13. AM. BAR ASS'N, *supra* note 1, at 5–6.

14. R. 5.5 note, R. 8.5 note (Repl. Vol. 2010).

15. See Barbara J. Balogh & James M. McCauley, *Multijurisdictional Practice in Virginia*, VA. LAW., June/July 2005, at 52, 52.

16. *Id.*

17. R. 5.5(d) (Repl. Vol. 2010).

18. *Id.* R. 8.5(a) (Repl. Vol. 2010).

19. Compare *id.* R. 5.5 (Repl. Vol. 2010), with MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983) (amended 2007). They serve as models for the ethics rules of most states. *Preface to the 2010 Edition of AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT*, at ix (2010 ed.). Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility. *Id.* at ix–x. Preceding the Model Code were the 1908 Canons of Professional Ethics. *Id.* at ix.

20. See AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 (2010), http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf.

21. R. 5.5(d) (Repl. Vol. 2010).

Rule 5.5, unauthorized practice of law by foreign attorneys was regulated and monitored by the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law ("UPL Committee") and part six, section I(C) of the Rules of the Supreme Court of Virginia.²² Rule 5.5 now makes practice by non-Virginia licensed lawyers, other than as authorized by the rule, a disciplinary matter.²³ The UPL Committee will deal only with unauthorized practice of law by foreign attorneys.²⁴ Foreign lawyers who engage in temporary practice in Virginia are subject to the Virginia Rules of Professional Conduct and submit to the jurisdiction of the Virginia State Bar.²⁵

Rule 5.5 authorizes a foreign lawyer to provide legal services in Virginia on a "temporary and occasional basis" only if they are: (1) undertaken in association with a licensed Virginia lawyer who actively participates in the matter; (2) related to a pending or potential proceeding in Virginia or another jurisdiction if the lawyer is authorized to appear or expects to be so authorized; (3) related to mediation or arbitration in Virginia or another jurisdiction if such services are related to the lawyer's practice in his licensing jurisdiction and do not require *pro hac vice* admission; or (4) related to representation of a client in the foreign lawyer's licensing jurisdiction or a jurisdiction governed by international law.²⁶

Rule 5.5 prohibits a lawyer from establishing "an office or other systematic and continuous presence in Virginia," except as authorized by other Rules of Professional Conduct or other law.²⁷ The rule retains the longstanding restrictions under the current Rule 5.5 regarding the employment of a lawyer whose license has been suspended or revoked.²⁸

22. *Id.* R. 5.5 note (Repl. Vol. 2010) (Prior Rule Comparison).

23. *Id.* R. 5.5 cmt. 19 (Repl. Vol. 2010).

24. *Id.* R. 5.5 note (Repl. Vol. 2010) (Prior Rule Comparison).

25. *Id.* R. 8.5(a) (Repl. Vol. 2010) ("A lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia.").

26. *Id.* R. 5.5(d)(4) (Repl. Vol. 2010).

27. *Id.* R. 5.5(d)(2) (Repl. Vol. 2010).

28. *Id.* R. 5.5(a), (b) (Repl. Vol. 2010).

b. Rule 8.5: Disciplinary Authority; Choice of Law

Rule 8.5, patterned after ABA Model Rule 8.5, addresses disciplinary authority and choice of law in disciplinary cases, and provides enforcement authority for lawyers engaged in temporary practice under Rule 5.5.²⁹ As of January 25, 2010, forty-four states have adopted rules identical or similar to the ABA rule.³⁰ The amendment to Virginia Rule 8.5 extends the Virginia State Bar's disciplinary authority over any lawyer who provides or holds herself out as providing legal services in Virginia regardless of where the lawyer is licensed.³¹ Under Rule 8.5, a lawyer not admitted in Virginia who provides or holds herself out as providing legal services in Virginia, shall consent to appointment of the Clerk of the Supreme Court of Virginia as her agent for disciplinary service of process.³²

If a foreign lawyer is subject to investigation and discipline by the Virginia State Bar, the choice of law to be applied in a disciplinary matter will be: (1) the rules of the court, agency, or tribunal if the conduct in question occurred in connection with a matter before such court, agency, or tribunal; (2) for any other conduct, the rules of the jurisdiction where the conduct occurred; or (3) the Virginia Rules of Professional Conduct, if the lawyer provides or holds himself out as providing legal services in Virginia.³³ The ABA Model Rule provides for a choice of law where the conduct had its "predominant effect";³⁴ however, the MJP Task Force chose not to include this in the Virginia rule revision because it believed that where the conduct occurred provided a brighter line for enforcement than the "predominant effect" test.³⁵

29. Compare *id.* R. 8.5(a)–(b) (Repl. Vol. 2010), with MODEL RULES OF PROF'L CONDUCT R. 8.5 (1983) (amended 2002). Rule 5.5 authorizes the limited practice of law by foreign lawyers in the Commonwealth of Virginia. R. 5.5(d) (Repl. Vol. 2010).

30. See AM. BAR ASS'N, STATE IMPLEMENTATION OF MODEL RULE 8.5 (2010), http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf.

31. R. 8.5(a) (Repl. Vol. 2010).

32. *Id.*

33. *Id.* R. 8.5(b)(1)–(3) (Repl. Vol. 2010).

34. MODEL RULES OF PROF'L CONDUCT R. 8.5 (1983) (amended 2002).

35. See R. 8.5 note (Repl. Vol. 2010) (Committee Commentary).

B. *Rule 1.17: Sale of a Law Practice*

Rule 1.17 establishes the procedure under which a lawyer may sell or purchase a law practice and its goodwill, partially or in its entirety, but requires the seller to cease practicing law in the geographic area in which the practice has been conducted.³⁶ As originally written, the rule prohibited the seller from practicing law entirely in the geographical area, even when that seller sold only a particular portion of the practice but retained other portions.³⁷ To give effect to the seller's ability to sell a particular portion of the practice, effective January 4, 2010, the seller may continue practicing in those areas that were not sold in the geographical area where the practice was conducted.³⁸ In other words, the rule amendment prohibits the selling lawyer from engaging in the private practice of law in the geographic area *only with respect to the particular practice area* that has been sold.³⁹ As amended, the rule will require a lawyer selling his practice to sell the *entire practice or area of practice* to prevent the buyer from retaining the most attractive or lucrative cases at the expense of clients with less appealing cases, thereby protecting clients who may find it difficult to secure substitute counsel.⁴⁰

C. *Rules 1.9 and 1.11: Conflicts of Interest in Moving From Private Practice to Public Employment*

Conflict of interest problems may arise when a lawyer moves from private to government practice. For example, Lawyer A is in private practice and defends Client in a criminal case. Client is convicted and appeals to the Virginia Court of Appeals. While the case is on appeal, Lawyer A leaves private practice and joins the local Commonwealth Attorney's office. The Court of Appeals reverses and remands Client's case to the trial court for retrial. The Commonwealth Attorney's office that Lawyer A joined is responsible for the retrial of that case. Assuming Lawyer A has a conflict and cannot prosecute the case, are all the other prosecutors in the same office disqualified?

36. *Id.* R. 1.17(a) (Repl. Vol. 2010).

37. *Id.* R. 1.17(a) (Repl. Vol. 1999).

38. *Id.* R. 1.17(a) & note (Repl. Vol. 2010).

39. *Id.* R. 1.17(a) & cmt. 5 (Repl. Vol. 2010).

40. *Id.* R. 1.17(b) & cmt. 6 (Repl. Vol. 2010).

Effective January 4, 2010, the court approved amendments to Rules 1.9 and 1.11 to make clear that Rule 1.11(d), rather than Rule 1.9, applies to conflicts of interest created when a lawyer moves from private practice to public employment.⁴¹ Rule 1.9 is the general conflict of interest rule that applies when a lawyer represents a client directly adverse to a former client in the same or a substantially related matter.⁴² Conflicts under Rule 1.9 are imputed to all the other lawyers working in the same law firm or office.⁴³ Rule 1.11 controls conflicts created when lawyers move from private to public practice and vice versa.⁴⁴ Rule 1.11(d) prohibits Lawyer A from prosecuting the former client if Lawyer A was “personally and substantially [involved with the matter] while in private practice.”⁴⁵ However, this conflict is *not* imputed to the other prosecutors in the office who may prosecute Client and therefore, appointment of a special prosecutor is not necessary.⁴⁶

D. *Lawyer Advertising and Solicitation—Sunsetting of Standing Committee on Lawyer Advertising and Solicitation*

Effective January 22, 2010, the Supreme Court of Virginia discontinued the Standing Committee on Lawyer Advertising and Solicitation and, in cases where disciplinary enforcement is deemed necessary, transferred the responsibility of monitoring and enforcing the rules regarding lawyer advertising and solicitation to the Standing Committee on Legal Ethics and the Office of Bar Counsel.⁴⁷ Much of the monitoring of lawyer advertising is staff generated and includes reviewing lawyer advertising communicated via all media including print, television, radio, and In-

41. Compare *id.* R. 1.9 & cmt. 5 (Repl. Vol. 2010), and *id.* R. 1.11 (Repl. Vol. 2010), with *id.* R. 1.9 (Repl. Vol. 2009), and R. 1.11 (Repl. Vol. 2009).

42. R. 1.9(a) (Repl. Vol. 2010) (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.”).

43. *Id.* R. 1.10(a) (Repl. Vol. 2010) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).”).

44. *Id.* R. 1.11 (Repl. Vol. 2010).

45. *Id.* R. 1.11(d)(1) (Repl. Vol. 2010).

46. *Id.* R. 1.11(e) (Repl. Vol. 2010) (“Paragraph (d) does not disqualify other lawyers in the disqualified lawyer’s agency.”).

47. Alan S. Anderson, *Standing Committee on Lawyer Advertising and Solicitation*, VA. ST. B. (Aug. 27, 2009), <http://www.vsb.org/site/about/lawyer-advertising-0809>.

ternet.⁴⁸ The Virginia State Bar staff issues a proactive non-compliance letter that informs the lawyer that his advertisement does not comply with an applicable rule.⁴⁹ The staff requests the lawyer to rectify the noncompliance problem in exchange for closing the informal investigation, which creates no disciplinary record for the lawyer.⁵⁰ This approach keeps most lawyer advertising issues out of the disciplinary process except in rare cases of recalcitrant lawyers who refuse to rectify the problem informally or lawyers who engage in a pattern of repeated violations of the same rule.

II. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Lack of Competence; Filing Frivolous Pleadings*

The Virginia State Bar filed disciplinary charges against a lawyer for filing a frivolous lawsuit against a physician on behalf of a medical malpractice plaintiff.⁵¹ The lawyer elected to have the disciplinary case tried by a three-judge court, which imposed a public reprimand and found that the lawyer violated Rule 3.1 of the Rules of Professional Conduct.⁵² On an appeal of right, the Supreme Court of Virginia affirmed the three-judge court's decision because the defendant physician had no involvement with the plaintiff's surgery or medical care.⁵³ In fact, the defendant physician had no staff privileges at the hospital and was not present where the plaintiff's surgery was performed.⁵⁴ The court noted that the lawyer never attempted to contact or request medical records from the physician to verify whether this particular doctor had participated in the plaintiff's surgery or that the plaintiff had ever been his patient.⁵⁵ In defense of the disciplinary charges, the lawyer claimed that he relied on an operative report

48. See Alison P. Landry, *Standing Committee on Lawyer Advertising and Solicitation*, VA. ST. B., http://www.vsb.org/docs/69AP/2007_A-R_SCOLAS.pdf (last visited Oct. 30, 2010).

49. See Anderson, *supra* note 47.

50. See *id.*

51. *Weatherbee v. Va. State Bar ex rel. Fourth Dist.—Section I Comm.*, 279 Va. 303, 305, 307, 689 S.E.2d 753, 754, 755 (2010).

52. *Id.* at 305–06, 689 S.E.2d at 754.

53. *Id.* at 309, 689 S.E.2d at 756.

54. *Id.*

55. *Id.*

that indicated that a “Bob Vaughan” had assisted in the surgery.⁵⁶ From a website maintained by the Virginia Board of Medicine, the lawyer deduced that the only Dr. Vaughan practicing in the Winchester area was a Dr. Ward P. Vaughan and assumed this was the doctor identified in the operative report.⁵⁷ Consequently, the lawyer filed suit against this doctor on that basis.⁵⁸ The lawsuit damaged the doctor’s reputation and had an adverse effect on his medical practice.⁵⁹ The court found that there were simple tasks the lawyer failed to perform that would have informed him that the doctor he sued had no involvement with his client’s care.⁶⁰ The court concluded that the lawsuit had no basis in fact or law and was frivolous within the meaning of Rule 3.1.⁶¹ In *Weatherbee v. Virginia State Bar ex rel. Fourth Dist.—Section I Comm.*, the Supreme Court gave some guidance as to what constitutes a “frivolous” lawsuit under Rule 3.1 by quoting one of the rule’s comments:

The filing of an action or defense or similar action taken for a client 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. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.⁶²

In another recent case, plaintiff Moseley filed suit on behalf of Ammons against the Christian Coalition of America alleging breach of a contract.⁶³ The contract contained a provision requir-

56. *Id.* at 307, 689 S.E.2d at 755.

57. *Id.*

58. *Id.*

59. *Id.* at 308, 689 S.E.2d at 756.

60. *Id.* at 309, 689 S.E.2d at 756.

61. *Id.* at 309–10, 689 S.E.2d at 756. Rule 3.1 states: “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.” VA. SUP. CT. R. pt. 6, § II, R. 3.1 (Repl. Vol. 2010).

62. 279 Va. at 309, 689 S.E.2d at 756 (quoting R. 3.1 cmt. 2. (Repl. Vol. 2010)).

63. *Moseley v. Va. State Bar ex rel. Seventh Dist. Comm.*, 280 Va. 1, 1, 694 S.E.2d

ing arbitration in the event of a dispute.⁶⁴ A circuit court sanctioned Moseley and Ammons because they held an evidentiary hearing regarding the existence of an agreement to arbitrate in spite of the fact that they knew Ammons' employment contract contained an arbitration clause.⁶⁵ Moseley argued that although a contract existed, Ammons did not have a copy, and therefore was unsure if the contract contained an arbitration clause.⁶⁶ On cross-examination, however, Ammons admitted that he gave a copy of the contract to Moseley.⁶⁷ The circuit court also reprimanded Ammons and Moseley, who filed in excess of eighty pleadings and motions in the case, for using abusive discovery tactics and filing frivolous pleadings.⁶⁸ The circuit court stated that Ammons and Moseley conducted the proceeding without any basis and with the goal "to specifically harm, deter, and harass the Defendant through vexatious litigation."⁶⁹ Moseley and Ammons were sanctioned and ordered to pay attorney's fees and costs.⁷⁰ The circuit court revoked Moseley's right to practice before that court, Moseley appealed, and the Virginia Supreme Court affirmed.⁷¹ In this disciplinary proceeding, a three-judge court found that Moseley had violated Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2, and 8.4(a), (b), and (c).⁷² The panel suspended Moseley's license to practice

586, 588 (2010).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1–2, 694 S.E.2d at 588.

69. *Id.* at 2, 694 S.E.2d at 588 (internal quotation marks omitted).

70. *Id.*

71. *Id.* at 1–2, 694 S.E.2d at 588; *see also In re Moseley*, 273 Va. 688, 690–91, 643 S.E.2d 190, 191 (2007) (affirming the Arlington County Circuit Court's decision to revoke Moseley's privilege to practice before it).

72. 280 Va. at 2, 694 S.E.2d at 589 (applying VA. S. CT. R. pt. 6, § II, R. 3.3(a)(1) (Repl. Vol. 2010) (providing that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal"); *id.* R. 3.4(e) (Repl. Vol. 2010) ("A lawyer shall not . . . [m]ake a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."); *id.* R. 3.4(j) (Repl. Vol. 2010) ("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 the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."); *id.* R. 4.1(a) (Repl. Vol. 2010) (providing that "in the course of representing a client a lawyer shall not knowingly . . . [m]ake a false statement of fact or law"); *id.* R. 8.2 (Repl. Vol. 2010) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer."); *id.* R. 8.4(a) (Repl. Vol. 2010) (providing that "[i]t is professional misconduct for a lawyer to . . . violate the Rules of Professional Conduct . . . through the acts of another"); *id.* R. 8.4(b) (Repl. Vol. 2010) (providing that "[i]t is profes-

law for six months.⁷³ The Supreme Court of Virginia affirmed, holding that a six-month suspension was reasonable in view of the evidence and the numerous rule violations in this case.⁷⁴

In another Virginia State Bar disciplinary proceeding, the Supreme Court of Virginia found that there was no error in an order revoking the license to practice law of an attorney who, while under a prior suspension of his license to practice law, represented himself in domestic relations proceedings during which he asserted persistently and repeatedly before the circuit court and the Court of Appeals of Virginia that he was no longer required to support his children.⁷⁵ In light of the facts and applicable law, the court found his position was completely frivolous and in violation of Rule 3.1 of the Virginia Rules of Professional Conduct.⁷⁶ The Court noted that “a lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to the Rules”;⁷⁷ and thus there was no merit to the lawyer’s constitutional challenge to the application of the Rules in this case.⁷⁸ Respondent is subject to Rule 3.1 when representing himself.⁷⁹

B. *Attorney-Client Privilege Waived by Inadvertent Disclosure*

In a medical malpractice case, the defendant doctor waived the attorney-client privilege when he wrote a letter to his attorney regarding potential negligence in his examination of key X-rays

sional misconduct for a lawyer to . . . commit a criminal or deliberately wrongful act”); *id.* R. 8.4(c) (Repl. Vol. 2010) (providing that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”).

73. *Id.* at 2, 694 S.E.2d at 589.

74. *Id.* at 5, 694 S.E.2d at 590. Moseley was found guilty of other violations including making false and reckless statements about the judge and opposing counsel. *See id.* at 2–3, 694 S.E.2d at 589.

75. *Barrett v. Va. State Bar ex rel. Second Dist. Comm. (Barrett II)*, 277 Va. 412, 412, 416–17, 675 S.E.2d 827, 828, 830 (2009). At the time this disciplinary proceeding was pending, Mr. Barrett’s law license was suspended for previous violations of the Rules of Professional Conduct. *Id.* at 413, 675 S.E.2d at 828.

76. *Id.* at 418–19, 675 S.E.2d at 831–32 (applying R. 3.1 (Repl. Vol. 2010)).

77. *Id.* at 414, 675 S.E.2d at 829.

78. *Id.* at 416, 675 S.E.2d at 830.

79. *See id.* at 414, 675 S.E.2d at 829. Representing himself, Barrett argued that the Rules “apply only when a lawyer is representing a client, not when a lawyer represents himself in a proceeding.” *Id.* (quoting *Barrett v. Va. State Bar ex rel. Second Dist. Comm. (Barrett I)*, 272 Va. 260, 267, 634 S.E.2d 341, 345 (2006)). The court observed that it had rejected this same argument in a prior case involving Mr. Barrett. *Id.* (quoting *Barrett I*, 272 Va. at 267–68, 634 S.E.2d at 345).

and that letter was produced to the plaintiff during discovery.⁸⁰ While the doctor's disclosure of the letter was inadvertent, the doctor waived his attorney-client privilege by failing to take reasonable measures to ensure and maintain the confidentiality of the letter.⁸¹ The Supreme Court of Virginia adopted a five-part test for determining whether an inadvertent disclosure of a document covered by the attorney-client privilege waives the privilege.⁸² The court held that the attorney-client privilege had been waived and reversed the trial court decision, applying these five factors:

- (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.⁸³

Applying these factors, the court found that the privilege was waived because the doctor and his lawyer had not used reasonable measures to prevent the inadvertent disclosure.⁸⁴ Neither the doctor nor the lawyer had undertaken to review the documents before they were produced in discovery.⁸⁵ Instead, they relied on a third-party contractor to perform the task of gathering and producing the documents in the ordinary course of discovery.⁸⁶ The doctor and his lawyer also failed to take immediate action to rectify the inadvertent disclosure.⁸⁷ In her answers to interrogatories, the plaintiff disclosed the existence of the letter the doctor wrote to his lawyer and her reliance upon it as a basis to establish the doctor's negligence.⁸⁸ The defendant physician and his

80. *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 118, 694 S.E.2d 545, 547 (2010).

81. *Id.*

82. *Id.* at 126–27, 694 S.E.2d at 552.

83. *Id.* at 127, 694 S.E.2d at 552. Many jurisdictions now follow the five-factor test applied by the *Walton* court in determining whether there is a waiver of the attorney-client privilege when a document is ostensibly privileged but inadvertently produced to an opponent. See Anne Jordan, *Ethics*, in ELECTRONIC DISCOVERY GUIDANCE 2010: WHAT CORPORATE AND OUTSIDE COUNSEL NEED TO KNOW, at 283, 313–16 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 832, 2010).

84. 280 Va. at 128–29, 694 S.E.2d at 553.

85. *Id.* at 128, 694 S.E.2d at 553.

86. *Id.* at 128–29, 694 S.E.2d at 553.

87. *Id.* at 129, 694 S.E.2d at 553.

88. *Id.*

lawyer took no action until a year and half later when they moved the court for a protective order.⁸⁹

C. Disciplinary Proceedings Are Not Subject to Statutes of Limitations

In *Moseley v. Virginia State Bar ex rel. Seventh District Committee*, the Supreme Court of Virginia reaffirmed well-established precedent that statutes of limitations do not apply to proceedings to discipline a lawyer.⁹⁰

D. Criminal Appeals—Neglect—Failure to Appear at Oral Argument

Failure to appear for oral argument in two criminal appeals before the court of appeals justified holding the respondent lawyer in contempt.⁹¹ Based on the respondent attorney's prior disciplinary record, consisting of two prior public reprimands for failure to perfect and prosecute criminal appeals, the court of appeals suspended respondent's privilege to practice before that court for two years.⁹² This decision reinforces the principle established in *In re Moseley* that a court has the inherent power to discipline a lawyer for misconduct, separate and independent from the authority given the Virginia State Bar, and may suspend or revoke that lawyer's right to practice before that particular court.⁹³ On April 23, 2010, the Virginia State Bar Disciplinary Board ("Disciplinary Board") suspended respondent's license to practice law for sixty days for violating professional rules that govern diligence and communication.⁹⁴ The Disciplinary Board found that

89. *Id.*

90. *Moseley v. Va. State Bar ex rel. Seventh Dist. Comm.*, 280 Va. 1, 4, 694 S.E.2d 586, 589 (2010) (citing *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 842, 172 S.E. 282, 286 (1934)).

91. *In re Davey*, 54 Va. App. 228, 228, 677 S.E.2d 66, 66 (Ct. App. 2009).

92. *Id.* at 229, 677 S.E.2d at 66.

93. *In re Moseley*, 273 Va. at 680, 696, 643 S.E.2d 190, 195 (2007) (citing *Legal Club of Lynchburg v. Light*, 137 Va. 249, 250, 119 S.E. 55, 55 (1923)).

94. *Davey*, Nos. 09-090-079790 & 09-090-079865 (Va. State Bar Disciplinary Bd. Apr. 29, 2010) (order of suspension), available at <http://www.vsb.org/docs/Davey-052110.pdf>.

respondent failed to perfect appeals to the Virginia Court of Appeals in three criminal cases and failed to appear for oral arguments in two other cases.⁹⁵

E. *Improper Criticism of Judges*

In *Moseley*, after an evidentiary hearing in which respondent and his client were sanctioned, Moseley wrote a letter to the American Arbitration Association, complaining that “the circuit court judge who had adjudicated the evidentiary hearing ‘was caught engaging in serious misconduct’ and that the circuit court judge was the subject of an investigation by the Judicial Inquiry and Review Commission.”⁹⁶ Moseley e-mailed colleagues, stating that “the monetary sanctions award entered by the circuit court judge was ‘an absurd decision from a whacko judge, whom I believe was bribed,’ and that he believed that opposing counsel was demonically empowered.”⁹⁷ A three-judge court found that Moseley had violated Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2, and 8.4(a), (b), and (c), and suspended his license to practice law for six months.⁹⁸ Moseley argued that the charges brought by the Virginia State Bar under Rule 8.2 were unconstitutional as he was being punished for purely private speech, and the rule was void for vagueness as it failed to distinguish between a lawyer’s private versus public speech.⁹⁹ To these claims, the court responded:

[P]ublic statements by attorneys concerning the integrity of judges and judicial officers are not protected speech because they create a “substantial likelihood of material prejudice to the administration of justice.” Moseley clearly made derogatory statements about the integrity of the judicial officer adjudicating his matters and those statements were made either with knowing falsity or with reckless disregard for their truth or falsity. Therefore we hold that Moseley’s Contentions that Rule 8.2 is void for vagueness and that his statements were not a proper predicate for discipline under that Rule are without merit.¹⁰⁰

95. *Id.*

96. *Moseley v. Va. State Bar ex rel. Seventh Dist. Comm.* 280 Va. 1, 2, 694 S.E.2d 586, 588 (2010).

97. *Id.*

98. *Id.*, 694 S.E.2d at 589 (applying VA. SUP. CT. R. pt. 6, § II, R. 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2, 8.4(a)–(c) (Repl. Vol. 2010)).

99. *Id.*

100. *Id.* at 3, 694 S.E.2d at 589 (quoting *Anthony v. Va. State Bar ex rel. Ninth Dist.*

The court affirmed the three-judge panel's order imposing a six-month suspension of Moseley's law license.¹⁰¹

In another recent case, while attempting to have a circuit judge disqualified, the respondent lawyer made several remarks that were found to have violated Rule 8.2:

"I don't feel that you're appropriate to ever hear any cases that I might be . . . defending."

"It makes me feel comfortable for you not to hear any jury trial that I got against any of my clients."

Respondent accused [the judge] of harboring animosity toward Respondent and implied it would cause [the judge] to treat the defendant unfairly.

Respondent suggested that [the judge] was biased for the Commonwealth in criminal cases.¹⁰²

A three-judge court found Respondent violated Rule 3.5(f) (conduct intended to disrupt a tribunal) and Rule 8.2 (attacking qualifications or integrity of a judge).¹⁰³ Respondent defaulted on his appeal by failing to timely file the notice of appeal with the trial court.¹⁰⁴

F. *A Proceeding to Discipline a Lawyer is Civil in Nature*

The Supreme Court of Virginia has previously stated that a proceeding to discipline an attorney is a civil, rather than a criminal or quasi-criminal, proceeding.¹⁰⁵ In *Moseley*, the respondent argued that his due process rights were violated, insisting disciplinary proceedings are quasi-criminal.¹⁰⁶ Therefore, he claimed that "the original complaint was not valid because it was not verified by an affidavit that included detailed allegations which could

Comm., 270 Va. 601, 610, 621 S.E.2d 121, 126 (2005)) (internal quotation marks omitted).

101. *Id.* at 5, 694 S.E.2d at 590.

102. Va. State Bar *ex rel.* Second Dist. Comm. v. Brown, No. CL09-5166, slip op. at 2-3 (Va. Cir. Ct. Dec. 15, 2009) (Norfolk City) (first alteration in original).

103. *Id.* at 3.

104. *Id.*, *dismissed*, No. 100491 (Va. Ct. App. May 10, 2010).

105. 208 Va. at 3, 694 S.E.2d at 589 (citing Norfolk & Portsmouth Bar Ass'n v. Dreyery, 161 Va. 833, 837, 172 S.E. 282, 284 (1934)).

106. *Id.* Some authority supporting Moseley's argument exists. *See, e.g., In re Ruffalo*, 390 U.S. 544, 551 (1968) (citation omitted) ("These are adversary proceedings of a quasi-criminal nature.").

not be amended during the proceedings.”¹⁰⁷ Moseley argued the three-judge panel “erred in failing to dismiss as invalid various allegations that never identified the precise conduct violating the rules.”¹⁰⁸ Although Moseley was entitled to notice of the charges of misconduct, the court responded that “it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer.”¹⁰⁹ The court found that “Moseley had adequate notice and opportunity to answer, as he was present for the proceedings and responded not only to the charges of misconduct pending against him, but disputed the underlying facts as well.”¹¹⁰ Further, the Court held that the Virginia State Bar complied with Virginia Code section 54.1-3935 by verifying the district committee complaint through an affidavit.¹¹¹ The court then rejected Moseley’s contention that his due process rights were violated by the panel’s proceedings.¹¹²

G. *Virginia State Bar Counsel’s Delay in Filing Charges Not a Basis for Dismissal Absent Showing of Prejudice*

Dismissal of a complaint for failure of the Virginia State Bar to comply with a procedural requirement of the Rules of the Supreme Court of Virginia is inappropriate absent some showing of prejudice to the respondent because of the failure.¹¹³ In *Green v. Virginia State Bar*, the Supreme Court of Virginia ruled a delay for more than one year in serving the charges of misconduct is not a basis for dismissal absent a showing that respondent was prejudiced by the delay.¹¹⁴ The court observed:

We have previously admonished the Bar for the untimely performance of certain of its responsibilities for professional regulation in a prior proceeding against Green, and the Court again states its disapproval of the Bar’s delay in the certification of ethical complaints

107. 208 Va. at 3, 694 S.E.2d at 589.

108. *Id.*

109. *Id.* (quoting Seventh Dist. Comm. of the Va. State Bar v. Gunter, 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971)).

110. *Id.*

111. *Id.*

112. *Id.*

113. See *Motley v. Va. State Bar*, 260 Va. 251, 257–58, 536 S.E.2d 101, 103–04 (2000). In *Motley*, the Virginia State Bar sent certification to respondent eleven months after subcommittee made the decision to certify, although the Rule at that time required only mailing the complaint “promptly.” *Id.*

114. 278 Va. 162, 172–74, 677 S.E.2d 227, 231–32 (2009).

from a subcommittee. However, absent a showing of prejudice by the attorney, “[a]ny betrayal of the trust which the attorney is sworn to keep demands appropriate discipline; a delay in prosecution, without more, cannot override this necessity. If the conduct of a member of the bar disqualifies [the attorney] from the practice of law, it would not be in the public interest to dismiss the disciplinary proceedings for no reason other than the Bar’s failure to prosecute [him] with the proper dispatch.” The burden of demonstrating prejudice remains on Green, and he failed to establish how he was prejudiced by the delay in this case.¹¹⁵

III. DECISIONS BY THREE-JUDGE COURTS, VIRGINIA STATE BAR DISCIPLINARY BOARD, AND DISTRICT COMMITTEES

A. *Authority of Virginia State Bar Counsel to Dismiss or Withdraw Charges of Misconduct*

In a recent case, a three-judge court acknowledged that pursuant to part 6, section IV, paragraph 13.B.7a(1) of the Rules of the Supreme Court of Virginia, “Bar Counsel is given the authority to ‘initiate, investigate, present or prosecute Complaints’ and to ‘act independently and exercise prosecutorial autonomy and discretion.’”¹¹⁶ In granting Virginia State Bar Counsel’s motion to dismiss, the three-judge court found that “[i]nherent within . . . [the Virginia State Bar’s] authority is the authority to move the court to dismiss a complaint with prejudice.”¹¹⁷

B. *Fees and Fee Agreements*

Because of the lawyer’s fiduciary relationship with a client, the fee agreement between the lawyer and the client is not governed solely by the law applicable to ordinary commercial contracts.¹¹⁸

115. *Id.* at 173–74, 677 S.E.2d at 232 (alteration in original) (quoting *In re Williams*, 513 A.2d 793, 796, 797 (D.C. 1986)) (citing *Green v. Va. State Bar*, 274 Va. 775, 786, 652 S.E. 2d 118, 123 (2007)).

116. *Va. State Bar ex rel. Third Dist. Comm. Section III v. Corcoran*, No. CL07-2749-3, slip op. at 2 (Va. Cir. Ct. Aug. 2, 2007) (Richmond City) (quoting VA. SUP. CT. R. pt. 6, § IV, Para. 13B.7a(1) (Repl. Vol. 2007)).

117. *Id.*

118. It is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each.

Consequently, certain provisions in a contract with a client may be held unethical even if the client has agreed to a particular term or condition.

In a recent decision, respondent's agreement with a client stipulated that unpaid legal fees could not be discharged in bankruptcy and permitted the lawyer to charge the client for time spent defending and responding to any bar investigation.¹¹⁹ In this case, the Disciplinary Board found the respondent lawyer violated Rules 1.5, 1.7(a)(2) and 8.4 of the Virginia Rules of Professional Conduct.¹²⁰

Some lawyers include in their contract with a client a provision stating that certain fees are "minimum" or "nonrefundable." Nonrefundable advanced legal fees are improper because they potentially violate the rule requiring an attorney who has been discharged to refund any advanced legal fee that has not been earned,¹²¹ and because "[a] fee that is not earned is per se an unreasonable fee."¹²² The Virginia State Bar Committee on Legal Ethics "has previously opined and continues to be of the opinion that any fee arrangement involving advanced legal fees and providing for a non-refundable or minimum fee violates the Disciplinary Rules and is thus improper."¹²³ In a recent disciplinary case, a lawyer received a public reprimand with terms for using nonrefundable fee provisions in contracts with clients, in violation of Rules 1.5 and 8.4(a).¹²⁴ In another recent case involving abuse of legal fees, the Disciplinary Board found the respondent lawyer violated Rule 1.5 by charging a client for time spent preparing for and appearing at a motion to withdraw from the client's case.¹²⁵

Heinzman v. Fine, Fine, Legum & Fine, 217 Va. 958, 962-63, 234 S.E.2d 282, 285 (1977) (quoting Krippner v. Matz, 287 N.W. 19, 24 (Minn. 1939)).

119. Gay, No. 08-022-073165 (Va. State Bar Disciplinary Bd. Feb. 17, 2010) (order), available at www.vsb.org/docs/Gay_02-21-10.pdf.

120. *Id.*

121. R. 1.16(d) (Repl. Vol. 2010) (requiring the lawyer, upon termination of representation to, *inter alia*, refund unearned legal fees to the client).

122. See VA. CODE ANN. L. Ethics Op. 1606 (Repl. Vol. 2002 & Cum. Supp. 2010).

123. *Id.*

124. Oulton, No. 05-032-3243 (Va. State Bar Third Dist. Subcomm. Sept. 19, 2008) (subcommittee determination (public admonition with terms)), available at www.vsb.org/docs/Oulton_11-20-08.pdf (discussing, *inter alia*, R. 1.5, R. 8.4(a) (Repl. Vol. 2010)). While Rule 1.5(a) requires that legal fees be reasonable, comment 4 to Rule 1.5 states (in part) that "[a] lawyer may require advance payment of a fee but is obliged to return any unearned portion." R. 1.5(a) cmt. 4 (Repl. Vol. 2010).

125. Gay, No. 08-022-073165 (Va. State Bar Disciplinary Bd. Jan. 22, 2010) (order),

C. *Duty to Pay Medical Liens*

A three-judge court ruled that a lawyer violates Rule 1.15(c)(4) if he refuses to honor a chiropractor's consensual lien or assignment of benefits with a client, which directs the client's lawyer to pay the total bill owed to the chiropractor out of the settlement of the client's personal injury case.¹²⁶ Although the lawyer was not a party to the assignment of benefits,¹²⁷ the lawyer knew that the client had contracted with his chiropractor to pay the medical bill out of settlement.¹²⁸ When the chiropractor refused to reduce his bill, the lawyer unilaterally arbitrated the dispute by disbursing to the chiropractor an amount less than what was owed.¹²⁹ A three-judge court ruled the lawyer failed to either hold the amount in dispute in trust until the client and chiropractor could resolve their dispute or interplead the disputed funds into court.¹³⁰ This was an appeal from a district committee determination.¹³¹ The court cited with approval Legal Ethics Opinion 1747 and comment 4 to Rule 1.15 and affirmed the district committee's finding of misconduct, but reduced the sanction from a public admonition to a dismissal *de minimis*.¹³²

D. *Neglect: Withholding Services Until Client Pays Overdue Fees*

In a separate case, the Disciplinary Board concluded that respondent lawyer violated Rules 1.16, 1.3, 1.7, and 8.4(a) and (b) by withholding services because the client was delinquent in paying the respondent's fees.¹³³ Based on the client's failure to pay outstanding legal fees, the respondent lawyer withheld submitting a sketch final decree of divorce to the court for entry and failed to

available at www.vsb.org/docs/Gay_02-21-10.

126. See Va. State Bar *ex rel.* Third Dist. Comm. v. Johnson, No. CL09-2034-4, slip op. at 14 (Cir. Ct. July 14, 2009) (Richmond City) (applying R. 1.15(c)(4) (Repl. Vol. 2010)), available at www.vsb.org/docs/Johnson_08-24-09.pdf.

127. *Id.* at 13.

128. *Id.* at 5.

129. *Id.* at 6, 13.

130. *Id.* at 6.

131. *Id.* at 1.

132. *Id.* at 9–11, 15 (citing, inter alia, VA. SUP. CT. R. pt. 6, § 11, R. 1.15 cmt. 4 (Repl. Vol. 2009); VA. CODE ANN. L. Ethics Op. 1747 (Repl. Vol. 2002 & Cum. Supp. 2010)).

133. Gay, No. 08-022-073165 (Va. State Bar Disciplinary Bd. Jan. 22, 2010) (order), available at www.vsb.org/docs/Gay_02-21-10. The supreme court dismissed his appeal on April 30, 2010. Gay v. Va. State Bar, No. 100656 (Va. dismissed Apr. 30, 2010).

withdraw for a period of fourteen-and-one-half months.¹³⁴ The divorce could have been completed, in the respondent's own estimation, in "one billable hour."¹³⁵ Nevertheless, the respondent lawyer refused to proceed until he was paid in full.¹³⁶ The client had proposed to pay her obligation from the proceeds she anticipated receiving from her ex-husband's military pension upon entry of the final decree.¹³⁷

E. *Notary Misconduct—Lawyer Serving as Notary—False Acknowledgments*

In a separate decision, respondent, acting as a notary, falsely certified that persons who had signed a "Deed of Dedication and Easement" had appeared before him to acknowledge their signatures.¹³⁸ A three-judge court subsequently approved an agreed-upon disposition for public reprimand.¹³⁹

IV. LEGAL ETHICS OPINIONS ISSUED BY THE VIRGINIA STATE BAR
STANDING COMMITTEE ON LEGAL ETHICS

A. *Confidentiality—Obligations of Lawyers When Using Internet Web Pages to Communicate with Prospective Clients*

The duty of confidentiality attaches "when the lawyer agrees to consider whether a client-lawyer relationship shall be established."¹⁴⁰ Nevertheless, lawyers may use to their client's advantage (and represent the adversary of a prospective client who sent) a prospective client's: (1) unsolicited voicemail message containing confidential information, sent to a lawyer who advertises in the local Yellow Pages and includes his office address and telephone number; and (2) unsolicited e-mail containing confidential information, sent to a law firm that "maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm

134. Gay, No. 08-022-073165, at 5, 8.

135. *Id.* at 5 (internal quotation marks omitted).

136. *Id.*

137. *Id.* at 6.

138. Va. State Bar *ex rel.* Fifth Dist.—Section III Comm. v. Compton, No. 69168, slip op. at 2–3 (Cir. Ct. Oct. 9, 2007) (Prince William County).

139. *Id.* at 5.

140. VA. SUP. CT. R. pt. 6, § II, Preamble (Repl. Vol. 2010).

by e-mail.”¹⁴¹ Someone submitting such confidential information does not have a reasonable basis for believing that the lawyer will maintain the confidentiality of the information simply because the lawyer uses “a public listing in a directory” or a passive website.¹⁴² The lawyer in that situation “ha[d] no opportunity to control or prevent the receipt of that information,” and “it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client.”¹⁴³ Lawyers might create a reasonable expectation of confidentiality if they include language in advertisements or on their website that implies “the lawyer is agreeing to accept confidential information.”¹⁴⁴ In contrast to lawyers who merely advertise in the Yellow Pages or maintain a passive website, a lawyer that “offers to provide prospective clients a free evaluation of their claims” would have to keep information provided by a prospective client who completes an online form on a law firm website confidential, and would be prohibited from representing a client adverse to a prospective client which supplies such information.¹⁴⁵ Law firms may wish to consider including appropriate disclaimers on their website or external voicemail greeting, or including a “click-through” disclaimer “clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential.”¹⁴⁶

B. Patent Lawyer Forming Partnership with Non-Lawyer Patent Agent

Federal regulations governing lawyers practicing before the United States Patent and Trademark Office (“USPTO”) permit forming partnerships and sharing fees between attorneys and registered patent agents to the extent the shared fees arise from the practice of patent law before the USPTO.¹⁴⁷ As a result, the

141. VA. CODE ANN. L. Ethics Op. 1842 (Cum. Supp. 2010).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. 37 C.F.R. § 10.48 permits a lawyer/practitioner to share legal fees with a non-lawyer practitioner. 37 C.F.R. § 10.48 (2009). 37 C.F.R. § 10.49 allows the formation of a partnership among lawyer and nonlawyer “practitioners” as long as the activities of that

patent lawyer can join the practice of a nonlawyer patent agent either as a registered active Virginia lawyer or an associate member of the Virginia State Bar, as long as that practice is devoted solely to patent law before the USPTO.¹⁴⁸

C. *Lawyer Serving as Guardian Ad Litem for Child—Duty to Investigate and Report Child Abuse*

A lawyer is appointed to serve as a guardian *ad litem* (“GAL”) for a seven-year-old girl who is a suspected victim of abuse by her father.¹⁴⁹ The girl asked the lawyer not to disclose her father’s abusive behavior, which the father denies.¹⁵⁰ The lawyer must balance the duty of confidentiality under Rule 1.6¹⁵¹ with his role as a GAL under Rule 8:6.¹⁵² “[L]awyers serving as GALs are subject to the Rules of Professional Conduct as they would be in any other case, except when the special duties of a GAL conflict with such rules.”¹⁵³ However, the GAL’s compliance with the Supreme Court of Virginia’s Rule 8:6 and the Standards to Govern the Performance of Guardians Ad Litem for Children¹⁵⁴ may justify the dis-

partnership consist solely of the practice of patent law before the USPTO. *Id.* § 10.49 (2009).

148. See VA. CODE ANN. L. Ethics Op. 1843 (Cum. Supp. 2010).

149. See *id.* L. Ethics Op. 1844 (Cum. Supp. 2010).

150. *Id.*

151. Rule 1.6 states:

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).

VA. SUP. CT. R. pt. 6, § II, R. 1.6(a) (Repl. Vol. 2010).

152. *Id.* pt. 8, R. 8.6 (Repl. Vol. 2010).

153. VA. CODE ANN. L. Ethics Op. 1844 (Supp. 2010); see also *id.* L. Ethics Op. 1729 (Repl. Vol. 2002) (“[T]he relationship of the GAL and child is different from the relationship of attorney and client. In reconciling the differences between the traditional ethical duties an attorney owes to a client, and the legal obligations that a GAL must discharge, the committee believes that where fulfilling a specific duty of the guardian ad litem conflicts with the traditional duties required of an attorney under the Code of Professional Responsibility, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the GAL should follow traditional course of action required under the Code of Professional Responsibility.”).

154. See OFFICE OF THE EXEC. SEC’Y, SUPREME COURT OF VA., STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIAN AD LITEM FOR CHILDREN (2003) [hereinafter PERFORMANCE STANDARDS], available at http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf; STANDARDS TO GOVERN

closure of confidential information pursuant to Rule 1.6(b)(1), which allows the disclosure of confidences “to comply with law” or a court order.”¹⁵⁵ “For example, the GAL may learn from the child that a custodian is taking illegal drugs and may use that information to request that the court order drug testing of the custodian.”¹⁵⁶ According to the opinion, because “the GAL not only serves as the child’s advocate but is obliged to identify and recommend the outcome that best serves the child’s interests,” the GAL “needs to investigate information obtained from and about the child in order to ascertain certain facts,” after which the GAL can assess “the risk of probable harm to the child” and then determine “whether the GAL has a duty, as an advocate for the child’s best interests, to disclose to the court or appropriate authority information necessary to safeguard the best interests of the child.”¹⁵⁷ This disclosure would be permitted under Rule 1.6(b)(1), where a lawyer can reveal protected information “to the extent reasonably necessary to comply with law.”¹⁵⁸

D. *Use of Covert Tactics by Virginia State Bar Staff to Investigate Unauthorized Practice of Law*

Virginia State Bar staff lawyers may direct and supervise non-lawyer bar investigators, outside investigators, or volunteers who “engage in covert investigative techniques in the investigation of the unauthorized practice of law in *any* case in which no other reasonable alternative is available to obtain information against

THE APPOINTMENT OF GUARDIANS *AD LITEM* PURSUANT TO § 16.1-266, CODE OF VIRGINIA (2009) [hereinafter APPOINTMENT STANDARDS], available at http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf. The Performance Standards and the Appointment Standards outline the specific duties and qualifications of a GAL appointed by the court. The Performance Standards inform Virginia courts as to the expectations regarding the conduct of GALs and provide additional guidance for GAL’s conduct. In addition, the Performance Standards augment the policies governing the qualifications of attorneys as GALs. These documents were formally adopted by the Judicial Council of Virginia and reviewed by the Supreme Court of Virginia and became effective in September of 2003. See JUDICIAL COUNSEL OF VIRGINIA, REPORT TO THE GENERAL ASSEMBLY AND SUPREME COURT OF VIRGINIA 49 (2003), available at www.courts.state.va.us/Courtadmin/judpolicies/2003_jev_report.pdf. Additional amendments to the APPOINTMENT STANDARDS became effective January 1, 2009. See APPOINTMENT STANDARDS, *supra*.

155. VA. SUP. CT. R. pt. 6, § II, R. 1.6(b)(1) (Repl. Vol. 2010); see also VA. CODE ANN. L. Ethics Op. 1844 (Cum. Supp. 2010).

156. PERFORMANCE STANDARDS, *supra* note 154, at S-6.

157. L. Ethics Op. 1844 (Cum. Supp. 2010).

158. *Id.*

the person engaging in the unauthorized practice of law.”¹⁵⁹ For example, they may undertake a covert investigation of a paralegal’s reported preparation of wills and powers of attorney (“POAs”) without a lawyer’s direct supervision (which would amount to a criminal act).¹⁶⁰ The committee worried that “because of the absence of witnesses who can testify or produce substantive evidence,” the Virginia State Bar might not be able to undertake enforcement actions against the paralegal.¹⁶¹ The Virginia State Bar proposed to direct a nonlawyer to contact the paralegal “under the pretext of wanting a will and/or POA prepared, collect and pay for these services, and report back the results.”¹⁶² Lawyers directing and supervising such a covert operation would not violate Virginia Rule 8.4(c), because such behavior would not reflect adversely on the lawyer’s fitness to practice law.¹⁶³ Virginia’s unique comment 1 to Rule 5.3 specifically approves traditionally permissible activity such as law enforcement investigations and housing discrimination tests.¹⁶⁴ Earlier legal ethics opinions have also recognized a “law enforcement” exception to Rule 8.4(c)’s general prohibition on deception.¹⁶⁵

159. L. Ethics Op. 1845 (Cum. Supp. 2010).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* (applying VA. SUP. CT. R. pt. 6, § II, R. 8.4(c) (Repl. Vol. 2010) (prohibiting conduct “involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law”). Since the type of undercover investigation proposed in Legal Ethics Opinion 1845 involves misrepresentation of identity and purpose by the investigator, there is an element of misrepresentation or deceit, but it would not “reflect[] adversely on the lawyer’s fitness to practice law” under the circumstances presented in this opinion. *Id.*

164. The comment states:

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

R. 5.3 cmt. 1 (Repl. Vol. 2010).

165. *See, e.g.*, L. Ethics Op. 1738 (Repl. Vol. 2002 & Cum. Supp. 2010) (lawyers and agents involved in law enforcement and housing discrimination have traditionally em-

E. *Lawyer Participating in “Lead-Sharing” Organization With Other Professionals*

Lawyers may not join a lead-sharing organization¹⁶⁶ in which membership is often dependent on the number of leads a member passes, because such “reciprocal referrals amount [] to a *quid pro quo* payment for services” in violation of the prohibition on providing something of value in return for a referral.¹⁶⁷ Such participation puts the client’s “interests at risk” because the lawyer “may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client’s needs.”¹⁶⁸ The lawyer faces a personal conflict of interest because the lawyer may not feel free “to choose the most appropriate specialty provider for a client.”¹⁶⁹ The committee observed that “[t]he mere disclosure of a client’s name and specific need in certain circumstances may be enough to violate [Rule 1.6] without consent of the client.”¹⁷⁰ A lawyer may own an interest in a company that is a lead-sharing organization as long as the lawyer is not a member.¹⁷¹ Lawyers may also engage in voluntary referrals to other lawyers and professionals, but may not join “a hypothetical organization which bases membership on a commitment to provide referrals.”¹⁷²

ployed artifice and deception in undercover law enforcement investigations and such traditional investigative procedures have been accepted by the courts as permissible activity); *id.* L. Ethics Op. 1765 (Cum. Supp. 2010) (lawyer employed as intelligence agent for government may use deception to gather information without violating ethics rules).

166. A “lead-sharing” organization is a profit or non-profit organization in which members of various professions share “leads” (potential clients or customers) between each other. *See id.* L. Ethics Op. 1846 (Cum. Supp. 2010).

167. *Id.* Rule 7.3(d) states that:

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

R. 7.3(d) (Repl. Vol. 2010).

168. L. Ethics Op. 1846 (Cum. Supp. 2010).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

F. *Use of Credit Cards for Payment for Legal Services*

After receiving an opinion from Virginia's Attorney General, the Standing Committee on Legal Ethics approved Virginia lawyers passing along to their client the transactional costs and merchant fees charged by a credit card company when the client uses a credit card, as long as the lawyer explains the process to the client before the client uses the credit card.¹⁷³ Such transactional and service fees may be deducted from the lawyer's trust account, but lawyers using best practices should arrange for the fees to be deducted from the lawyers' operating account.¹⁷⁴ Lawyers "must monitor and personally replace any escrow funds that are subjected to a chargeback" by a credit card company, and lawyers using best practices should arrange for any chargebacks to come from their operating account rather than their trust account.¹⁷⁵

G. *Employment Restrictions for Suspended or Disbarred Lawyers*

Rule 5.5(a) prohibits a law firm from employing "in any capacity a lawyer whose license is suspended or revoked . . . if the disciplined lawyer was associated with such lawyer, law firm, or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation."¹⁷⁶ The language of Rule 5.5(a), stating the date of the acts "which resulted in suspension or revocation" means "the date of the alleged misconduct or acts upon which the lawyer's suspension or revocation is based."¹⁷⁷ Determination of the actual date is both a factual and legal determination made by a disciplinary tribunal and beyond the Standing Committee on Legal Ethics's purview.¹⁷⁸ A law firm not subject to the hiring prohibition in Rule 5.5(a) may hire the disciplined lawyer as a consultant, law clerk, or legal assistant, provided the hiring firm does not then represent any former or current clients of the disciplined lawyer or clients of the lawyers or law firms prohibited from hiring the disciplined lawyer in any

173. *See id.* L. Ethics Op. 1848 (Cum. Supp. 2010).

174. *Id.*

175. *Id.*

176. VA. SUP. CT. R. pt. 6, § II, R. 5.5(a) (Repl. Vol. 2010).

177. L. Ethics Op. 1852 (Cum. Supp. 2010) (discussing R. 5.5(a) (Repl. Vol. 2010)).

178. *Id.*

capacity.¹⁷⁹ Additionally, “nothing would prohibit the suspended or disbarred lawyer from owning or being employed by a business providing non-legal services as long as that business is not employed by one of the lawyer’s former law firms.”¹⁸⁰

H. *Sexual Relationships With Clients*

According to the Virginia State Bar’s Ethics Committee, numerous issues develop “when a lawyer enters into a sexual relationship with a client during the course of the representation.”¹⁸¹ The ethical issues occurring due to such situations do not require a description or definition of “the actual acts of the lawyer nor what defines a ‘sexual relationship.’”¹⁸² Upon being requested to address the issue, the Standing Committee on Legal Ethics found that “impropriety and unfair exploitation of the lawyer’s fiduciary position as well as the lawyer’s untold influence and potential personal conflict” were frequently the root of the problem.¹⁸³ As the ABA’s Standing Committee on Legal Ethics identified in Formal Opinion 92-364, “[t]he roles of lover and lawyer are potentially conflicting ones as the emotional involvement that is fos-

179. L. Ethics Op. 1852 (Cum. Supp. 2010). The Committee applied Rule 5.5(b), which states

[a] lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk, or legal assistant when that lawyer’s license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

R. 5.5(b) (Repl. Vol. 2010).

180. L. Ethics Op. 1852 (Cum. Supp. 2010).

181. *Id.* L. Ethics Op. 1853 (Cum. Supp. 2010).

182. *Id.*

183. *Id.* The Ethics Committee elaborated further:

A client may not feel free to rebuff a lawyer’s unwanted advances for fear the rejection will reduce the lawyer’s attention to the case or cause the client to find a new lawyer. Mr. Compton stipulated in an agreed disposition that he engaged in sexual conduct with clients while employed at a licensed legal aid society. On December 15, 2008, a three-judge panel of the Dickenson County Circuit Court suspended Wade Trent Compton’s license to practice law for five years with terms for violating professional rules that govern conflict of interest and misconduct that involves a criminal or deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer. Clients in emotionally traumatic domestic relations and criminal cases may be psychologically distressed, weakened and vulnerable, and the lawyer can become a powerful figure who can victimize the client by exploiting the weakness.

Id. at n.12 (citations omitted).

tered by a sexual relationship has the potential to undercut the objective detachment that is often demanded for adequate representation.”¹⁸⁴ The Virginia Bar’s Ethics Committee advises that

[w]hile distinctions may be drawn between sexual relationships that predate the formation of the attorney/client relationship and those that begin during the attorney-client relationship, the lawyer must always be mindful of the ethical considerations involved. Clearly, the situation where the sexual relationship develops during the attorney-client relationship risks more probable ethical breaches and in most instances forms the basis for lawyer discipline.¹⁸⁵

It is evident that engaging in a sexual relationship with a client during the course of representation may be seriously detrimental to the client’s interests.¹⁸⁶ The many ethical duties of an attorney to a client “are so fundamental to the attorney-client relationship that obtaining the client’s purported consent to entering into a sexual relationship with the lawyer will rarely be sufficient to eliminate any potential ethical violation.”¹⁸⁷ An attorney should avoid any involvement in a sexual relationship with a client.¹⁸⁸ A client’s consent does not absolve the lawyer of liability because, “[i]n most situations, the client’s ability to give the informed consent required by Rule 1.7(b) is overwhelmed by the lawyer’s position of power and influence in the relationship and the client’s emotional vulnerability.”¹⁸⁹

184. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-364 (1992).

185. L. Ethics Op. 1853 (Cum. Supp. 2010).

186. *Id.*

187. *Id.* For a list of “reported disciplinary cases” discussing the possibility of misconstruing consent, see *id.* at n.3.

Id.

188. *Id.*

189. *Id.*; see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-364, (1992) (“An individual client, in particular, is likely to have retained a lawyer at a time of crisis. The divorce client’s marriage is disintegrating. The criminal client may have just been arrested and could be facing the possibility of jail. The probate client is dealing with the loss of a loved one. The immigration client may fear deportation. Other client’s may be trying to save a business or salvage a reputation. The corporate employee may see his or her employment on the line, depending on the outcome of the transaction or litigation. . . .”).

V. EMERGING DEVELOPMENTS IN PROFESSIONAL REGULATION

A. *ABA Amends Model Rule 1.10 to Allow Screening to Avoid Conflicts Created by Lateral Hiring*

Recognizing that most lawyers in private practice will change law firms several times over the course of their careers, to promote lawyer mobility, the ABA's Standing Committee on Legal Ethics and Professionalism proposed amendments to Model Rule 1.10¹⁹⁰ that would avoid imputation of a conflict resulting from a lawyer changing firms.¹⁹¹ The ABA's House of Delegates adopted the amendments in 2009.¹⁹² Under the amended rule, a law firm may hire opposing counsel in a pending matter, without client consent or even over the client's objection, provided the law firm

190. The text of the rule reads:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

MODEL RULES OF PROF'L CONDUCT R. 1.10 (1983) (amended 2009).

191. See Jeffrey B. Tracy, *Model Rule 1.10 Amendments Affect Lateral Moves*, LITIG. NEWS, Spring 2009, at 4, 4.

192. American Bar Association Resolution Amending Model Rules of Professional Conduct Rule 1.10 (Feb. 16, 2009), available at http://www.abanet.org/leadership/2009/midyear/daily_journal/Adopted109.doc.

timely “screens” the lateral hire and gives notice to the lateral hire’s former client.¹⁹³

B. *ABA Commission on Ethics 20/20*

In 2009, then ABA President Carolyn Lamm, a partner at White & Case, appointed a special commission to reevaluate the Model Rules and other professional regulation of lawyers in the United States in view of recent developments in both the United States and abroad including: licensing and admission of foreign lawyers; choice of law in transnational practice; alternative business structures for the delivery of legal services (including publicly held law firms); third party loans, investments, or alternative financing for litigation matters; regulation of inbound foreign lawyers; technology and the regulation of the practice of law; domestic and international outsourcing of legal services; and choice of law issues for conflicts.¹⁹⁴

VI. CONCLUSION

Rapid changes in technology and the means by which legal services are delivered continue to outpace the organized bar’s ability to regulate the practice of law. The challenge for regulatory bars will be to promulgate and enforce rules that accommodate rather than restrict appropriate changes in the legal marketplace, while at the same time fulfilling their mission to protect the public from lawyer misconduct and instill confidence in the administration of justice.

193. Tracy, *supra* note 192 (“The proposal adopted by the Delegates, Recommendation 109, enables a law firm to ‘screen’ the incoming attorney from representation adverse to the former client to allow the firm to continue representing its client without the consent of the incoming attorney’s former client. The Standing Committee’s proposal eliminates the need for client consent.”).

194. See generally News Release, Am. Bar Ass’n, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), available at http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730; *ABA Comm’n on Ethics 20/20*, AM. BAR ASS’N, <http://www.abanet.org/ethics2020/> (last visited Oct. 30, 2010); *ABA Comm’n on Ethics 20/20, Message from Commission on Ethics 20/20 Co-Chairs Jamie S. Gorelick and Michael Traynor*, AM. BAR ASS’N, <http://www.abanet.org/ethics2020/chairs.html> (last visited Oct. 30, 2010); *ABA Presidential Commissions—Carolyn B. Lamm, Office of the President*, AM. BAR. ASS’N, <http://www.abanet.org/op/lamm/presidentialcommissions.shtml> (last visited Oct. 30, 2010).